report from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

JUDGMENT.—Three objections are taken to the decree of the Judge, and the first of them is that the right which is the subject of the present suit is a public right, and that in the absence of special damage no suit ought to have been brought upon it. The respondent's case was that as a raiyat of the village of Toraiyur, he was entitled to graze his cattle on the tank bed and the fact that the other raiyats of the village have similar rights does not make his right a public right in the sense that no action can be brought upon it unless special damage is proved. As observed by the Judge, the right in contest is one which vests in the respondent and the other raiyats jointly and severally. The next objection taken in appeal is that the respondent ought not to have been permitted to amend the plaint and that his suit ought to have been dismissed. The amendment allowed consisted in striking out the names of nine other persons which appeared in the original plaint as those of co-plaintiffs and allowing the plaint to stand as one framed for the purpose of establishing the respondent's right alone. The right claimed vests, as already observed, severally as well as jointly in the respondent and the other raiyats, and the amendment made is not in our judgment contrary to the provisions either of s. 31 or 53.

As to the merits, we see no reason to interfere, and upon the facts found, the decision is right.

We dismiss this second appeal with costs.

## APPELLATE CIVIL.

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

NÁRÁYANASÁMI AND OTHERS (DEFENDANTS), APPELLANTS,

and

KUPPUSÁMI (PLAINTIFF), RESPONDENT.*

1886. October 22. 1887. April 19.

*Hindú Law—Adoption—Only son given in adoption by widow.*

A widow is competent to give in adoption whenever the husband is legally competent to give, and when there is no express prohibition from him.

* Appeal No. 90 of 1885.

NÁRÁYANASÁMI v. KUPPUSÁMI.

Three principles appear to regulate the power to give in adoption: (1) the son is the joint property of the father and the mother for the purposes of a gift in adoption, (2) when there is a competition between the father and the mother, the former has the predominant interest or a potential voice, and (3) after the father's death the property survives to the mother.

The adoption of an only son is not invalid—*Chinna Gaundan* v. *Kumara Gaundan* (1), followed.

APPEAL against the decree of R. Vasudeva Ráu, Subordinate Judge of Negapatam, in Original Suit No. 46 of 1883.

This was a suit to recover family property brought by Kuppusámi, who claimed as the adoptive son of Nagalinga Pillai. Náráyanasámi, defendant No. 3, claimed to hold the property in dispute as the adoptive son of an undivided brother of Nagalinga Pillai. Both adoptions were put in issue; and it was contended that the adoption of Kuppusámi could not be valid in that he was an only son, and that his father was dead at the time when the adoption was alleged to have taken place. The Subordinate Judge found that both the adoptions set up were valid and decreed accordingly.

Against this decree the defendants appealed and the plaintiff filed a Memorandum of Objections.

*Bháshyam Ayyangár* and *Désikachárydr* for appellants.

*Subramanya Ayyar* and *Kaliáyanaráma Ayyar* for respondents.

The further facts of the case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—There were two brothers at Negapatam, Sattiya Pillai and Nagalinga Pillai, who constituted together a joint Hindú family owning the property now in litigation. Each of the brothers married several wives, but neither of them had any male issue. Nagalinga, the younger brother, died about the 10th November 1876, leaving him surviving two widows, Subbu Lakshmi and Sundaram; and Sattiya Pillai's branch of the family consisted of Sattiya Pillai and his two wives, Parvati and Sornam, and a daughter named Annam. The real parties to this appeal are two minors named Kuppusámi, the plaintiff, and Náráyanasámi, defendant No. 3. It was alleged for the former, that, about 15 days prior to his death, Nagalinga Pillai adopted him, that he had since lived in coparcenary with Sattiya Pillai, that Sattiya Pillai died on the 21st January 1883 without male issue, natural

(1) 1 M.H.C.R., 54.

or adopted, and that, as the only surviving male coparcener of the joint Hindú family, he was solely entitled to the property now in dispute. The *factum* and validity of the adoption were denied for and by the appellants. The two brothers had a sister named Ponnammal, who had four sons named (1) Appadorai Pillai, (2) Govinda Pillai, (3) Singaravelu Pillai and (4) Kayarogana Pillai, who had formed together another joint Hindú family, which, according to Subbu Lakshmi's evidence was possessed of property of 70,000 or 80,000 rupees value. Of these four brothers, Govinda Pillai died first, Appadorai Pillai died in 1875, Singaravelu died in 1881, and Kayaroganam died in 1883. In this family, none of the brothers, except Appadorai Pillai, had male issue and even he had an only son—the respondent—when he died in 1875. In advertence to this circumstance, the appellants contended that the respondent's adoption, even if true, was invalid for two reasons, viz., first because he was the only son of his father and as such not eligible for adoption, and, secondly, for the reason that, assuming that a father was competent to give his only son in adoption so as to validate it when it was made, the mother was certainly not entitled to do the same either with or without the consent of his kinsmen in the absence of his permission. Apart from denying the respondent's adoption, the appellants alleged that Náráyanasámi was adopted by Sattiya Pillai the day previous to his death, viz., the 20th January 1883, and that, by virtue of such adoption, he was exclusively entitled to the property in suit. We may also mention here that the respondent's natural mother Vedam is the sister of Nagalinga's widows and that the third defendant's natural father, Ramasami Pillai, is Sattiya Pillai's first cousin on the mother's side and a cousin in the second degree on the father's side. The questions raised for decision in the suit were, whether the alleged adoptions or either of them were or was true, and whether the respondent's adoption was invalid on either of the grounds suggested on behalf of the appellants.

The Subordinate Judge has found that both adoptions are true and valid and decreed to each of the rival claimants a moiety of the property in dispute. To this decree, both parties object, the appellants, so far as it upholds the respondent's adoption, and the latter, so far as it recognizes the adoption of the third appellant. We shall consider first whether the appeal can be supported and then deal with the Memorandum of Objections.

NÁRÁYANA-SÁMI v. KUPPUSÁMI.

[Their Lordships here set out and discuss the evidence as to the adoption of the respondent. The judgment then proceeds as follows :—]

Upon considering the whole evidence, we are not prepared to hold that the Subordinate Judge was wrong in considering the respondent's adoption as sufficiently proved.

The next contention is that the adoption is invalid either because the respondent was the only son of his father or because there was an implied prohibition, which rendered his mother incompetent to give him in adoption. As to the first ground of objection, it was not pressed and we are content to hold by decided cases. The question was considered in this Presidency in 1862, and after consideration the High Court then came to the conclusion that it was concluded by authority, *Chinna Gaundan* v. *Kumára Gaundan*(1). In Regular Appeal 70 of 1882, this decision was followed. Again, the Judicial Committee referred to the decision in 1862 and to the decision in *Rája V. A. Nimbálkar* v. *Jayavantráv M. Ranadive*(2), as showing that the maxim "*Quod fieri non debuit factum válet*" had received a limited application in Southern and Western India, in *Srimati Uma Devi* v. *Gokoolanund Das Mahapatra*(3). We are not prepared to depart from the course of decisions in this Presidency, and we hold then that the adoption of an only son, if actually made, is valid, however sinful the act may be on strict religious considerations.

As to the second ground of objection, according to the original texts of Hindú Law, the prohibition of the adoption of an only son is made in order that the family of the giver may not thereby become extinct, but not with reference to any distinction between the power of the father and after his death of the mother to give an only son in adoption. As was contended by the pleader for the respondent, the texts suggest a disqualification rendering one ineligible for adoption whether he is given by the father or the mother. Vasishta says "an only son let no man give or take; for he is destined to prolong the line of his ancestors" (Dattaka Chandriká, s. 1, sloka 29)(4). Caunaka says, "By no man having an only son is the gift of a son ever to be made. By a man having several sons such gift is to be anxiously made," (Dattaka

(1) 1 M.H.C.R., 54.
(2) 4 B.H.C.R., A.C., 191.
(3) L.R., 5 I.A., p. 53.
(4) Stokes' Hindú Law Books, p. 636.

Chandriká, ss. 1–29). The texts contain a suggestion as to who ought not to be adopted and therefore either given or taken in adoption. If the husband then can give an only son in adoption on the ground that the texts are only directory or rest on theological considerations, the same reasoning applies by whomsoever that son is given. The general rule is, as suggested in Dattaka Chandriká, s. 1, slokas 31 and 32, that the mother can give whenever the father can legally give, for what is not expressly prohibited by him is tacitly permitted by him. Three principles appear to regulate the power to give: (1) a son is the joint property of the father and the mother for the purposes of a gift in adoption; (2) when there is a competition between the father and the mother, the former has a predominant interest or a potential voice; and (3) after the father's death, the property survives to the mother.

According to Manu, chap. IX, p. 168(1), the father or the mother may give. According to Yájñavalkya who is followed in Dattaka Chandriká, he, whom his father or mother gives, is a son given. According to Vasishta—"let not a woman either give or take a son, unless with the consent of the husband." The author of the Dattaka Chandriká interprets this text with reference to that of Yájñavalkya and deduces the theory of implied consent in the absence of express prohibition. According to the Mitákshará, chap. I, s. XI(2), he, whom his father or mother gives for adoption, shall be considered as a son given. In the note to Mitákshará, chap. I, s. XI, several interpretations of the passage "whom his father or mother gives" are noticed by the translator. According to the Mitákshará, the particle "Cha" in the original text is conjunctive and both the father and the mother must join in the gift. According to Bulambatta, the particle is used in a disjunctive sense. According to Smriti Chandriká, he, whom his father or mother affectionately gives as a son, is a given son or dattama (Smriti Chandriká, chap. X, 3) (3).

According to Dattaka Chandriká, where there is no express prohibition, women are considered to be independent on the authority of Yájñavalkya. The theory of implied prohibition in the absence of express authority cannot then be supported in

(1) Institute of Manu by Jones, Ed. 4, p. 252.
(2) Stokes, p. 415; Mandlik, p. 468. (3) Ed. by Kristnasawmy Iyer, p.

NÁRÁYANA-SÁMI v. KUPPUSÁMI.

principle in regard to the gift of a son in adoption. We are then referred to the decision of the Bombay High Court in *Lakshmáppa* v. *Rámáva*(1) and in *Somasekhara Rája* v. *Subhádrá Máji*(2). In Western India, Dattaka Mímánsá is a binding authority and according to it no adoption can be made for the husband after his death without his express authority.

The Mayúkha Kaustubha and other treatises of special authority in Bombay introduced the theory of implied authority, on the ground that an adoption by a widow was a meritorious act, which, unless forbidden by the husband, might be taken to have been sanctioned. As a limitation of the theory founded on the character of adoption as a meritorious act, they held that the adoption of an only son was a sinful act and that it did not come within the rule of implied authority. It followed then that in the absence of express authority from the husband, a widow can neither give nor take an only son in adoption. In Southern India, however, the theory of implied authority from the husband to adopt has not been recognized. There must be either the express permission of the husband, or what is equivalent to it the authority of his sapindas; otherwise the widow is not competent to adopt. The meritorious character of an adoption as a religious act was not accepted as the basis of a general presumption of law and the limitation suggested in connection with it has likewise no application in this Presidency. We must hold then on the authority of Dattaka Chandriká, and Yájñavalkya that the widow is competent to give whenever the husband is legally competent to give and when there is no express prohibition from him. The result is that this appeal must fail, and we accordingly dismiss it with costs.

[The Memorandum of Objections was also dismissed with costs, their Lordships having ruled that the Subordinate Judge was right in holding that appellant No. 3 had been duly adopted as alleged.]

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(1) 12 B.H.C.R., 364. (2) I.L.R., 6 Bom., 524.