delegate it, are acknowledged and confirmed both by the Indian Legislature in the Act of 1879, and by the order of His Majesty in Council issued under the authority of the British Legislature in the Act of 1890.

For these reasons, I am of opinion that Mr. Plumer had jurisdiction to convict the accused in the case before us. If he had jurisdiction there is no ground for revision.

DAVIES, J.—I am not prepared to differ from the conclusion arrived at by my two learned colleagues.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SUBRAHMANYAM (PLAINTIFF), APPELLANT,

v.

VENKAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1903. February 11, 12, 18.

Hindu Law—Adoption by widow—Consent of sapinda—Exercise of discretion—Effect of representation by widow that her husband had given authority when none had in fact been given—Effect of asking consent of one of two sapindas of equal degree.

Where a widow obtains the assent of a sapinda to an adoption by representing that her late husband had authorized it when in fact he had not, such assent is inefficacious in law. The assent of a sapinda to an adoption to be made by the widow of a deceased kinsman should be given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow who has not received her husband's authority to make the adoption.

A widow whose late husband had died without giving her authority to adopt a son, applied for such authority to one of two sapindas of equal degree, who were divided as between themselves and who were both divided from the deceased. This sapinda (who was the senior) gave his assent to the adoption. The other was not asked. On a suit being brought for a declaration that the adoption was invalid, it was argued that though the assent of the other sapinda had not been asked for at or about the time of the adoption, it must be taken that his assent had been applied for and refused, inasmuch as the circumstances and the attitude he had assumed showed that he would have refused to give it:

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* Appeal No. 114 of 1901 presented against the decree of W. C. Holmes, District Judge of Kistna, in Original Suit No. 12 of 1900.

SUBRAHMANYAM v. VENKAMMA.

Held, that the adoption was invalid. If it was the widow's duty to seek the assent of both sapindas, she could not be regarded as having discharged her duty, because, in her opinion, such an application would have been made in vain. The object of enjoining a widow to seek and act under the guidance of her husband's sapindas would be defeated if she should omit to give an opportunity to the sapindas concerned to advise her against making an adoption or against adopting a particular boy. If such an assent had been applied for and had been refused, and the adoption had then been made on the assent of one sapinda, the Court would have been in a position to decide whether consent had been withheld properly or improperly and capriciously. But it was clear that in this case the widow had been determined to ignore the other sapinda, and not to care for his advice or even to give him an opportunity to advise her.

There is nothing improper in a sapinda proposing to give his assent to a widow adopting his own son, if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda, if there be no reasonable objection to the adoption of his own son.

In the case of an undivided family, it may be that the assent of the senior sapinda, having the status of managing member, will be equivalent to the assent of the family and will be sufficient. But this consideration has no application to cases where the assent has to be sought from divided kinsmen, especially when they are divided as between themselves.

SUIT for a declaration that an adoption by first defendant of second defendant was invalid. Plaintiff and third defendant were divided brothers, and the late Ramayya was their father's cousin. Ramayya had died issueless some twenty years prior to the present suit, leaving his widow, first defendant, and no undivided member of his family him surviving. Plaintiff alleged that first defendant had not been authorized by her late husband or by any of the gnatis to make any adoption, but that she was setting up an alleged adoption of the second defendant, the effect of which would be to interfere with plaintiff's right to inherit property. He prayed for a declaration that the so-called adoption was invalid and would not affect the heirs of the late Ramayya. The first and second defendants pleaded that the late Ramayya had, when he was ill, some time previous to his death, given first defendant authority to adopt a boy from the gnatis; that the widow had obtained the further permission of third defendant (who, as plaintiff's elder brother, was the nearest gnati of the deceased), and other gnatis, and had accordingly adopted the second defendant. They contended that the adoption was valid; and their statement was supported by third defendant, plaintiff's elder brother. A deed of authority given by third defendant, filed as exhibit III, was in the following terms: "Deed authorizing adoption executed on the 19th April 1900 in

favour of Jonnalagadda Venkamma, wife of the late Ramayya, Brahman . . . . Your husband late Ramayya is the grandson of my divided junior paternal grandfather. He died having no male or female issue. Both during his lifetime as well as at the time of his death, he felt sorry for his having had no issue and had expressed his opinion by telling you and myself and other gnatis that a boy should be adopted for him and the family be perpetuated. In pursuance of that authority you have also sought authority from me, a *Sannihitha Gnathi* for adopting a boy to your said husband. So I also agree out of my free will to your adopting a suitable boy as foster-son to your husband from the *Gnathis* or *Sagothras*, accordingly, when necessary, for achievement of the object of yourself as well as your husband, and you are hereby authorized (to do accordingly). This deed authorizing adoption is executed and given with consent. (Signed) Narasimham [third defendant]."

The District Judge believed the evidence that a form of adoption had been gone through on the day following the execution of this deed. He found that the defence had not proved that the widow had received authority from her late husband, but he held that the authority given by the third defendant was an independent one; that it was *bonâ fide;* that plaintiff and third defendant were the two nearest gnatis to the deceased Ramayya, and that it would have been useless for the widow to seek authority from plaintiff, who probably wanted one of his own sons to be adopted and would have refused to give authority. The evidence of the first defendant showed that she had not applied to plaintiff for his consent; the Judge considered that in the circumstances the authority from third defendant was sufficient to enable the widow to adopt. He upheld the adoption and dismissed the suit with costs.

Plaintiff preferred this appeal.

T. V. Seshagiri Ayyar for appellant.

V. Krishnaswami Ayyar and *K. Subrahmania Sastri* for first and second respondents.

JUDGMENT.—This is a suit to obtain a declaration that the adoption of the second defendant by the first defendant—the widow of one Ramayya—is invalid on the grounds that the first defendant had no authority from her husband to make the adoption and that the alleged assent of the third defendant alone to the adoption is invalid and insufficient in law. The plaintiff and the

SUBRAHMANYAM v. VENKAMMA.

third defendant are divided brothers, being the nearest existing cousins of the deceased Ramayya, who died issueless about 20 years ago, leaving him surviving no undivided member of his family. The second defendant, who is the son of a remote *gnati* of the deceased, was, shortly before the institution of this suit, adopted by the first defendant, who purported to adopt him in pursuance of her husband's oral authority and of the assent of the third defendant and some other *gnatis*. The District Judge disbelieved the evidence as to the oral authority given by the husband, but upheld the adoption on the grounds that, according to the proper construction of the document (exhibit III) executed by the third defendant signifying his assent to the adoption, his consent was one given independently of the alleged authority of the husband, that such assent was not proved to have been given from corrupt motives and that the assent of the third defendant alone was sufficient in law inasmuch as "it would have been useless for the widow to have sought also the assent of the plaintiff who probably wanted one of his own sons to be adopted by her."

Notwithstanding the attempt made before us by the respondent's pleader, to impugn the finding of the District Judge as to the alleged authority from the husband, we are quite satisfied that his finding is correct and that the oral evidence in support of the alleged authority is altogether untrustworthy. We also agree with the District Judge that the evidence is by no means sufficient to establish that the third defendant's assent was procured for a pecuniary consideration.

The two questions which have been chiefly argued at length before us are (1) whether the third defendant's assent is not null and void as having been given on a representation made by the widow that she had her husband's authority to make the adoption and (2) whether the assent of the third defendant alone is sufficient in law, either absolutely or under the circumstances of the case.

The principle of law applicable to the determination of the first question, as laid down by the Judicial Committee of the Privy Council in *Sri Raghunadha* v. *Sri Brozo Kishoro*(1) and in *Karunabdhi Ganesha Ratnamaiyar* v. *Gopala Ratnamaiyar*(2) and followed by this Court in *Venkatalakshmamma* v. *Narasayya*(3), is

(1) L.R., 3 I.A., 154. (2) L.R., 7 I.A., 173.
(3) I.L.R., 8 Mad., 545.

that the assent of a sapinda to an adoption to be made by the widow of a deceased kinsman should be one given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow not having her husband's authority to make the adoption and that, therefore, a sapinda's consent obtained by the widow upon a representation that she had received authority to adopt from her husband, when no such authority has in fact been given, is inefficacious in law. Applying this principle to the present case, the third defendant's assent would undoubtedly be inefficacious if it could be regarded as having been influenced by the widow's allegation of authority from her husband.

We are quite unable to concur with the District Judge in construing exhibit III as the according of an independent assent by the third defendant, whether the husband had given permission or not. On the contrary the document expressly recites that in asking the third defendant to give his assent also, the widow's proposal to him was to make an adoption in pursuance of her husband's authority given to her in the presence of the third defendant and other *gnatis*. The learned pleader for the respondents seeks to distinguish the present case from the cases above referred to, on the ground that, if no authority had been given by the husband, as alleged, the third defendant while giving his assent must have known perfectly well that no such authority had been given, and the widow's representation, if any, that such authority was given, being one which must have been false to his knowledge, could not have influenced the exercise of his discretion in according his assent. Assuming that the alleged authority of the husband was false to the third defendant's knowledge, the soundness of this contention must be accepted and the case would thus be clearly distinguishable. In the present case, no doubt, the third defendant has given direct evidence in support of the alleged oral authority of the husband and he also stated in exhibit III that the husband's authority was given in his presence. Though we concur with the District Judge in distrusting his evidence, it does not, however, necessarily follow from this circumstance that the third defendant himself really disbelieved the widow's representation, if any, that she had her husband's authority to adopt. It may be that, believing the representation to be true, he supported the widow by falsely stating and giving evidence that he himself was present when the alleged authority was given. But upon the whole evidence in this case, we are

SUBBAH-MANYAM v. VENKAMMA.

satisfied that he knew as well as the first defendant did, that the husband had given no authority whatever but that the two, acting in collusion against the plaintiff, invented the husband's authority—which the third defendant was to support by his evidence—with a view to neutralizing the absence of the assent of his brother (the plaintiff) and thus avoid the risk—by no means an improbable one—of the adoption being upset on the ground that the third defendant's assent alone was insufficient. We cannot, therefore, hold that the third defendant's assent, if otherwise sufficient, is invalidated by the widow having falsely set up her husband's authority.

In approaching the consideration of the second contention relied on in support of the appeal, we have to be guided chiefly by the decisions of this Court in *Parasara Bhattar* v. *Ranga Raja Bhattar*(1) and *Venkatakrishnamma* v. *Annapurnamma*(2). We may at the outset dispose of the assent alleged to have been obtained by the widow from a number of her husband's distant *gnatis*, with the remark that such of them as have been examined as witnesses in the case deny having given any such assent and that even assuming it to have been given, such assent can be of no avail as the first defendant herself in her evidence states that she obtained their oral assent to the adoption by representing it to each of them that she had her husband's authority.

In *Parasara Bhattar* v. *Ranga Raja Bhattar*(1) as in the present case, the adoption was made with the assent of only one of two sapindas of equal degree, who were divided between themselves and both divided from the deceased. In upholding the adoption on the ground that the non-assenting sapinda withheld his assent on improper grounds, this Court laid down the law applicable to the case as follows:—(pp. 206-207)—" . . . . and where the only surviving members of the family are divided from the deceased husband for whose benefit it is desired to make the adoption, and also from each other and equally distant from the deceased, there seems nothing in principle to throw doubt upon the sufficiency of the assent of some of them, when *bonâ fide* given, if it be shown that the consent of the others is refused from interested or improper motives or without a fair exercise of discretion. In the present case the assent of both sapindas was sought and plaintiff's

(1) I.L.R., 2 Mad., 202. (2) I.L.R., 23 Mad., 486.

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"All which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." The expression 'family council' in the above extract is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of sapindas and samanodakas or to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband and as such the natural advisers of the widow; and if his or their assent be obtained and the same be given *bonâ fide* and not from any corrupt motive, that would be sufficient authority on which she could act and it would not be necessary that she should seek the assent of remoter reversionary heirs. The two cases of *Parasara Bhattar* v. *Runga Raja Bhattar*(1) and *Venkatakrishnamma* v. *Annapurnamma*(2) evidently proceed on this view, though it does not appear from the report whether or not there were remoter reversionary heirs in existence. If the presumptive reversionary heir or heirs withhold his or their assent from improper motives, the widow may validly act upon the assent given *bonâ fide* by remoter reversionary heirs. Adverting to cases in which a majority give or withhold assent and a minority withhold or give assent, Mr. Justice Subrahmania Ayyar in his judgment (concurred in by Moore, J.) in *Venkatakrishnamma* v. *Annapurnamma*(2) observed as follows:—(at page 488) "It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that, when the majority give their assent, such assent was given on *bonâ fide* grounds. If, however, it be shown that the majority give or withhold their assent from improper considerations, such assent or dissent will be of no avail to the party relying on it." In the above case, there were four reversionary heirs of equal degree, three of whom gave assent, but the fourth withheld his assent, without communicating to the

(1) I.L.R., 2 Mad., 202. (2) I.L.R., 23 Mad., 486.

SUBRAHMANYAM v. VENKAMMA.

widow, either at the time he was asked to assent or subsequently, what the reasons for his refusal were and the adoption was upheld on the ground that the sapinda who refused "to give his reasons for the opinion why an heir by adoption should not be substituted, while other sapindas decide in favour of such substitution cannot be held to exercise properly the discretion confided to him. His opinion against the adoption must be put entirely out of consideration as capricious or prompted by undue considerations."

In both the above cases, the widow had sought the advice and assent of all the presumptive reversionary heirs and the adoption was upheld, though one of the two in the first case withheld his assent—but on an improper ground—and one of the four, in the latter case, withheld his assent—but without giving any advice or reason. In the present case, it is argued that though the plaintiff's assent was not sought for, at or about the time of the adoption, yet inasmuch as he would have refused to give his assent, it must be taken that his assent was applied for and refused. It is however impossible to accede to this argument. If it was her duty to seek the assent, not only of the third defendant, but also of his brother (the plaintiff), she cannot be regarded as having discharged her duty because, in her opinion, she would have made an application to the plaintiff but in vain. The very object of enjoining a widow to seek and act under the advice of her husband's sapindas will be defeated if she does not give an opportunity to the sapindas concerned to advise her against making an adoption or against adopting a particular boy. It may be that if the sapinda who is supposed to be opposed to the adoption be consulted, his advice against the adoption will be effective upon the widow or it may be that the widow's explanation will induce him to change his mind and give his assent. Whether the deponent was conscious of it or not, we think there is much truth and force in the following statement of the plaintiff in his deposition:—"I was not asked to give consent to the adoption. I cannot say what I would have done if I had been asked." In answer to questions put to the plaintiff as to the allusion made in his notice (exhibit I already referred to) to the first defendant having fallen into evil ways, he stated as follows:—"The minor's (second defendant's) natural father was familiar with the first defendant and so I wrote as I did in the letter. I suspected her conduct." It would have been perfectly

legitimate on the part of the plaintiff to dissuade the widow from adopting the second defendant if he had reason to believe that such adoption would lead to scandal and bring disrepute on the family. If she had applied to him for his assent and he had withheld the same, with or without assigning reasons and she had nevertheless made the adoption relying on the assent of the third defendant alone, we should have been in a position to decide whether the plaintiff had withheld his assent properly or improperly and capriciously. But it is clear from the action of the first defendant in refusing to receive the letter which was sent to her by registered post, that she was determined to ignore him and not care for his advice or even give him an opportunity to advise her. The plaintiff says in his evidence that he never asked the first defendant to adopt one of his sons. But, assuming, as the first defendant says, that some five years before the adoption the plaintiff wanted her to take one of his sons in adoption, there is nothing improper in a sapinda proposing to give his assent to the widow adopting his own son, if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda, if there be no reasonable objection to the adoption of his own son—as for instance in the case of *Parasara Bhattar* v. *Runga Raja Bhattar*(1).

For the above reasons the adoption of the second defendant made by the first defendant with the assent of the third defendant alone is invalid. The appeal is therefore allowed and, in reversal of the decree of the lower Court, judgment is given for the plaintiff with costs throughout, declaring the adoption of the second defendant by the first defendant to be invalid.

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(1) I.L.R., 2 Mad., 202.