[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

RANGUBA'I (ORIGINAL DEFENDANT), APPELLANT *v.* BHA'GIRTHIBA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

1877. October 10.

Hindu law—Adoption—Competency of a wife to give in adoption—Conditional adoption—Non-fulfilment of a condition—Mistake of fact.

According to the Hindu law prevailing in the Bombay Presidency a wife is not competent to give her son in adoption against the will, express or implied, of her husband, the father of that son, or under circumstances from which the husband's dissent can be inferred.

Where the natural father of the son given in adoption wrote to the adoptive mother, a widow, giving his consent to the adoption on certain conditions,

Held that a non-fulfilment of one of the conditions rendered the adoption invalid, notwithstanding that the condition was unnecessary, and imposed in consequence of a mistake as to the necessity for the assent of Government to the adoption.

THIS was an appeal from the decision of P. S. Binivále, Subordinate Judge, First Class, at Ahmednagar.

The Nimbálkars owned considerable moveable and immoveable property at Mirajgam, in the district of Ahmednagar. On the death of Gajrábái, the proprietress, the property devolved on Jayavantráv, who belonged originally to the Ranadive family, but had been adopted into the Nimbálkar family by Gajrábái.(1) At the time of Jayavantrav's adoption (4th February 1865) he was a grown-up man with two unmarried daughters, Bhagirthibái, the plaintiff, and Rangubái, the defendant in the present suit. Jayavantráv died on the 15th of April 1869, leaving him surviving his widow Gangábái, his daughter Bhagirthibái, who had married in the meanwhile, and his daughter Rangubái, who had not then been married.

On Jayavantráv's death the property devolved on Gangábái, who continued in possession till her death on the 25th of January 1872.

The plaintiff alleged that, ten days before her death, Gangábái had adopted Gájrájiráv, the son of her sister, Vithábái. At the time of the alleged adoption, Gájrájiráv was an infant, fourteen

* Regular Appeal No. 26 of 1877.

(1) See 4 Bom. H. C. Rep. A. C. J. 191.

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months old. He died on the 23rd August 1872, three months after the defendant Rangubái's marriage, and the plaintiff claimed from Rangubái a half share in the Mirajgam estate, on the ground that both the plaintiff and the defendant were the married sisters of Gájrájiráv, the last legal owner. The plaintiff's evidence went to show that the consent of the boy's natural father to the adoption was contained in two letters (exhibits 31 and 32), in which he insisted that, before the adoption was made, the adoptive mother must obtain the consent of the British Government, of her own family, and of the bankers of the town. The consent of Government never was obtained.

The defendant denied the fact of adoption, and disputed its validity, asserting that she, being unmarried at the time of her father Jayavantráv's adoption, was then engrafted with him into the adoptive Nimbálkar family; and finally claimed to have a preferential right to succeed to Gájrájiráv's property, supposing his adoption to have been both genuine and valid.

The Subordinate Judge held the adoption proved; and, finding that the plaintiff and the defendant were both married sisters at Gájrájiráv's death, awarded the half share claimed.

Shántárám Nárayan for the appellant:—Our first objection is that Gájrájiráv was never, in fact, adopted. In the second place we say the adoption, even if made, is invalid. The plaintiff has brought forward evidence to show that Vithábái, with the permission of her husband Khrishnaráv, gave their son in adoption to Gangábái. It will not be disputed that Vithábái without such permission could not give away their child—*Nárayan* v. *Náná*[1] and *Bashetiáppá* v. *Shivlingáppá*[2]—and the chief evidence to prove the permission consists of two letters, Nos. 31 and 32, addressed by Krishnaráv to Gangábái and her father and uncle. In these letters Krishnaráv grants the permission to adopt, subject to the prior fulfilment of three conditions: viz., 1, the sanction of the British Government; 2, the approval of the members of the adoptive family; and, 3, the approbation of the bankers of Mirajgam. The two latter conditions may have been performed, but the

(1) 7 Bom. H. C. Rep. 153 A. C. J.

(2) 10 Bom. H. C. Rep. 268. See *Raja Vyankatráv* v. *Jayavantráv*.

first was not. Moreover, Gajrájiráv was the only son of Krishnaráv, and could not be given away: *Raja Upendra Lal Roy* v. *Shrimati Rání Prasanna Mayi*.(1)

[WEST, J.:—On this point the Courts have held differently in this Presidency. A great conclave of the sastris at Poona declared that, although it might be very wicked in the giver to give away an only son, the adoption, if otherwise unobjectionable, was not invalid. The Privy Council, in *Nilmadhub Doss* v. *Bishumber Dass*,(2) recognizes the possibility of the adoption of an only son.]

But, admitting the adoption to have been made, and to be valid, we say that at Jayavantráv's adoption the position of the plaintiff, who was married, remained unaltered. She never became a Nimbálkar: *Raghunadha* v. *Sri Brizo Kishoro*.(3) Sir James Colvile, who delivered the judgment of their Lordships in that case, observes at page 191: "The Hindu wife, upon her marriage, passes into and becomes a member of that family."

Vishvanáth Nárayan Mándlik, for the respondents:—The adoption of Jayavantráv was duly authorized and performed. [Goes into evidence to show the *factum* of adoption.] In letters 31 and 32 Krishnaráv, after imposing three conditions, leaves it entirely to the adoptive mother Gangábái to act as she pleases. Two of the conditions imposed have been complied with. The third one, as to obtaining the previous sanction of the British Government, is unnecessary, and founded on a mistake of fact. The conditions, as a whole, were complied with.

He then cited the following:—1 Strange H. L. 91; 1 Story Eq. Jur. 182, 183; Leake on Contr. 357; Act IX. of 1872, ss. 22 and 189; 1 Domat's Civ. Law 499; *Kennedy* v. *Panama Company*.(4)

WEST, J.:—We are of opinion that it is not within the competence of a wife, according to the Hindu law prevailing in this part of India, to give a son in adoption against the will, express or implied, of her husband, the father of that son. The principal authorities are quoted in the judgment of Sir M. Westropp, C.J.,

(1) 1 Beng. L. R. 221 A. C. J.
(2) 13 Moore I. A. 85.
(3) L. R. 3 Ind. App. 154.
(4) L. R. 2 Q. B. 580; see p. 588.

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in *Náráyan* v. *Náná*(1) and *Basheliáppa* v. *Shivlingáppa*.(2) There is a certain degree of ambiguity in the original passage of Manu (ch. IX., 168),(3) arising from the use of singular nominatives with a disjunctive particle along with a verb in the dual; but the two principal commentators, Medhatithi and Kulluka, have both construed the passage as requiring the concurrence of both parents to a giving in adoption. According to Vashista, quoted in the Dattaka Chandrika, a woman is not either to give or to take in adoption without the assent of her husband; and though Dewandha Bhat urges that non-prohibition may constitute assent, he applies this only to the cases of the husband's being dead, or having emigrated, or entered a religious order. The Dattaka Mimausa, which is of high authority on the subject of adoption, allows the father to give in adoption without the assent of the mother, but not the mother to give without the assent of the father. The Vyavahara Mayukha repeats the text: "Let not a woman give or accept a son without the consent of her husband,"(4) and the Mitakshara is to the same effect.(5) A mother may give a son with her husband's consent during the husband's absence or after his death, though ordinarily he is to be given by the father or by both parents. The absence here contemplated is manifestly not such an absence as is compatible with the interchange of letters by post; it means an absence shutting out the mother from communication when some emergency has arisen which

(1) 7 Bom. H. C. Rep. 153 A. C. J.; see pp. 167-8

(2) 10 Bom. H. C. Rep. 268; see pp. 271-2.

(3) मातापितावादद्यातां यमद्भिःपुत्रमापदि। सदृशं प्रीतिसंयुक्तं सज्ञेयोदत्रिमः सुतः॥ *Mátá pitá vá dadyátám yamadbhih putramápadi, sadrisám pritisañyuktam sa jñeyo datrimah sutah*: "He is called a son given whom his father or mother affectionately gives as a son, being alike [by class], and in a time of distress; confirming the gift with water."—Mit., chap. I., sec. XI., pl. 9.

(4) नतु स्त्रीपुत्रन्दद्यात्प्रतिगृण्हीयाद्वान्यत्रानुज्ञानाद्भर्तुः। *Na tu striputran dadyát Pratigrihnìyát ványatránujñánád bhartuh.* See Borr., chap. IV., sec. V. 16.

(5) मात्रा भर्त्रनुज्ञया प्रोषिते प्रेतेवा भर्तरि पित्रा वोभाभ्यां सवर्णाय यस्मै दीयते स तस्य दत्तकपुत्रः *Mátrá bhatranujñayá proshite prete vá bhartari pitrá vobhábhyám savarnáya yasmai diyate sa tasya dattakah putrah*: "He who is given by his mother with her husband's consent, while her husband is absent, [or incapable though present] or [without his assent] after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka)."—Mit. chap. I., sec. XI., pl. 9.

would justify the giving of the son. Even in that case, the Mitakshara and the Mayukha seem to regard the consent of the father as indispensable, though, possibly, the condition of absence in the intended sense may be read grammatically in the Mitakshara as a condition, the satisfaction of which would enable a woman on a proper occasion to act without the express assent of her husband.

It would be going far beyond this to allow that a woman may give away her and her husband's only son, while she is on a visit, having the child with her, and while her husband is within reach of communication in a few days by post, not only without his assent but against his will. If his dissent has been expressed, or can be inferred, there is no authority for reducing him through the folly or the caprice of his wife, who may be subjected to very injurious influences, to the painful condition of sonlessness.

In the present case the documents Nos. 31 and 32 addressed to Gangábái, the intended adoptive mother, and to her father and uncle, express in the most emphatic terms and repeatedly that the writer Krishnaráv, father of the intended adoptive son, will consent to the adoption only if the assent of the British Government be previously obtained. "Without the prior order of the British Government," he says (31), "you are not to make the adoption, because there have been former wrangles about your estate. Therefore, first get the order of Government, and then do the thing." The father and uncle of Gangábái are (32) "to obtain the prior assent of the British Government," and not "by proceeding without it to place the boy in a ruinous dilemma." "Without the prior order of the British Government," he repeats, "do nothing at all, as I have not five or ten sons; only this one." These letters were received the day before the alleged adoption was carried out. Krishnaráv has deposed that he had given permission to his wife Vithábái to give the boy in adoption. His examination contains statements which show that, notwithstanding his respectable social position, he is utterly unworthy of credit as a witness; but, even if any communication had passed orally or by letter between him and Vithábái on the subject of the adoption, his instructions would be superseded by the letters Nos. 31 and 32 which immediately preceded the adoption. These express-

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ed his will as it existed then. Vithábái was in the house of her sister Gangábái when they arrived (135, 337), and they were read out at the adoption. She had not, and could not suppose she had, authority after these letters had been received, to give her son in adoption without the condition that Krishnaráv had attached to his assent being satisfied. Until assent of the British Government had been obtained, and "an order issued in the boy's favour as to all the possessions" of the family, his language conveyed an absolute prohibition to the proposed adoption.

It has been contended before us, by Ráv Sáheb Vishvánáth Náráyan Mándlik for the respondent, that the condition as to the prior sanction of the Government being but one of three, (the other two being the assent of the family and the approval of the sáukars,) the other two of which were substantially complied with, a literal fulfilment of it was not to be exacted. If the group of conditions, viewed as a whole, was substantially satisfied, Krishnaráv's desire was, it is said, sufficiently fulfilled, and the adoption must be taken to have been made with his assent. It is obvious, however, that he, having a right to impose his own terms, made the prior assent of the Government to the adoption an essential, if not the principal, condition of his own assent. It could not be dispensed with or relieved against. An adoption made in disregard of it was no adoption at all. But his requirement, it is further urged, was grounded on an entire mistake. The estate, having come under the summary settlement, had been reduced to the condition of private property. Krishnaráv's principal object had already been attained, and there being thus no necessity to apply to the Government for a sanction to the proposed adoption, the condition he had imposed was satisfied, or, being grounded on an erroneous conception, needed not to be satisfied. His assent, free from all conditions, was to be inferred when the condition he had imposed was one of no practical importance. But the only document (225) relating to the summary settlement of the estate dates from 1864. It is not to be supposed that, in the course of the negotiations connected with the adoption, Krishnaráv had not become acquainted with it, and the reason he assigns, of family wrangles, might reasonably make him desirous of having the estate secured to his son by an express decision of the Gov-

ernment, even though it had been brought under the summary settlement. There was a part of the estate, too, the *patilki inam* at least, which was not included within the provisions of the Summary Settlement Act. It cannot, then, we think, be assumed, that, even if Krishnaráv had known all the facts, he would not still have insisted on his conditions. The important point, however, is, that he did insist on them down to the time of the adoption. They may have been based on erroneous conceptions and groundless fears on his part, but this did not make them less the expression of his present will. The mere fact that a man might have judged more wisely or have obtained more accurate information, does not justify those to whom his permission is requisite for a legal transaction to think and judge for him. His volition and its legal consequences are, in fact, not affected by a mistake under which he may labour.(1) The business of the other parties concerned, is not to supersede but to persuade him. Krishnaráv's prohibition, therefore, however ill-founded—the prior sanction of Government having admittedly not been obtained—made all the proceedings in the pretended adoption simply abortive. The claim of the respondent has not been rested on any other ground than that of a joint succession to the estate which, having by his adoption vested in the son of Krishnaráv, descended to the respondent and her sister, the appellant, in equal moieties. As the adoption never was valid, Gangábái died sonless, and the alleged right of the respondent Bhagirthibái, as against her unmarried sister Rangubái, never arose.

We must, therefore, reverse the decree of the Subordinate Judge, with appellant's costs throughout on respondent.

Decree reversed with costs.

(1) Savigny System, vol. 3, s. 115; Coleb. Dig., b. II., ch. IV., t. 54 Comm.; Story's Eq. Jur., ch. 34.