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The statement made by the witness on the 24th of April, 1912, in the absence of the accused, is not admissible in evidence under section 288 of the Code of Criminal Procedure. The witness was examined again by Cantonment Magistrate on the 4th of June and he then admitted that he had made the statement of the 24th of April and also admitted that it was true. It is possible that the statement of the 24th of April might be treated as having been incorporated in and so forming part of the statement of the 4th of June which was made in the presence of the accused. If so, it might be admitted under section 288 of the Code of Criminal Procedure. But on the 4th of June, while admitting the truth of his previous statement of April 24th, Jaswant made other statements wholly inconsistent with that statement. It is impossible to place much reliance on such a witness. It seems to us that, even if the confession were admitted in evidence, it would be unsafe to rely on it and that the other evidence is wholly insufficient to justify a conviction. We therefore dismiss this appeal and direct that Gulabu be set at liberty.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

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February, 26

JHUNKA PRASAD (PLAINTIFF) *v.* NATHU (DEFENDANT) *

Hindu law—Adoption—Ahirs—Validity of adoption after marriage of adopted son.

Held that amongst Ahirs the adoption of a son after his marriage has taken place is not permissible. *Pichuvayyan* v. *Subbayyan* (1) followed.

THE plaintiff in this case sued on the allegation that over six years ago the defendant, who was his paternal uncle, had adopted him with all due ceremony. He claimed a declaration of title and possession of his share of the family property by partition. The defendant admitted the *factum* of the adoption, but pleaded that it was invalid in law for the reason that at the time of the adoption the plaintiff was a married man with a daughter of his own. The parties were *ahirs* by caste. Both the lower courts gave effect to

* Second Appeal No. 435 of 1912 from a decree of W. H. Webb, Additional Judge of Saharanpur, dated the 8th of February, 1912, confirming a decree of Jawwad Husain, Subordinate Judge of Saharanpur, dated the 17th of July, 1911.

(1) (1889) I. L. R., 13 Mad., 128.

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the defendant's plea and dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Nihal Chand*, for the appellant:—

Ahirs do not belong to the twice-born classes. They have no *upanayan*. They are the descendants of mixed marriages and are *sudras*. Among the *ahirs* of the United Provinces a nephew can be adopted at any age; in the case of an outsider the age must not be more than 12 years; Crooke, Tribes and Castes of the North-Western Provinces, Vol. I., p. 50 et seq; and p. 59. Whether, apart from this special custom, a married man can be adopted by Sudras generally is a question on which the only authority of this High Court is an *obiter dictum* in the case of *Ganga Sahai* v. *Lekhraj Singh* (1). There are rulings of the Bombay High Court in my favour. Secondly, the defendant having adopted the plaintiff cannot now, after the lapse of over six years, call it in question on any ground. He is estopped; *Dharam Kunwar* v. *Balwant Singh* (2). Thirdly, the defendant is barred by the limitation of six years from impugning the validity of the adoption. The plea taken by him aims, though indirectly, at getting the adoption set aside. He cannot indirectly effect that which he is barred by limitation from doing directly; *Mohesh Narain Munshi* v. *Turuck Nath Moitra* (3).

Babu *Durga Charan Banerji*, for the respondent:—

A married person cannot be adopted by a Sudra. According to the Dattaka Chandrika *upanayan* is the limit of age for adoption among the twice-born classes and marriage is the limit for Sudras; Bhattacharyya: Hindu Law (3rd Edition), Vol. I, p. 446; Mayne: Hindu Law (7th Edition), p. 181; *Vythilinga Muppanar* v. *Vijayathammal* (4). Secondly, the defendant is not estopped from denying the validity of the adoption; *Pichuvayyan* v. *Subbayyan* (5). The case in I. L. R. 34 All., cited by the appellant, can be distinguished. It was there held that the adoptive mother was by her conduct estopped from denying the fact that she had authority from her husband to make the adoption. Here the defendant does not attempt to deny any previous statement of fact; the adoption is by law altogether void.

(1) (1886) I. L. R., 9 All., 253 (328).
(2) (1912) I. L. R., 34 All., 398.
(3) (1892) I. L. R., 20 Calc., 487 (495).
(4) (1882) I. L. R., 6 Mad., 43.
(5) (1889) I. L. R., 13 Mad., 128.

Mr. *Nihal Chand*, replied.

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GRIFFIN and CHAMIER, JJ. :—The plaintiff claiming to be the adopted son of defendant sued for partition. His suit was dismissed by both the courts below on the finding that the alleged adoption was invalid. The plaintiff comes here in second appeal. The parties are *ahirs*. The plaintiff at the time of the alleged adoption was a married man. It is admitted that among the twice-born classes a married man cannot be adopted. The court below says that *ahirs* belong to the twice-born classes. This assertion is challenged in appeal. However that may be, there is authority for holding that the adoption of a married man is not valid even amongst Sudras. In the case of *Pichuvayyan* v. *Subbayyan* (1) it was said that an adoption in order to be valid even among Sudras must take place before the marriage of the adopted son. Reference is made to the Dattaka Chandrika. The same rule is to be found in the text-books on the subject. We see no reason to differ from the finding of the court below on this point. As to the question of estoppel we hold that there is no estoppel in a case of this nature. The plea of limitation in our opinion has no force. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

KASTURI AND OTHERS (DEFENDANTS) *v.* CHIRANJI LAL (PLAINTIFF)*

1913

February, 25

Hindu law—Marriage—Marriage of a Hindu girl without force or fraud but without consent of legal guardians—Maxim "factum valet."

The marriage of a Hindu girl of some 16 years of age was effected by the maternal grandfather and the maternal uncle of the girl. There was no evidence of force or fraud; but the marriage was against the wishes of the paternal relatives of the girl, who desired to make a profit by marrying her to a rich but one-eyed man called Tulshi. *Held* that the case was one to which the doctrine of *factum valet* should be applied, and the marriage was declared to be valid. *Ghazi* v. *Sukru* (2), *Venkatacharyulu* v. *Rangacharyulu* (3), *Surjyamoni Dasi* v. *Kali Kanta Das* (4), *Mulchand* v. *Bhudhia* (5), and *Khushalchand Lalchand* v. *Bai Mani* (6) referred to.

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* Second Appeal No. 434 of 1912, from a decree of W. H. Webb, Additional Judge of Saharanpur, dated the 5th of March, 1912, confirming a decree of Priya Charan Agarwal, Additional Munsif of Saharanpur, dated the 10th of July, 1911.

(1) (1889) I. L. R., 13 Mad., 128.
(2) (1897) I. L. R., 19 All., 515.
(3) (1890) I. L. R., 14 Mad., 316.
(4) (1900) I. L. R., 28 Calc., 37.
(5) (1897) I. L. R., 22 Bom., 812.
(6) (1886) I. L. R., 11 Bom., 247.