APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

MANDAVILLI SEETHARAMAMMA AND ANOTHER (DEFENDANTS), APPELLANTS,

1926, April 26.

v.

ATTIVILLI SURYANARAYANA (PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption—Husband's consent or authority to adoption by his widow—Consent or authority, whether can be implied—Express consent, meaning of—Positive consent—Essentials of adoption—Giving and taking—Datta homam—Giving and taking during husband's lifetime—Datta homam performed after husband's death—Completion of adoption—Validity of adoption.

Under the Hindu Law prevalent in Southern India, a husband's consent or authority to an adoption by his widow can be implied from his conduct and the circumstances.

The expression "*express consent*," used in this connexion in some of the decisions of the Privy Council, means nothing more than "*positive consent*"; and the true rule deducible from them is this :—If from the circumstances you can infer that the husband did not prohibit and nothing more, that is not sufficient consent; but if you can infer that he assented to or authorized the adoption, that is clearly sufficient:

The Collector of Madura v. *Muthuramalinga Sathupathy* (1868) I.L.R., 12 M.I.A., 397, explained;

Held also, that giving and taking of the boy is of the essence of the adoption, and if it took place in the lifetime of the adoptive father the religious part, such as datta homam where necessary, can be deferred to a subsequent period and can be performed after his death.

Venkata v. *Subhadra* (1884) I.L.R., 7 Mad., 548; *Subbarayar* v. *Subbammal* (1898) I.L.R., 21 Mad., 497, followed.

* Second Appeal No. 708 of 1923.

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SECOND APPEAL against the decree of C. G. MACKAY, District Judge of Vizagapatam, in A.S. No. 408 of 1920, preferred against the decree of P. NARAYANA RAO, Subordinate Judge of Vizagapatam, in O.S. No. 25 of 1919.

The plaintiff, as the daughter's son of one Kurmanadhan (deceased), sued for a declaration that the adoption of the second defendant by the first defendant, the widow of Kurmanadhan, was invalid as the widow had no authority from her deceased husband to make the adoption. The boy was brought over from Cocanada, where he lived with his natural father, to Anakapalle, where the deceased lived, on the 1st June 1916; the auspicious date for adoption had been fixed for the 16th June 1916, and in the meantime all the terms in contemplation of the adoption had been settled. But on the 10th June 1916 Kurmanadhan died. The ceremony of adoption was performed on the 24th June 1916, the boy was *formally* given and taken and there was also the performance of datta homam. The defendants relied in the lower Courts upon an oral authority said to have been given by Kurmanadhan some four hours previous to his death. Both the lower Courts disbelieved the oral authority and held that the adoption was invalid for want of authority and gave a declaration in favour of the plaintiff. The defendants preferred this Second Appeal.

G. Lakshmanna for appellants.—There was implied authority for the adoption. Authority need not be express. It may be implied. It should not be prohibited; it is enough if the husband had expressed a wish and did not prohibit. In Bombay express prohibition is necessary. In Madras, an implied authority is sufficient and not merely express authority. If the husband expresses his unequivocal wish or intention, it is enough. Assent or authority may be inferred as a fact, though it is not express: Reference was made to *Collector of Ramnad*

v. *Muthuramalinga Sathupathy*(1), *Subbarayar* v. *Subbammal*(2), *Vaithlingam* v. *Natesa*(3) to West and Buhler's Hindu Law, page 867 (4th Edn.), Book III, section 7, and to *Maharaja of Kolhapur* v. *Sundaram Ayyar*(4).

Further, the giving and taking had taken place in Kurmanadhan's lifetime; the datta homam can be deferred; it is only a completion of what had begun; the giving and taking was the essential act in adoption; the completion can be made after the adoptive father's death. The widow had certainly implied authority to complete the adoption. See *Venkata* v. *Subhadra*(5) and *Subbarayar* v. *Subbammal* (2).

B. Satyanarayana for respondent.—In the pleadings, the defendants rely only on a specific oral authority, which both the lower Courts have found to be false; no other authority or completion by the widow of an adoption begun by the deceased had been set up in the written statement or raised in the issues.

The authority must be express and not implied in such cases: See, *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(6). There was no giving and taking even in the husband's lifetime, since the natural father wanted a deed of adoption, which was not executed. There was also giving and taking prior to the datta homam, which shows that all the essential elements were performed only after the husband's death.

JUDGMENT.

RAMESAM, J.—I have had the advantage of perusing the judgment of my brother VENKATASUBBA RAO, J. I will add a few reasons for agreeing with it. RAMESAM, J.

In the first place I agree with him in thinking that the phrase "express authority of the husband" so often used in decisions means nothing more than an affirmative indication enabling the widow to adopt, which can be traced to the mind of the husband. The word "express" is used in opposition to the state of the law in Bombay where non-forbidding of adoption by the

(1) (1868) 12 M.I.A., 397. (2) (1898) I.L.R., 21 Mad., 497.
(3) (1914) I.L.R., 37 Mad., 529 (531).
(4) (1925) I.L.R., 48 Mad., 1 at (202).
(5) (1884) I.L.R., 7 Mad., 548. (6) (1876) I.L.R., 1 Mad., 69 at 78 (P.C.).

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widow is taken as equivalent to authorization. In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(1), we have got the words "express authority" in two places at page 77, and at page 78 "express permission." The Judicial Committee then referred to Justice HOLLOWAY'S opinion in the Ramnad case and to the manner in which it was dealt with by the Judicial Committee. They said—

> "It pointed out that on the question who are the kinsmen whose assent will supply the want of a positive permission from the husband, etc."

Thus it is clear that the word "express" is not used in opposition to the word "implied" and an authority can be implied from the facts of a particular case. In *Subbarayar* v. *Subbammal*(2), their Lordships say :—

> "In the circumstances of this case, the direction in the will most clearly implied that datta homam should precede the Upanayana."

Secondly, there are two essentials requisite for the validity of an adoption ;

(1) Giving and taking.

(2) Datta homam (only in certain cases).

Where only the giving and taking is complete but the case is one which requires datta homam, it may be said that the process of adoption has begun but is not completed, until datta homam is performed. In such cases it has been held that the datta homam may be performed later on even if both the natural parents of the boy are dead, *Venkata* v. *Subhadra*(3). It is true that in the ceremony of datta homam there is always a formal giving and taking even if previously there had been an informal giving and taking, and because of this

(1) (1876) I.L.R., 1 Mad., 69 at 78 (P.C.).
(2) (1898) I.L.R., 21 Mad., 497 at 502.
(3) (1884) I.L.R., 7 Mad., 548.

Mr. Satyanarayana contends for the respondent that the first giving and taking is nothing and the second giving and taking is everything and it cannot be said that the process of adoption has begun, for, he asks, if the first giving and taking has any significance, why should it be repeated in the datta homam ceremony? The reply to this argument is that the repetition is a purely formal matter and if the giving and taking in the course of datta homam is the only real giving and taking, it could not be held that the datta homam can be performed by a relation after the death of both the parents as has been held in *Venkata* v. *Subhadra*(1), for an orphan cannot be given away. It follows therefore in all cases where the process of adoption has begun by a giving and taking in the lifetime of the adopting father there is a clear indication of his desire and no further authority is needed to enable the widow to adopt. It should be necessarily implied in such taking by the adoptive father. In the practical application of this rule no doubt some caution will have to be observed. There may be cases where a boy is brought merely for trial, that is, kept on probation. It cannot be said in such cases there is a complete giving and taking on account of the temporary parting of the parent's custody. But where it has been settled that the boy should be adopted and his custody has been parted with by the parents finally and a date is fixed for the datta homam ceremony and a few days before that the adopting father dies by a sudden attack of colic or other disease and nothing has happened after the bringing of the boy to show that the adoptive father has changed his attitude towards the boy, such facts constitute a cogent indication of the husband's wishes which enable the widow to

(1) (1884 I.L.R., 7 Mad., 548)

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adopt. It is said that this point was not raised in the Courts below. In the similar case of *Subbarayar* v. *Subbammal* (1), also there was no issue but on the ground that all the facts were known and there was no prejudice their Lordships affirmed the decree on the ground of a taking and acceptance at a different date from that found by the lower Court. In the present case, the facts were pleaded in the written statement and found by the Courts below.

I agree with the order proposed by my learned brother. The memorandum of objections is dismissed. No order as to costs.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—The Plaintiff is the daughter's son of one Kurmanadhan deceased, and he files the suit for a declaration that the second defendant has not been validly adopted by the first defendant, the widow of Kurmanadhan.

The defendants relied upon oral authority said to have been given by Kurmanadhan some four hours previous to his death on the 10th of June 1916. Both the lower Courts have disbelieved the specific case set up and have allowed the plaintiff's claim. This is a finding of fact and we cannot interfere with it in Second Appeal. On behalf of the defendants, however, the case has been presented to us from a somewhat different standpoint. In regard to the facts, upon which depends the question of law raised, there is no dispute. The second defendant was living with his natural father at Cocanada and Kurmanadhan was a resident of Anakapalle. On the 1st of June 1916 the boy was taken from Cocanada to Anakapalle with a view to his being adopted. Three letters passed between Kurmanadhan and the father of the boy between the 2nd and the 7th of

(1) (1898) I.L.R., 21 Mad., 497.

June 1916, which show that in respect of the contemplated adoption all the terms were settled. An auspicious day was chosen and the adoption was fixed for the 16th of June 1916. Unfortunately, in the meantime, on the 10th of June Kurmanadhan died. The ceremony of adoption was performed on the 24th of June, the boy was formally given and taken and there was also the performance of *datta homam*.

These facts are clearly set forth in the written statement of the defendants and are found to be true by the learned District Judge. We are not therefore called on to deal with the evidence in the case, the only question to be decided being, what is the legal effect of the facts found. Mr. Lakshmanna, the learned vakil for the defendants, puts his case in two ways. He says first, from the facts found, the husband's consent to his wife making the adoption may be implied; secondly, that the secular act of giving and taking the boy having been completed in the lifetime of the husband, the religious act of datta homan essential to complete the adoption, may be performed subsequent to his death.

If either of these contentions is accepted, the appeal must be allowed and in my opinion both these propositions are sound.

In regard to the first contention, the question resolves itself into this, can a husband's consent or authority be implied from his conduct? If in law it can be implied, the facts of the present case lead almost to an irresistible conclusion that the wife did have the necessary authority. While the law says that the widow must have her husband's consent, it does not restrict the manner in which that consent may be given. Whether consent was given is a question of fact and I fail to see why it cannot be implied from conduct. The plaintiff's learned vakil points out that what is recognized in the

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decisions is the husband's "express consent." It is undoubtedly true that in the decisions of the highest authority, the expression used is "express consent." But what does that expression mean? In the leading case on the subject, *The Collector of Madura* v. *Muthuramalinga Sathupathy*(1), the Privy Council point out how the various schools in India accepting the same text as their authority have developed different rules of law in regard to the widow's power of adoption. Their Lordships observe:—

"All the schools accept as authoritative the text of Vasistha, which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore that a widow cannot receive a son in adoption, according to the dattaka form at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; while the Mayukha, Kaustubha, and other treatises which govern the Mahratta school, explain the text away by saying, "that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul."

It is now settled that in Southern India as in Bengal, the husband's assent is required and in the passage quoted above that assent is described as "express permission." These words are used to mark the contrast between the law as accepted by the Bengal school and the Mahratta school. The Mahratta doctrine proceeds upon the view that the adoption being beneficial to the husband's soul, where he has not intimated his prohibition, assent may be assumed. In Bengal and Southern India, on the other hand, assent cannot be inferred from the mere absence of prohibition; something more is required; there must be positive or affirmative consent

(1) (1868) 12 M.I.A., 397.

given by the husband. Putting it in other words, according to the Mahratta school, if there is no dissent, assent may be assumed. In Bengal and Southern India, the absence of dissent or prohibition is not sufficient but positive assent must be proved. If the judgment of the Privy Council in the *Collector of Madura* v. *Muthuramalinga Sathupathy*(1) is carefully read, it will be seen, that it is to bring out this distinction their Lordships use the expression "express consent." This distinction is of great importance and cannot be ignored when the law obtaining in different provinces is under discussion. Now it will be observed that in the same judgment besides the word "express," two other words are used in this connection, namely, "formal" and "positive." The expression "express consent" means nothing more than "positive consent." What then is the true rule deducible? If from the circumstances you can infer that the husband did not prohibit the adoption and nothing more, that is not sufficient; but if you can infer that he assented to or authorized the adoption, that is clearly sufficient. The following passage in West and Buhler, 3rd Edition, at page 957, supports my view:—

"Any unequivocal indication of his assent would probably be taken as equivalent to an express command."

In this case the only reasonable inference from the proved facts is, that the husband gave his consent to his widow making the adoption and on this ground I would hold the adoption to be valid.

In regard to the second contention of Mr. Lakshmanna, it is clearly borne out by authority. *Venkata* v. *Subhadra*(2) is the converse of the present case. It was the natural father of the boy that died after the gift and the acceptance. At the datta homam which

(1) (1868) 12 M.I.A., 397. (2) (1884) I.L.R., 7 Mad., 548

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was performed subsequent to his death the elder brother of the boy made the formal gift. The learned Judges holding that there was giving and taking in the lifetime of the natural father, upheld the adoption on the ground that the religious rite was essential only to complete the adoption. *Subbarayar* v. *Subbammal*(1) is, however, a parallel case. The boy was given and taken and subsequently the adoptive father died. The ceremony of datta homam was performed by his widow and the adoption was held valid. The principle underlying these cases is, that giving and taking is of the essence of the adoption and the religious part of it can be deferred to a subsequent period. I am prepared to follow these cases and on this ground also I confirm the adoption.

The result is, the appeal is allowed and the plaintiff's suit is dismissed. The defendants will have their costs of this appeal, but the parties will bear their own costs in the lower Courts. K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1923, March 26.

K. C. MENON (COMPLAINANT), PETITIONER,

v.

P. KRISHNAN NAYAR (ACCUSED), RESPONDENT.*

Criminal Procedure Code, 1898, *sec.* 252—*Warrant case—Evidence produced by prosecution taken—Application by complainant to summon other persons as being able to prove his case—Arbitrary refusal by Court, improper.*

Though section 252 of the Criminal Procedure Code, unlike sections 208 (3) and 244 (2) of the Code, does not impose on a Magistrate trying a warrant case the duty of issuing summonses

(1) (1898) I.L.R., 21 Mad., 497.

* Criminal Revision Case No. 153 of 1926.