RE ABIBULLA RAVUTHAN. — WALLIS, C.J., AND COUTTS TROTTER, J.

Kader v. *Emperor*(1) and the same principle was applied by ERLE, J., in *Reg.* v. *Berriman*(2) to a statement elicited from a prisoner improperly questioned by an examining Magistrate in England. The same objection applies to the answers elicited from the accused by the learned Judge at the trial; and we feel constrained to say that the learned Judge subjected the accused to a cross-examination which far outstripped anything enjoined or permitted by section 342 of the Code. We set aside the convictions of accused Nos. 2, 6 and 7.

With regard to the fourth accused, there is some evidence against him, but it is practically the word of prosecution witnesses Nos. 1 and 2 against that of the fourth accused. The surrounding circumstances throw no light on the probabilities of the matter and we do not think it would be safe to convict on the evidence of two interested persons. We set aside this conviction and sentence also.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915. March 30 and 31 and April 1, 8 and 29.

RAJAH DAMARA KUMARA VENKATAPPA NAYANIM BAHADUR VARU (LATE A MINOR BUT NOW OF FULL AGE) (PLAINTIFF), APPELLANT IN APPEAL NO. 225 OF 1912 AND RESPONDENT IN APPEAL NO. 136 OF 1912,

v.

DAMARA RENGA RAO (LATE A MINOR BUT NOW OF FULL AGE) (DEFENDANT), RESPONDENT IN APPEAL NO. 225 OF 1912 AND APPELLANT IN APPEAL NO. 136 OF 1912.*

29 M.L.J. 718

Hindu Law—Adoption by junior widow without consulting senior widow but with sapindas' consent, invalidity of—Preferential right of senior widow to adopt.

An adoption made by a junior widow of a deceased Hindu purporting to be made with the consent of the sapindas but without consulting the senior widow is invalid.

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(1) (1904) I.L.R., 27 Mad., 238. (2) (1854) 6 Cox Cr.C., 388.

* Appeals Nos. 225 and 136 of 1912.

Kakerla Chukkamma v. *Kakerla Punnamma* (1914) 28 M.L.J., 72, followed. *Vellanki Venkata Krishna Rao* v. *Venkatarama Lakshmi* (1876) I.L.R., 1 Mad., 174 (P.C.), referred to.

Per WALLIS, C.J.—In the absence of an express authority by the husband to any one of the widows the senior widow has the preferential right to adopt with the consent of the sapindas.

The senior widow is one of the kinsmen whom it is the duty of the junior widow to consult, within the meaning of the rule enunciated in *The Ramnad case* (1868) 12 M.I.A., 397.

APPEALS against the decree of L. G. MOORE, the District Judge of North Arcot, in Original Suit No. 23 of 1910.

The facts of the case appear from the judgment of WALLIS, C.J.

A. Krishnaswami Ayyar and *T. M. Krishnaswami Ayyar* for the appellant.

T. V. Venkatarama Ayyar and *V. Ramesam* for the respondent.

WALLIS, C.J.—The plaintiff-appellant in this case bases his claim to succeed to the estate of the late Gangadhara Rama Nayanim on the ground that he was duly adopted by the junior widow with the consent of the sapindas after the senior widow had refused to adopt a boy. The District Judge has found and we agree with him, that no such refusal is proved. On the other hand the evidence shows that the senior widow who left the family house shortly after her husband's death set up almost at once that her husband had authorized her to adopt during his life time. It also appears that two days after the adoption of the plaintiff by the junior widow, and as soon as she heard of it, she went through the form of adopting the defendant purporting to act under the alleged authority from her husband. The District Judge found that this authority had not been proved, but this finding did not affect the result, as he also found that the plaintiff's adoption by the junior widow was invalid on the ground that it was made by her without consulting the senior widow and obtaining her consent, and also because it was made without consulting one of the nearest reversioners of the deceased, and that consequently he had no right to sue. WALLIS, C.J.

The view taken by the District Judge as to the senior widow's consent is in accordance with a subsequent and very recent decision of SANKARAN NAIR and SPENCER, JJ., in *Kakerla Chukkamma* v. *Kakerla Punnamma*(1), where it was held that the senior

(1) (1914) 28 M.L.J., 72.

RAJA VENKATAPPA NAYANIM BAHADUR v. RENGA RAO.

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widow has a preferential right to adopt, and that, so long as such preferential right subsists, the junior widow has no right to adopt. The learned Judges, one of them a Hindu Judge of long experience, based the decision not only on the decisions of the Bombay and Calcutta Courts but also on the preferential right of the senior widow to perform religious acts such as adoption.

The question which is one of considerable importance and had not previously come before this Court has again been very ably and elaborately argued before us by Mr. A. Krishnaswami Ayyar for the appellant and by Mr. T. V. Venkatarama Ayyar for the respondent; and after a careful consideration of their arguments I see no reason to differ from the conclusions arrived at by the learned Judges or the grounds on which it was based.

The preferential right of the senior wife as regards religious acts is in my opinion clearly established. The Mitakshara, Book I, Chapter III, verse 88, which has been specially translated for us, first cites the text of Yagnavalkya "when there is a wife of an equal class present, never do acts of religion with any other. When there is more than one wife of the same class as yourself in matters of religion never employ any but the eldest." On this Vignaneswara comments as follows: "When there is a wife of equal class never do acts of religion with wives of any other class. When there are several wives of the same class in matters of religion do not pass over the eldest wife and do not employ either the second or the third (lit. the middle or the youngest one)." See also Colebrook, volume 2, Digest, pages 124 to 126. The senior widow's preferential right of adoption is expressly recognized in Steele's Law and Custom of Hindu Castes, page 48, which embodies the results of an enquiry held in the year 1831 as to the Hindu customs and usages prevailing in the Deccan; and in *Padaji Rao* v. *Rama Rao*(1), SARGENT, C.J., after referring to this passage observed that the superior right of the elder widow was doubtless based on her being the *patni* (पत्नी) and as such entitled to take part with her husband in all religious ceremonies. I think that here the learned Judge was only offering an explanation of the usage prevailing in the Deccan, and even if, as contended by the appellant, he was mistaken in supposing

(1) (1888) I.L.R., 13 Bom., 160 at p. 166.

that the senior wife alone was entitled to be styled *patni*, I do not think that matters much, as it does not affect the preferential right of the senior wife to perform religious acts. As regards the meaning of *patni* (पत्नी) it appears from the passages in the Mitakshara and Viramitrodaya referred to in *Janokinath Mukhopadhya* v. *Mathuranath Mukhopadhya*(1), that the celebrated grammarian Panini considered that the word had been formed by affixing the particle *ni* (नी) to *pati* (पति) (husband) to signify one who partakes in the holy sacrifices. Fanciful as this may be, it was of course accepted on Panini's authority by the commentators, and Vignaneswara after referring to it states that all the wives were to be regarded as *patnis* and as such entitled to share in the inheritance. The omission in Colebrook's translation of the Mitakshara of this passage which is now accepted as genuine was responsible for Strange's view that the senior widow alone was entitled to succeed, a view which had been overruled by *Kissen Lala* v. *Javallah Prasad Lala*(2), and by the Privy Council in *Gajapathi Nilamani* v. *Gajapathy Radhamani*(3), which only left her the exclusive right of management until partition. Admitting however that the junior wives are *patnis* in the sense of being capable of partaking in sacrificial acts, it still remains true on the express authority of the Mitakshara already cited, that the senior wife has the preferential right, as regards religious acts, and this appears to me to be a sufficient foundation for her preferential right as to adoption.

It is then said that the learned Judges were wrong in applying the Bombay rulings—*Rakkhmabai* v. *Radhabai*(4), and *Padaji Rao* v. *Rama Rao*(5)—to this Presidency and that these decisions are opposed to the decisions of the Privy Council with reference to adoption in this part of India beginning with *The Ramnad Case*(6). But, as pointed out by their Lordships in that case, the law of adoption in all these presidencies rests on the text of Vasishta; "nor let a woman give or accept a son without the consent of her lord," and the main difference is as to the circumstances in which such consent should be considered

(1) (1883) I.L.R., 9 Calc., 580 at p. 583.
(2) (1867) 3 M.H.C.R., 346 at p. 351.
(3) (1876) I.L.R., 1 Mad., 290 at p. 293 (P.C.).
(4) (1868) 5 Bom. H.C.R., 192 (A.C.J.).
(5) (1888) I.L.R., 13 Bom., 160 at p. 166. (6) (1886) 12 M.I.A., 397.

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to have been given, evidence of express authority being required in Bengal, whereas in Bombay it is presumed except in cases where the husband was the member of a joint family where the consent of the managing member is required, while in Madras, as held by their Lordships in the Ramnad case on a variety of considerations the want of the husband's consent may be supplied by the consent of his kindred. Following Bombay decisions the Calcutta High Court has recently held that, where the husband authorized his two widows to adopt, he must be held to have intended the senior widow to have the preferential right. The Bombay decisions, JENKINS, C.J., observed "rest upon fundamental principles and on views of Hindu life and economy which appear to me to be fully applicable here. Any other view would merely lead to an unseemly scramble for the purpose of performing this solemn act." *Ranjit Lal* v. *Bijoy Krishna*(1). These observations in my view are equally applicable in this Presidency . . . . where, as observed by their Lordships in *Sri Viraŏa Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(2), the law in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay. Further in view of the inconveniences attendant on simultaneous rights of adoption, and in the significant absence of any evidence that such an equal right has ever been claimed in our Courts for junior widows prior to these two cases, I think the onus is on those who assert it to show that the law in Madras differs in this respect from that which prevails in the adjoining presidency. In the case of impartible estates the estate necessarily vests in the senior widow, and the result of holding that the junior widow with the consent of a majority of the sapindas has a right to adopt without reference to the senior widow would to render the latter's tenure of the estate exceedingly precarious. The absence until now of any such attempt by the junior widow and sapindas goes far to show that the rule in this presidency has been the same as in Bombay, and that we should effect an innovation by holding otherwise.

It is then argued that the equal right of the junior widow is to be deduced from the decisions of their Lordships of the Judicial Committee in which the question was not raised.

(1) (1912) I.L.R., 39 Calc., 582 at p. 586. (2) (1876) I.L.R., 1 Mad., 81.

considered. These arguments must be received with great caution, as their Lordships' observations were only directed to the questions before them. In *The Ramnad Case*(1) it was held not only on the authority of the Smrithi Chandrika and the Dattaka Mimamsa but also on the ground of proved usage that in Madras a Hindu widow not having her husband's permission might lawfully adopt if duly authorized by his kindred—the assent of the kinsmen being apparently required by reason of the presumed incapacity of women for independence. The question of priority among co-widows did not arise and was not considered in the case. The further explanation of that decision by their Lordships in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Deo*(2), as to what amounts to a sufficient consent of kinsmen does not affect the present question. In the next case—*Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(3)—where the question was whether an adoption made by a widow with the assent of the kindred after the death of her natural son was valid, their Lordships held that the husband during his lifetime might have authorized his wife in the event of the death of the natural son to adopt another son, and, if she could have done it with the husband's assent, she could equally do it with the assent of the kindred. Their Lordships no doubt laid down generally but of course with reference to the facts before them that a widow without permission from her husband may if duly authorized by her kinsmen adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband. This is the major proposition of the syllogism. The minor is to be found in the observation of their Lordships in *Annapurni Nachiar* v. *Forbes*(4): "It seems not to be doubted that a man may authorize one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother." We are then asked to conclude that a junior widow with the consent of the kinsmen may adopt to the exclusion of reference to the senior widow. The fallacy of this argument in my opinion consists in applying the general expressions of their Lordships in *Vellanki Venkata Krishna Rao* v.

(1) (1868) 12 M.I.A., 397.
(2) (1876) I.L.R., 1 Mad., 81.
(3) (1876) I.L.R., 1 Mad., 174.
(4) (1900) I.L.R., 23 Mad., 1 at p. 9

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Venkata Rama Lakshmi(1) to a case which was not before them and which involves, as I have sought to show, considerations of authority, usage, and convenience which were not presented to them.

The decision of the Bombay High Court in *Rakkhmabai* v. *Radhabai*(2) that the senior widow is entitled to adopt without the consent of the junior widow, and the decision of this Court in *Narayanasami Naik* v. *Mangammal*(3) that in this part of India the senior widow with the consent of the kinsmen may proceed without the consent of the junior widow must be considered as proceeding on a recognition of the senior widow's preferential right, and are no authority for holding that the junior widow may adopt without the senior's consent.

Mr. Venkatarama Ayyar for the respondent also argued that in any case the senior widow was entitled to be consulted as one of the kindred while on the other side it was argued that a widow is not a sapinda but only succeeds as one of the enumerated heirs. I do not think it necessary to go into this question, but having regard to the decision of their Lordships in *The Ramnad Case*(4) that the assent of the mother-in-law Mothuveroyee in that case was operative in support of the adoption, I should be disposed to hold that the senior widow was one of the kinsmen whom it was the duty of the junior widow to consult and that the adoption was bad for failing to consult her.

I do not consider it necessary to consider on the evidence whether as found by the District Judge there was a failure to consult one of the next reversioners, because for the reasons already given I think Appeal No. 225 fails and must be dismissed with costs. For the purposes of this appeal it is not necessary to consider the finding as to the adoption by the senior widow of the first defendant. It has also become unnecessary to hear the cross-appeal of the first defendant against the finding that he was not validly adopted by the senior widow, as that finding has become immaterial to the decision. Appeal No. 136 is withdrawn by consent. No order as to costs.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I also desire to express my indebtedness to the able and lucid arguments which have been addressed to

(1) (1876) I.L.R., 1 Mad., 174. (2) (1868) 5 B.H.C.R., 192 (A.C.J.).
(3) (1905) I.L.R., 28 Mad., 315. (4) (1868) 12 M.I.A., 397.

us, from which I have derived much assistance and instruction. Up to a certain point the law is clear, and its provisions are a common starting point to both parties; and the following propositions may be laid down. In Bengal a widow can only adopt if the husband had before his death given his express authority to her to do so. In Bombay, the consent of her husband is always implied and she can adopt without proving any authority on her own motion In Southern India, she can adopt without express authority, if she obtains the consent of the sapindas of her husband. When a man has mo rewives than one, he can associate any one of them with him in adoption, and can give an authority to any one of them to adopt after his death; his choice is in no way restricted and he can prefer the junior widow to the senior, the younger to the elder. It is argued for the appellant here, that as the junior widow can adopt with the authority of her deceased husband, she is in exactly the same position if she obtains the consent of the sapindas: for the sole object and import of the consent of the sapindas is that it should be the equivalent of the authority of the husband. In support of this view of the scope and nature of the authority of the sapindas, reliance was placed on the judgment in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1), and particularly on the observations of Sir James Colvile at pages 184 and 187.

For the respondent reliance was placed on the fact that both in Bengal, where the rule is stricter, and in Bombay where it is laxer than in Madras, the junior widow is not allowed to adopt in preference to or without the consent of the senior. See *Padaji Rao* v. *Rama Rao*(2) and *Ranjit Lal* v. *Bijoy Krishna*(3). In the Bengal case, the question arose and only could arise where a husband had given an authority to his wives to adopt, without distinguishing between them: the Court read the authority distributively, and held that its exercise was restricted in the first instance to the senior widow. In the Bombay case, where there was no question of express authority, it was held that the power was not exercisable by the junior widow without the consent of the senior. Mr. Krishnaswami

(1) (1876) I.L.R., 1 Mad., 174. (2) (1888) I.L.R., 13 Bom., 160.
(3) (1912) I.L.R., 39 Calc., 582.

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Ayyar, while prepared if necessary to say that these cases are wrong or at any rate have no application to Madras, distinguishes them from the present case. He points out that the Calcutta case only laid down a rule for the construction of an express authority given to two persons : and that the Bombay case applies the same construction to an implied authority. Here we have an express authority, that of the sapindas, to a definite person ; and he contends that there is nothing in either decision to prevent our giving effect to it.

An English Judge in deciding a question of English common law is in theory declaring what custom on the subject has subsisted immemorially in the country (Stephen's Blackstone, volume I, introduction, section I). An Indian Judge in deciding a question of Hindu law is in theory expounding the true construction of mandatory utterances to which a divine origin is ascribed, aided or impeded in his task by ancient commentaries, text books of authority, and judicial decisions of the Indian Courts and of the Privy Council. Nowadays there is little but fiction in either theory, and a Judge in both countries has only to apply the principles of previous decisions to particular sets of facts. But I think that the theoretical objective has just this much effect; that the argument that a suggested result is not in accordance with known practice will have less weight in India, if it can be shown to be the logical deduction from the authorities. In the present case, I feel it very difficult to escape from the conclusion that *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1) has declared the consent of the sapindas to be in all respects the equivalent of express authority from the husband. On the other hand, it is quite clear from the books that to give effect to the appellant's contention would be quite contrary to what everyone has hitherto supposed to be the law, and to legalize what in practice is a complete innovation. It is also a practice likely to lead to extreme inconvenience, to use no stronger term. In this state of things, I find that two Judges of this Court have in *Kakerla Chukkamma* v. *Kakerla Punnamma*(2) decided this question adversely to the appellant; one of those Judges being SANKARAN NAIR, J., whose authority on such a subject has the weight of his great experience. Further, I find that my Lord in

(1) (1876) I.L.R., 1 Mad., 174. (2) (1914) 28 M.L.J., 72.

the present case takes the same view. That being so, I think it would be quite wrong for me to give expression to any opinion that might tend to unsettle the former decision of this Court, or give any encouragement to its challenge in other cases. The expressions used in the Privy Council in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(1) were not really necessary to the decision and I think if the decision in *Kakerla Chukkamma* v. *Kakerla Punnamma*(2) is to be challenged, it must be challenged elsewhere than in this Court. The appeal fails and is dismissed with costs. I agree with the order proposed in my Lord's judgment.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

A. M. ROSS (AUTHORIZED AGENT OF CERTAIN TEA COMPANIES AND LABOUR ASSOCIATIONS IN ASSAM) (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

1915. April 19, 20 and 29.

19 M.L.T. 280

Secretary of State in Council, suit against, in respect of illegal order of District Magistrate under Assam Labour and Emigration Act (VI of 1901), sec. 91, and also for alleged defamation in a Government Order—Damage, remoteness of—Liability of defendant under the Government of India Act (I of 1858)—No liability, on the ground that the order was made in the course of employment, and that the acts were done by Government servants in the exercise of statutory powers—Alleged ratification by the Local Government—Government Order—Absolute privilege—Absence of malice.

Suit by the plaintiff, who represented the Assam Labour Supply Association in Ganjam and other districts, against the Secretary of State for India in Council for damages in respect of two orders of the District Magistrate of Ganjam suspending and dismissing one T.S., the local agent of the Association in Ganjam, and closing his depot to recruiting under the Assam Labour and Emigration Act (VI of 1901), whereby the plaintiff was prevented from earning from the members of the association his commission of seven rupees for each labourer sent to Assam; and for an alleged libel on the plaintiff in an order passed by the Governor-in-Council on appeals by the plaintiff and others against the aforesaid orders, in which it was stated that the plaintiff's own conduct was not altogether above suspicion,

(1) (1876) I.L.R., 1 Mad., 174. (2) (1914) 28 M.L.J., 72.

* Original Side Appeal No. 32 of 1913.