APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

1921. October 21.

MUTHUSAMI NAICKEN (PLAINTIFF), APPELLANT,

v.

PULAVARATAL AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption—Senior widow—Preferential right—Junior widow—Adoption by latter without asking senior widow to exercise her right of adoption—Relinquishment or waiver by senior widow, necessity for—Senior widow living apart from her husband for twenty-five years, whether disqualified to adopt—Prohibition by husband—Express or implied—Implied prohibition when made out.

Under the Mitakshara law, the senior widow has a preferential right to adopt a son to her husband with the consent of his sapindas, and this rule applies to Sudras as well as to other classes.

Rajah Venkatappa Nayanim Bahadur v. *Renga Rao* (1916) I.L.R., 39 Mad., 772, followed.

Unless the senior widow waives or relinquishes her preferential right and authorizes the junior widow to adopt, an adoption made by the latter with the consent of the husband's sapindas but without asking the senior widow to exercise her right of adoption, is invalid.

From the mere fact that the senior widow was living apart from her husband for twenty-five years, she cannot be deemed to be a "*dushta or nishidda,*" and so disqualified to exercise her preferential right to adopt.

Though a prohibition by the husband against the senior widow's adoption may be implied and need not always be express, the implication must be clear and necessary, and it is not for the Court to embark on a speculation as to what the husband might have done during his lifetime or might have wished if the point was expressly mentioned to him before his death.

Lakshmibai v. *Sarasvatibai* (1899) I.L.R., 23 Bom., 789, followed; *Dnynoba* v. *Radhabai* (1894) 8 Bom. Printed Judgments, 9, distinguished.

* Appeal Suit No. 149 of 1920.

APPEAL against the decree of K. S. LAKSHMINARASA AYYAR, the Subordinate Judge of Salem, in Original Suit No. 41 of 1919.

The material facts appear from the judgment of SPENCER, J. The terms of the notice (Exhibit IV) referred to in the judgment were as follows :

"Letter written to Polavarathal, residing in Mattu street, Athoor, by Poorayi, wife of Ammasi Naikan, residing at Thedavoor.

As some people deny and object to the adoption made by the deceased Ammasi Naiken while he was alive, this letter is written to you to ascertain your views in respect of the permission given to me (to adopt Muthusami himself, son of Naga Naikan) by Karuppa Naikar who is the next reversioner to myself and to him (my husband), in order to confirm the adoption made by him (my husband) and for the salvation of his soul."

Mark of Poorayi Ammal, 23-11-17.

T. Ranga Achariyar for appellant.—The adoption of the plaintiff is true and valid. The adoption was made by the last male owner himself. Even if that adoption is not made out, the junior widow (third defendant) made the adoption with the consent of the nearest sapinda of her husband. The senior widow has no preferential right to adopt. The last male owner can adopt without associating any of his wives or with any of his wives as he may choose. The sapinda's consent supplies the want of the husband's authority. Just as the husband can choose any of his wives, the sapinda who gives his consent, can give his consent to any of the widows he likes. The senior widow has no absolute preferential right. It is subject to the discretion of the sapinda. Suppose the elder widow is unchaste, and the junior widow is chaste and applies to him for consent, is the reversioner bound to withold his consent? The rule does not apply to Sudras, even if it is applicable to other castes.

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The senior widow (first defendant) was a discarded wife; she lived separately from her husband for more than twenty-five years during his life-time and did not perform his funeral or other ceremonies. Further, she was not present and in attendance on the husband and was not an "adushta" within the terms of Katyayana's text. In *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(1), the parties were not Sudras. A discarded wife has no preferential right of adoption. The injunction of the Smritis and other texts to associate the senior wife in religious ceremonies is only a moral injunction to the husband, and the latter may or may not follow them. These texts do not apply after his lifetime. Among Sudras, the rules do not apply, as adoption with Sudras is not a religious but a civil act: datta homum is not prescribed for adoption among Sudras: there is no religious ceremony for adoption among Sudras. Application by a widow and bona fide consent by the reversioner are all that is necessary among Sudras.

Prohibition by the husband of an adoption by the first defendant should be implied under the circumstances of this case. *The Ramnad case*(2) shows that there can be an implied prohibition.

Mitakshara, Chapter III, Slokas refers to association of the first wife in religious works: Katyayana says on this—"wife near or in attendance on him, and adushta (blameless)." The first defendant does not satisfy these conditions to claim a preferential right over the junior widow who lived with the husband till he died and bore him children. Manu also says, regarding the duties of a wife that she must do sareerasisrusha or personal attendance on the husband. The first defendant failed in this duty.

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(1) (1916) I.L.R., 39 Mad., 772. (2) (1868)12 M.I.A., 397, 443.

The notice (Exhibit IV) given by the third defendant to the first defendant is sufficient. No answer was given to this notice by the latter. She must be deemed to have relinquished and waived her preferential right in favour of the third defendant. The sapinda's consent is a valid and bona fide consent.

S. Panchapagesa Sastri, for third and fourth defendants, supported the adoption.

A. Krishnaswami Ayyar, for first and second respondents.—The preferential right of the senior widow to adopt is established by *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(1) and *Kakerla Chukkamma* v. *Kakerla Punnamma*(2). The law gives certain rights and privileges to the senior wife or widow which are recognized by decided cases, and they cannot be affected by the want of affection and misunderstanding between her and her husband: she is a preferential heir among her co-widows to succeed to the zamindari or to be the manager in a partible zamindari or other estate of her husband. She does not lose her status as first wife by living apart from her husband. "Satya" in the text of Katyayana means "in existence" and not "present near him."

There are no grounds for an implied prohibition against adoption by the first defendant. The husband cannot prohibit only one of his wives, he must either prohibit all or none at all. See as to limitations of doctrine of prohibition, *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*(3). In *The Ramnad case*(4) there was a disposition of all his property otherwise. Mere separate living is not sufficient evidence of

(1) (1916) I.L.R., 39 Mad., 772. (2) (1915) 28 M.L.J., 72
(3) (1899) I.L.R., 22 Mad., 398 (P.C.) at 408.
(4) (1868) 12 M.I.A., 397, 443.

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prohibition: see *Lakshmibai* v. *Saraswatibai*(1). The notice (Exhibit IV) is bad in law and insufficient, because the junior widow got the consent of the reversioner to adopt and did not give an opportunity to the senior widow to get it.

Again, the consent of the second defendant, who is also a sapinda was not obtained and hence the adoption is not valid. Every near sapinda should have been consulted. *The Urlam case*(2) shows widows are sapindas; see also *Ramnad case*(3) and *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(4).

S. Panchapagesa Sastri, in reply.—The first defendant (senior widow) has not an absolute right to veto or make the adoption. The omission to reply to the notice (Exhibit IV) is tantamount to surrender of her preferential right. The consent of all sapindas is not required under the law: the consent of male sapindas (gnatis) and not of female sapindas is required: see *Viswasundara Row* v. *Somasundara Rao*(5), *Ganga Sahai* v. *Kesri* (6).

SPENCER, J.

SPENCER, J.—The plaintiff in this suit seeks for a declaration that he is the adopted son of the deceased Ammasi Naicken and is entitled to the properties mentioned in the schedule which belonged to Ammasi Naicken in his lifetime.

Ammasi Naicken died on the 13th of November 1915 of a carbuncle. It is alleged that, on the morning of the day when he died, he adopted the minor plaintiff, who is the son of the deceased's second wife's brother, and that he associated the second wife, who is third defendant, with him in the act of adoption. It may here

(1) (1899) I.L.R., 23 Bom., 789, 795. (2) (1918) I.L.R., 41 Mad., 998 (P.C.).
(3) (1868) 12 M.I.A., 397, 443. (4) (1916) I.L.R., 39 Mad., 772, 778.
(5) (1920) I.L.R., 43 Mad., 876. (6) (1915) I.L.R., 37 All., 545 (P.C.), 551.

be stated that Ammasi Naicken left three wives, Pulavarthal, Sellayi and Poovayammal, and that the first wife has been living apart from him for about 25 years. As doubts were thrown upon the said adoption, it is alleged that the third defendant went through the ceremony of adopting the plaintiff a second time on the 3rd of December 1917. The Subordinate Judge found that the adoption alleged to have been made by Ammasi Naicken was not true and that the adoption made by the third defendant was true but not valid.

Two questions arise for decision, first, whether the first adoption was true in fact, and secondly, whether the second adoption was a valid adoption. On the first point I am of opinion that sufficient reason has not been shown for disturbing the finding of the Lower Court. The Subordinate Judge heard the witnesses deposing, and he has given good reasons for thinking that the deceased Ammasi Naicken did not adopt the plaintiff and that the evidence in favour of the adoption was unsatisfactory. There are several circumstances which throw suspicion upon the truth of the alleged adoption. One is that the deceased was very ill on the morning of the 13th of November and he died at 5 p.m. His third wife, the second defendant, says that he lost consciousness on Saturday morning and that he had no control over his tongue. The act of adoption is alleged to have been made at or about the time when the prayaschittam ceremony was performed and at that time it is apparent that he was in extremis. The statement of the second witness for the plaintiff that the deceased was sitting up leaning against the wall and that he embraced the plaintiff and delivered him into his wife's hands is very improbable. Then, although the adoption is alleged to have been made on the 13th of November 1915, the pouthivaras statement was sent in on the 1st of February 1916. This is signed

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by the karnam who was not present at the alleged adoption and not by the village munsif who says he was present. It contains a statement that the obsequies of the deceased were performed by Chenga Naicken, the deceased's elder brother's son, as the agent of the adopted son. This Chenga Naicken has not been examined as a witness to prove that he acted as an agent for the minor; nor has Karuppa Naicken who, according to P.W. 2, had come for the adoption and is the eldest surviving sapinda of Ammasi Naicken been examined as a witness. Then the effect of the adoption was to disinherit all the three widows and a daughter and to make a relation of his second wife succeed to the whole of the deceased's property. When we find the second wife, third defendant, propounding this adoption, it suggests that she does so because she is interested in getting the property for her family.

On the second point which is a question of law, the adoption on the 3rd of December 1917 is attacked on the ground that there was no authority received by the second wife, either in writing or orally, from her husband to perform this adoption and that during the lifetime of the senior wife, the senior wife has a preferential right to make adoptions. This has been established by *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(1), which followed a decision of SANKARAN NAYAR, J., and myself in *Kakerla Chukkamma* v. *Kakerla Punnamma*(2), and the Bombay and Calcutta High Courts have also held that the senior widow has a preferential right of adoption: see *Rakhmabai* v. *Radhabai*(3), *Dnyanu* v. *Tanu*(4) and *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar*(5). The passage in the

(1) (1916) I.L.R., 39 Mad., 772. (2) (1915) 28 M.L.J., 72.
(3) (1868) 5 Bom. H.C.R., 181, 192. (4) (1920) I.L.R., 44 Bom., 508.
(5) (1912) I.L.R., 39 Calc., 582.

Mitakshara that treats of this topic has been translated in Major Basu's Yagnavalkya Smriti as follows :

"When a wife of the same class (as that of the husband) exists, then religious works are not to be performed by a wife who is not of the same class"

Upon this Katyayana comments :

"Let him who has many wives employ one of equal class in the case of the sacrificial fire, and in attendance on himself; but if there be many such let him employ the eldest in those duties, provided she be blameless."

Now it is argued that the eldest wife, Pulavarthal, had been discarded by Ammasi Naicken and, therefore, she was not in attendance on her husband and not blameless. An attempt to prove that she was an adulterous wife entirely failed. We only know that she was living apart from her husband for about 25 years before his death. The question is whether such separation makes her incompetent to perform the act of adoption, and thus causes the capacity to make an adoption to devolve upon the second wife. The text of Katyayana seems to me to apply to a case of adoption performed during the lifetime of the adoptive father, when he speaks of a wife being in attendance on himself. It is doubtful whether the word "adushta" or blameless should be interpreted so as to exclude a woman who voluntarily lives separate from her husband without having been guilty of unchastity or misconduct. So far as the facts of the separation in this case are known, there is nothing to attribute blameworthiness to the elder wife. An adoption made by a widow without consulting the sapindas would be invalid for want of authorization from them, as it has been held that the consent of the sapindas supplies the want of the husband's authority. The other wives are sapindas, and it was necessary for third defendant to obtain their consent before any adoption could be made. In this case the

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third defendant sent a notice, Exhibit IV, to the senior wife in which she expressed her intention of confirming the adoption made by her husband and asked for an expression of her views in respect of the permission given by the next reversioner to her to adopt the plaintiff. When the senior wife has a preferential right of adoption, the proper course for a junior wife who wishes adoption to be made, would be to ask the senior wife to get the consent of the male sapindas to perform the adoption and to perform it herself. If she was unwilling to perform it herself it would then be soon enough to ask her to agree to the adoption ceremony being performed by the junior wife. Exhibit IV is not couched in such terms. It implies that Poovayammal was determined to carry out the ceremony of adoption without giving a chance to the senior wife to adopt a son to their husband. Under the circumstances of the present case, the absence of any relinquishment by the senior wife of her prior right of adoption invalidates the act performed by the junior wife. For these reasons, the second adoption cannot be supported as valid.

The result is that the Appeal is dismissed with costs. The Memorandum of Objections is not pressed and is dismissed.

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RAMESAM, J.—I agree. But I wish to add a few words. The first occasion on which the adoption of the plaintiff by the deceased Ammasi Naicken was asserted was in Exhibit A, dated the 31st January 1916, a petition by the second wife, the third defendant. This petition was filed nearly two months after the third wife sent Exhibit V and 17 days after the senior wife sent Exhibit G and was practically in reply to them. It seems to me that the delay was really due to the fact that the present

adoption was concocted, in reply to the claims made by the other two widows, with the help of the village munsif and the karnam and the other male relations of the third defendant. It must be remembered in this connexion that the third defendant is the sister's daughter or niece of the fourth defendant who gives the consent. It is also significant that Vaidyanatha Ayyar, the family purohit, who is said to have been present at the adoption, does not support the plaintiff's case. I need not repeat the other reasons given by my learned brother and the Subordinate Judge, with which I agree.

Coming to the question of law the appellant's vakil argues that *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(1) ought to be reconsidered. For the reasons given by my learned brother, and also for the reasons given by the learned Judges who decided *Dnyanu* v. *Tanu*(2), where their Lordships say that an adoption with the consent of the sapinda in Madras is not on the same footing as an adoption in an undivided family with the consent of the manager, I do not think it necessary to doubt the correctness of the former decisions of this Court.

Then it is said that, assuming that the senior widow has a preferential right to adopt, the principle does not apply to Sudras, because no religious ceremonies are essential for an adoption in the case of Sudras, and *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*(3) is relied on. In the first place it may be mentioned that *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(1) was a case of Sudras, but the point was not expressly argued. It may be that, for the validity of an adoption among Sudras, Dattahomam is not necessary but this does not mean that an adoption is not a religious act.

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(1) (1916) I.L.R., 39 Mad., 772 (2) (1920) I.L.R., 45 Bom., 503.
(3) (1880) I.L.R., 5 Calc., 615.

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Apart from this, as was pointed out by my learned brother and SANKARAN NAYAR, J., in *Kakerla Chukkamma* v. *Kakerla Punnamma*(1), the senior wife is the wife whom acts of duty concern, that is, "who officiates in acts of religion and so forth" (Colebrooke's Digest of Hindu Law, Book IV, Chapter 1, s. 51). This shows that the acts of duty in which a senior wife has got a preferential right need not necessarily be all religious duties. I therefore think that the principle is equally applicable to Sudras as well as to the other classes.

The next ground on which it is said that *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(2) does not apply to the present case is that in this case the senior wife was discarded. Verse 88 of Achara Adhyaya of Yagnavalkya was relied on in *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(2) as one of the reasons on which the preferential right of the senior widow is based. The translation of that verse as given in *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*(2) runs thus: "When there is a wife of an equal class present, etc.," Some stress is laid by Mr. Ranga Achariyar, the learned vakil for the appellant, on the word "present" in this translation. The original Sanskrit is "satyam"; the meaning of "satya" is "being in existence" as opposed to death. The translation of this verse in Mandlik's Hindu Law at page 173, in Major Basu's Edition of Mitakshara referred to by my learned brother and the translation of Sir P. S. Sivaswami Ayyar, in 1 Madras Law Journal 282, all show that what is meant by "satyam" is "existing" and not "being present near" (as opposed to being absent elsewhere). The fact, therefore, that the senior wife in this case had been living elsewhere does not make the text of Yagnavalkya inapplicable. Again

(1) (1915) 28 M.L.J., 72, 74. (2) (1918) I.L.R., 39 Mad., 772.

the text of Yagnavalkya, the commentary of the Mitakshara on it, the verse of Katyayana and the text of Vishnu cited by Balambhatta in the gloss on the Mitakshara and also in Colebrooke's Digest, Book IV (the two latter Smritis use the word "Adushta") all these are merely injunctions addressed to the husband as to what he should do during his lifetime. It may be that the husband is at liberty to disobey those injunctions: vide *Annapurni Nachiar* v. *Forbes*(1). But those injunctions do not touch the relative rights of the widows after the husband's death. These verses clearly prove the superior position of the senior widow. Once such superior position is established her preferential right to adopt after his death follows as an inference. In this particular case the evidence, which merely shows that the senior widow was living apart from the husband for the last 25 years apparently on account of the second marriage of her husband, does not justify us in calling her a "dushta" or "nishiddha." As my learned brother pointed out the case of unchastity attempted to be made against her has failed. I think no credence can be given to the evidence of the sixth and ninth witnesses for the plaintiff.

The last ground argued by the appellant on this portion of the case is that a prohibition against her adopting must be implied from the facts of the case. It does not appear from the Subordinate Judge's judgment that any such point was raised in the Court below, but it is now said that the point was argued. Though no doubt, a prohibition may be implied and need not always be express, such prohibition must be by a clear and necessary implication, and it is not for the Courts to embark on speculations as to what the husband might have done during his lifetime or might have wished, if

(1) (1900) I.L.R., 23 Mad., 1 (P.C.).

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the point was expressly mentioned to him before his death. One may well say that, on the facts of this case, the husband, if he ever contemplated adopting during his lifetime, would not have associated the senior wife with him in such an adoption. One may perhaps also say that, if he had left a will expressly authorizing an adoption he would probably have not authorized the senior wife to adopt. But on the other hand, one may also say, that he not having done either of these things, was well content to allow the law to take its course as to what should happen after his death, and that in the absence of any express prohibition against the senior widow, he left her to exercise the right which she has according to the sastras on account of her status as the senior widow. I do not think it is proper for Courts to speculate on probabilities of this kind for the purpose of inferring an implied prohibition. If the husband was, however, anxious that the senior widow should never adopt for him, he might have left a will in which he might have stated that the senior widow should not adopt for him, in case his widows should contemplate adoption for him. In the absence of such an express prohibition from him or some equally clear indication of his intention, an implied prohibition cannot be inferred in this case. It was held in *Lakshmibai* v. *Sarasvatibai*(1) that a prohibition ought not to be inferred from the mere fact that the husband and wife were living apart. In the case relied on by the learned vakil for the appellant, *Dnynoba* v. *Radhabai*(2), the facts were much stronger ; the wife was actually living in adultery with another man.

Coming to the third point argued in the case, that Exhibit IV is enough to satisfy the requirements of law

(1) (1899) I.L.R., 23 Bom., 789, 795.
(2) (1894) 8 Bom. Printed Judgments, 9.

in connexion with the senior widow, I agree with my learned brother in thinking that it does not. We are not here concerned with a question of obtaining her assent merely as that of a sapinda. On the other hand, until the senior widow clearly gives up her right to adopt, the junior widow has no such right. The letter in which she states that she had obtained the assent of the sapinda and was merely asking the senior widow's views, followed by the silence of the latter, cannot be construed to mean that the senior widow has waived her preferential right and authorized the junior widow to adopt. Not until she does any act amounting to this can the right to adopt devolve on the junior widow. The facts in this case fall short of this.

One or two points have also been argued before us, namely, that the consent of the sapinda in Exhibit C is not a valid consent. The Subordinate Judge has found it to be so. But we think it unnecessary to express an opinion on this question in view of our finding with reference to the right of the senior widow not being waived. If it were necessary, I would agree with the appellant's contention, that there was no misrepresentation made to the sapinda merely because the third defendant was asserting a prior adoption by her husband. But I would hold that Exhibit C is not a valid consent, because instead of giving the authority as one necessary and proper in the circumstances of the family, which is what a sapinda ought to address himself to, he gives it in order to give effect to the wishes of the husband, thus believing in the alleged prior adoption by the husband which we have already found to be not proved.

I agree that the Appeal should be dismissed with costs. The Memorandum of Objections is dismissed.

K.R.