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express any opinion as to whether the jurisdiction in pending suits was validly taken away. Nor do we think that the present defendants, who were no parties to the decree in original suit No. 25 of 1883, and as between whom and the plaintiff the execution creditor in the Cochin Subordinate Court, the Calicut Subordinate Court has jurisdiction, are entitled to rely on the provisions of section 25 of which the defendants in original suit No. 25 of 1883 did not avail themselves and thereby call in question the jurisdiction of the Cochin Subordinate Court.

We set aside the decree of the Lower Appellate Court and remand the appeal to be heard and determined on its merits. Costs to follow result.

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and  
Mr. Justice Muttusami Ayyar.*

1889.  
November 27.  
December 12.

RANGANAYAKAMMA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

ALWAR SETTI (PLAINTIFF), RESPONDENT.\*

*Hindu Law—Vaisyas—Requisites of adoption—Adoption during pollution of adoptive parent—Contract Act—Act IX of 1872, ss. 15, 16—Coercion—Undue influence.*

The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father who (*semble*) belonged to a different gotram from her deceased husband. There were no formal declarations of giving and taking the child, and *datta homam* was not performed. At the time when the child was handed over to the widow her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption :

*Held*, that there was no valid adoption by the widow.

*Per cur*: We cannot say that obstructing the removal of a corpse by the deceased's widow or her guardian, unless she made an adoption and signed a document is not an unlawful act or not an act such as is defined by section 15 or 16 of the Indian Contract Act.

*Dicta* in *Mahashaya Shosinath Ghose v. Srimati Krishna Soondari Dasi* (1) as to incidents of a formal adoption discussed.

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\* Appeal No. 143 of 1888.

(1) L.R., 7 I.A., 250.

Observations on the necessity of *datta homam* in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent.

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**APPEAL** against the decree of L. A. Campbell, District Judge of Nellore, in original suit No. 17 of 1887.

Suit by the minor plaintiff by his natural father and next friend to establish his adoption by defendant No. 1, the widow of Akula Chenchayya, a Vaisya, and for possession of the moveable and immoveable property of Akula Chenchayya. Defendant No. 1, who was a minor, defended the suit by her guardian *ad litem*, her father, who was also joined as defendant No. 2.

The facts of this case appear sufficiently for the purposes of this report from the judgment of the High Court. Exhibit A, which is there referred to, was translated as follows:—

“Yesterday at about 8 o'clock in the night my husband Chenchayya Setti died of the disease under which he was labouring.

“Before his death, *i.e.*, about 7 o'clock in the night, my husband directed me to adopt a boy in order to perpetuate his family. This he said in the presence of our priest by name Chakravartala Govinda Charulu Ayavaru Garu, Tusali Appala Charlu, Kami Setti China Subbiah, Duggi Setti Bali Setti and others, also in the presence of our relatives and females.

“According to the orders of my husband I, having this day consented to adopt a boy in the presence of the mediators, who are the attestors, adopted one Alwaru, son of Mogili Garathiah, and settled that the funerals of my husband should be performed in the name of my adopted son.

“If my father, &c., raise any objections as to the said arrangement, these shall not be valid. I caused this to be written by Addanki Subbaramiah of my own free will.”

The District Judge, on a question raised as to the ceremonial validity of the adoption, delivered judgment as follows:—

“There were no religious ceremonies. The immediate presence of the corpse forbid them. But there seems to have been a giving and taking, though the defence argue otherwise. Admittedly the father of plaintiff and two sons were fetched to the house, and there is the evidence of several witnesses for plaintiff to the effect that the boy selected, *i.e.*, plaintiff, offered fruits to first defendant. The fifth, sixth, eighth, ninth, and tenth witnesses all say that plaintiff was taken by his father up to first

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ALWAR SETTI, defendant, and the first four of these agree in saying that the child was seated on his father's thigh at the time. It is in such little points that the truth becomes apparent, and there can be no doubt but that this action of the father of the boy did occur. If so, it seems to me that there was a giving. An acceptance there certainly was, for not only was the document then signed, but, as already noticed, the boy was admittedly kept on in the house for some days.

"The parties are Komatis and are, therefore, members of the third superior regenerate class, the Vaisiyas. It has been ruled by the Madras High Court in *Chandramala v. Muktamala*(1) that a giving and receiving in adoption is sufficient in the case of the next highest class, the Kshatriyas. It follows, therefore, that this is sufficient in the class to which the parties belong. The adoption now in question is, therefore, not invalidated on the absence of religious ceremony. There was some sort of ceremony, for the boy's head was admittedly shaved. If a religious ceremony is not necessary, the fact of the person adopting being under pollution is necessarily not fatal to an adoption. Pollution merely bars the performance of a religious ceremony. This is shown in the case of *Thangathanni v. Ramu*(2). The circumstances there were the same as here, and the fact that those parties were Sudras does not affect the principle involved. I take it from that decision that the mere fact of death causes pollution. But the sixth witness for plaintiff, a Brahmin, stated that 'pollution begins, it is said, after the dead body is burnt.' . . . I hold, therefore, that adoption was made, and that it is valid, unless it can be shown for the defence that undue influence or coercion was used to bring it about."

The District Judge came to the conclusion that no undue influence and coercion had been exercised on defendant No. 1 and passed a decree for the plaintiff.

The defendants preferred this appeal.

*Rama Rau* for appellants.

*Parthasaradhi Ayyangar* for respondent.

JUDGMENT.—The real parties to this appeal are minors, and the question for decision is whether the first appellant adopted the plaintiff, and whether the adoption, if true, is valid.

The minor appellant's husband was one Chenchayya, a Komati

(1) I.L.R., 6 Mad., 20.

(2) I.L.R., 5 Mad., 358.

or Vaisya by caste, and on 16th March 1887 he died after a protracted illness extending over several months. He left considerable property, which is estimated in the plaint at Rs. 40,000, and but for the adoption, the first appellant, his childless widow, would be his heir-at-law. The plaintiff's case was that about two hours before his death, Chenchayya learned that he was in a critical condition, that after directing his wife to pay certain legacies, he asked her to adopt some boy and thereby perpetuate his family, and that upon his death and prior to the removal of his corpse for cremation the widow adopted the plaintiff with the consent of her guardian and father, the second appellant, and executed a deed of adoption (exhibit A) in the name of the plaintiff's natural father. The appellants contended that Chenchayya became unconscious on the morning of the 16th March and died in the evening; that he was not in a condition either to give legacies or authorize an adoption; that the plaintiff was neither given by his father nor taken by the first appellant in adoption; that no *datta homam* was performed; that the appellant was under pollution when the adoption is said to have been made, and that the plaintiff's brother-in-law with the aid of a police constable and others obstructed the removal of Chenchayya's dead body, and by continuing to do so coerced her to sign exhibit A when she was in grief and unfit to act with free will and consent. The Judge upheld the adoption and decreed the claim, and to this decision the appellants object and reiterate the objections urged in the written statement.

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We agree with the Judge that Chenchayya did authorize his widow to adopt. Five witnesses for the plaintiff deposed to that effect, and they are in no way connected with the plaintiff. The authority to adopt is mentioned in exhibit A, and it is very likely that a person in Chenchayya's position should have desired to provide against the extinction of his family. Though this evidence is contradicted by some of the appellants' witnesses, and though they state that Chenchayya was unconscious throughout the 16th March, they are all related to the minor appellant with one exception. Again the appellants' pleader lays stress on the absence of an authority in writing, on Chenchayya's omission to adopt whilst alive notwithstanding his protracted illness, on the plaintiff's omission to call Chenchayya's guru or priest, Govindaचारु, who is said by the plaintiff's witnesses to have been

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consulted about the adoption, and on Chenchayya's conduct in accepting at once the statement of the plaintiff's sixth witness that he would die soon, without communicating with the physicians who had been treating him. These defects in the evidence in support of the authority to adopt detract doubtless from its weight, but it must also be observed that persons often postpone the making of a will or arranging for an adoption until they are on their death-bed. On the one side there is positive evidence, apparently disinterested and accepted as *bonâ fide* by the Judge who had the witnesses before him, and not inconsistent with the probabilities of the case; whilst on the other there is only the evidence of relatives, and the observations to which the plaintiff's evidence is open are in themselves not conclusive. We are of opinion that on appeal we must accept the finding that Chenchayya directed his widow to adopt.

We also concur in the opinion of the Judge that before Chenchayya's corpse was removed, the plaintiff was taken to his house and given by the boy's father and taken by the minor appellant in adoption. We shall presently consider how far the latter acted under pressure, and whether the pressure amounts to coercion; but, for the present, we confine ourselves to the consideration of the question whether there was such an overt act as might be accepted in law to amount to a gift and acceptance. The evidence for the plaintiff shows that he was taken to Chenchayya's house, that he was there seated on his father's lap, that a cocoanut and fruits were then placed in his hands, and that he gave them to the minor appellant, his adoptive mother. The plaintiff's third witness, who officiated at Chenchayya's funeral ceremonies, stated that the acceptance of fruits from the boy selected for adoption by the desire of his natural father, and in his presence, was a token of his acceptance in adoption. The appellants' pleader draws our attention to the decision of the Privy Council in *Mahashaya Shosinath Ghose v. Srimati Krishna Soondari Dasi*(1) and argues that though the boy might be taken to be corporeally delivered, the act was not accompanied with the declarations, viz., "I give this child as your son, and I take him as my son." We do not apprehend their Lordships of the Privy Council to do more than indicate the ordinary incidents of a formal adoption, and rule that there must be a

(1) I.L.R., 7 I.A., 250.

corporeal delivery of the boy by a person competent to give to a person competent to take under circumstances which denote an intention on the part of the one to give and an intention on the part of the other to accept the boy in adoption.

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Upon the evidence, the Judge, we consider, properly held that there was a gift and acceptance as described above. Though there is a conflict of testimony on this point also, we are inclined to accept the finding of the Judge. It is clear that the plaintiff was shaved immediately after he had been received in adoption, and according to his third witness, the funeral ceremonies of Chenchayya were performed until the eighth day of his death in the name of the plaintiff. The adoption is further referred to as having taken place in exhibit A. The substantial questions then for determination in this case are whether the plea of coercion is well founded and whether the adoption is invalid either because no *datta homam* was performed or because it was made whilst the adoptive parent was under pollution. As to the contention in regard to pollution, the Judge is clearly in error in saying that it arises on the cremation of the corpse. Pollution consequent on birth or death arises according to the usage of the caste to which the parties belong at the moment of birth or death. It is, however, unnecessary to dwell further on this point as *datta homam* was admittedly not performed, though Chenchayya was a Vaisya by caste and belonged to the third of the regenerate classes. Though *datta homam* was declared not to be indispensable even among Brahmins in the case of *Singamma v. Ramaniya Charlu*(1), yet it was held in *Govindayyar v. Dorasami*(2) by the Full Bench that it might be necessary to a ceremonial adoption, that adoption among the three higher classes was ceremonial, and that unless the adoption was from the same *gotram*, an inquiry as to Hindu usage in this presidency would be material. This view is confirmed by the observations of the Privy Council in *Mahashoya Shosinath Ghose v. Srimati Krishna Soondari Dasi*(3). Their Lordships say in that case that "All that has been decided is that amongst Sudras no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child in adoption continues to stand on Hindu law and usage, and it is perfectly clear

(1) 4 M.H.R., 165.

(2) I.L.R., 11 Mad., 5.

(3) L.R., 7 I.A., 250.

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*that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the datta homam in particular, are in their case requisite.* The system of adoption seems to have been borrowed by the Sudras from these twice-born classes, whom in practice they imitate as much as they can, adopting those purely ceremonial and religious services which, it is now decided, are not essential for them in addition to the giving and taking in adoption. It would seem, therefore, that according to Hindu usage which the Courts should accept as governing the law, the giving and taking in adoption should take place by the father handing over the child to the adoptive mother and the adoptive mother declaring that she accepts the child in adoption."

It is then said that these remarks are in the nature of an *obiter dictum*, and that the parties in that case were Sudras. But, even if they were so, they would be entitled to great weight as pointing to a distinction in the law of adoption as administered to the different classes. They are, however, made to indicate the ground of the decision that corporeal delivery of the child is essential even among Sudras, and unless it is shown that the usage in this presidency is otherwise, they must be accepted as binding upon us.

As regards the plea of coercion, the case for the plaintiff is that the minor appellant insisted upon carrying out the wishes of her husband at once; that her father consented to her doing so; that two boys, the plaintiff and his younger brother, were shown to her; that she selected the plaintiff; that those assembled for the funeral said that there was no objection to the selection, the plaintiff not being the first born, though he was the eldest of the sons alive, and that thereupon he was given and taken in adoption in the mode already described. The appellants' case, on the other hand, is that the removal of the corpse was obstructed; that the appellants were told that the corpse should not be removed until the plaintiff was adopted; that his brother-in-law took an active part in forcing the adoption on the appellants; that at his instance a police constable interfered and insisted on the adoption; that an application made at the neighbouring police station for aid was refused, and that overcome by grief, the minor appellant and her father were coerced into making the adoption, and that exhibit A was executed by the minor and attested by her father otherwise than with free will and consent. The Judge observes that no

actual force or restraint was used; that some caste influence was very probably brought to bear on them; that the spiritual needs of the deceased as conceived by his castemen called for their interference, and that his expressed wish for a son almost rendered such interference a duty on their part. No doubt the caste wished the adoption, wished it to take place at once, and if the deceased had authorized it, there was no occasion for the delay. He held that the caste influence was not exerted in an irregular manner, and that the adoption must be upheld. In coming to this finding the Judge has overlooked several facts in evidence which raise a strong presumption in support of the appellants' contention. The first appellant was only about 13 years old when Chenchayya died, and, though under Hindu law a minor might make a valid adoption for the spiritual benefit of her husband, yet there must be cogent evidence to show that she did so under the intelligent and disinterested guidance of her legal guardian seeking *bonâ fide* to provide for a spiritual necessity with due regard to her interest so far as it is compatible with such necessity. The Judge finds that Chenchayya's castemen exerted a pressure on the widow and her guardian, but he omits to consider that the occasion was one when no such pressure should be and is ordinarily exerted. The adoption was authorized but on the previous evening, and within two hours later, Chenchayya died, and his death, which doomed the minor, according to the usage of her caste, to a life-long widowhood, must have caused to her and her father intense grief. The occasion was, therefore, one in which no guardian would be in a frame of mind to deliberate and decide whether an adoption should be made, and if so, who ought to be selected for the adoption. Adoption is usually regarded in this country as a solemn and irrevocable act, and it is generally made after protracted discussion and careful consideration among members of the family interested in the infant widow. The procedure which was followed in the case before us is as summary as it is unusual.

If immediate adoption had been deemed necessary by Chenchayya for his spiritual benefit, it was in his power to have made it before he died, or to have named a boy and enjoined his widow to adopt on the expiry of the period of pollution. This he had not done on the plaintiff's own showing. It is then by no means easy to understand why Chenchayya's castemen should care more for his spiritual benefit than himself, unless they feared that the

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RANGANAYA- widow might, in the exercise of her legal right, either not adopt  
 KAMMA at all or not adopt the boy they desired to see her adopt if she  
 ALWAR SETT. and her guardian were allowed time for freedom of thought and  
 action.

Again, it is an undisputed fact that the minor appellant was under pollution when the adoption was made. On this point the Judge is clearly in error, for according to the usage of the caste, as is indeed conceded by the respondent's pleader, pollution commences, as already stated, at the moment of death and not after cremation as is remarked by the Judge. The plaintiff's third witness, who officiated at Chenchayya's funeral, deposes that adoption is an auspicious act, that no auspicious or religious ceremony is performed before the expiration of the period of pollution, and that although he is 41 years of age, and although he is a *purohit* by profession, as far as he was aware no adoption ever took place anywhere else whilst the corpse was still lying in the house. Several other witnesses for the plaintiff say that when they have to perform their father's annual obsequies, which, according to custom, must be performed on the lunar day corresponding to the date of death, such ceremonies are postponed, if they are under pollution, until it is over and they become pure again. It is also generally believed that religious ceremonies, if performed during the period of pollution, are devoid of merit and lose their efficacy. Hence it is that when an immediate adoption is desired, it is made either immediately prior to death or on the expiration of the period of pollution. Having regard to these incidents of caste custom, we do not see our way to believe that those who insisted on immediate adoption and prior to the removal of the corpse did so *bonâ fide* to provide for urgent spiritual necessity.

Apparently, several of the plaintiff's witnesses suggest in view of this peculiarity in the case that the minor appellant desired to carry out the wishes of her husband at once and that her father consented to her doing so. The Judge evidently does not credit them, inasmuch as he accepts the evidence for the appellant so far as it shows that pressure was put upon them. In support of this view, there is the evidence of the appellants and their witnesses Nos. 2, 5, 8, 9, and 10. As most of these witnesses are relatives of the minor appellant, the Judge considers perhaps that the pressure was neither irregular nor severe and that it did not go beyond firm persuasion. But we find from the evidence of the

Inspector of Police, viz., the fourth witness for the appellants, that the girl's uncle, her second witness, went to the police station-house at Nellore Town whilst Chenchayya's corpse was lying in his house and complained that its removal was being prevented and the adoption of a boy was being fabricated, but that he was told that the matter was not one for police interference. This corroborates the evidence of the minor appellant's father and uncle that the plaintiff's brother-in-law and others urged upon them the plaintiff's adoption; that they refused to adopt and persisted in doing so until 10 o'clock in the morning; that the former refused to allow the corpse to be removed; that these were backed by the Head Constable of Nabob's Petta; that by the desire of the minor appellant's father, her uncle complained at the police station at Nellore; that the complaint was ineffectual, and that they were overcome by the pressure. Their evidence is corroborated in another important particular. The plaintiff's second witness is the head constable who so interfered. There is strong reason to think that he was there and assisted in bringing about the execution of the document through pressure. Though he states that he went to Chenchayya's house because he wanted to see him on hearing of his death, yet it is to be observed that he must have been then aware that the presence of a Mahomedan like him would be unwelcome on the occasion, that there was no satisfactory reason for his going into the entrance where the corpse lay unless it was to speak to the minor and assist the plaintiff's brother-in-law as suggested by the appellant and several of her witnesses or for his taking part as an attesting witness in the execution of exhibit A. Seeing that the plaintiff was a pauper, whilst Chenchayya was comparatively well to do in life, and his widow had several relations, the selection of the plaintiff for adoption, whose father only recently settled at Nabob's Petta and was in no way related to Chenchayya's family, was antecedently improbable. The evidence of the appellants' seventh witness, who wrote exhibit A, shows that it was dictated by the plaintiff's brother-in-law, the police constable, and others, that though he waited there till 10 A.M., the parties did not affix their signatures, and that he then left. He is corroborated by the fact that his attestation does not appear in the document. As to the suggestion that no physical force or restraint was used, we cannot say that obstructing the removal of a corpse by the deceased's widow or

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her guardian unless she made an adoption and signed a document, is not an unlawful act or not an act such as is defined by section 15 or 16 of the Indian Contract Act.

It is true that one witness for the plaintiff stated in his examination-in-chief that the plaintiff was of the same *gotram* with Chenchayya, but he denied all personal knowledge in cross-examination. The appellants' witnesses Nos. 2 and 8 denied that the plaintiff was of Chenchayya's *gotram*, and the plaintiff's father did not go into the witness box to contradict them. Furthermore, it is an undisputed fact that the plaintiff was expelled from Chenchayya's house within eight days after his death, and before the funeral ceremonies were completed. This revulsion of feeling is also unaccountable on the view suggested for the plaintiff that the adoption was sought for by the minor appellant with the sanction of her father. There appears to have been some misapprehension on the part of the Judge in regard to the right of interference on the part of Chenchayya's castemen. It is usually regarded as indelicate and harsh even to suggest an adoption to an infant widow and her father when the corpse is lying, and when in the midst of their affliction they can think of nothing else than their misfortune, and as altogether inconsistent with what is due from persons calling to condole and express their sympathy. The exerting of any pressure by strangers on such occasion is as unwarranted in law as by the usage of the caste.

We are of opinion upon the whole evidence that but for the obstruction caused to the removal of Chenchayya's corpse by his brother-in-law and others, and for the appellant and her guardian being overawed by a head constable assisting them, and by the police refusing to interfere on their complaint, neither the plaintiff would have been taken in adoption nor exhibit A executed as evidence of it.

We set aside the decree of the Judge and dismiss the suit with costs throughout.

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