1891.

SÁMALDÁS BECHAR DESÁI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

declaration will doubtless be of material assistance to him, as, armed with it, he can now again apply under section 162 of the Land Revenue Code, and his application cannot be refused on the ground of the village having been forfeited, or declared *khálsa.*

The decree, therefore, of the lower Court must be amended. The plaintiff's suit must be dismissed, save and except so far as it is held to include a prayer to have the forfeiture order of the 6th January, 1881, declared null and void and set aside. This forfeiture order is null and void, and inoperative to vest the village in Government, and to deprive the plaintiff of his right to the village, which is still his, subject only to the attachment. This is the decree passed by my learned colleague, and I concur therein and in the order of costs.

Decree amended.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891. *August* 31.

PA'TEL VANDRA'VAN JEKISAN AND ANOTHER, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* PA'TEL MA'NILA'L CHUNILA'L, (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption, caste custom prohibiting—Kadwa Kunbi caste at Ahmedabad—Conscience of the members of the caste—Nature of proof required—Uniform and persistent usage moulding the life of the caste.

A caste custom prohibiting widows from adopting, is one which, before the Court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden.

A caste custom having been set up in the Kadwa Kunbi caste at Ahmedabad prohibiting widows from adopting, a large number of witnesses were examined with respect to the custom. Their evidence showed that it had not been the practice in the caste for widows to adopt; but it also showed that there had been no caste resolution forbidding such adoption. On the other hand, it was established that there had been, as a matter of fact, two previous adoptions by widows which were not actually impugned, and that the adoption in dispute had been attested by a large number of pátels in the caste.

Held, that the evidence, as a whole, led to the conclusion that "a uniform and persistent usage had not moulded the life of the caste."

* Appal No. 72 of 1890.

1891.

PÁTEL VANDRÁVAN JEKISAN *v.* PÁTEL MÁNILÁL CHUNILÁL.

THIS was an appeal from the decision of Ráo Bahádur Chunilál Máneklál, First Class Subordinate Judge of Ahmedabad.

The plaintiff, Pátel Mánilál Chunilál, a separated brother of one Máneklál Chunilál, brought a suit against Bái Rupáli, the widow of Máneklál Chunilál, and Vandrávandás Jekisandás, the adopted son of Bái Rupáli, to set aside the adoption, the deed of adoption, and Bái Rupáli's will. The plaintiff alleged that, according to Hindu law, and the custom of the Kadwa Kunbi caste to which the parties belonged, he was the heir of his deceased brother Máneklál; and that Bái Rupáli, being a widow, had no authority to adopt, according to the caste custom.

The Subordinate Judge found *(inter alia)* that the adoption and Bái Rupáli's will were proved; but he held that Bái Rupáli had no authority to make a will, and that there existed a custom in the Kadwa Kunbi caste prohibiting a widow from adopting a son. He, therefore, allowed the plaintiff's claim. Against the decree of the Subordinate Judge, the defendant Vandrávandás, (Bái Rupáli having died while the suit was pending in the Subordinate Judge's Court), appealed to the High Court—*vide* I. L. R., 15 Bom., 565,—which held the defendant's adoption to be valid. It was argued by counsel for the appellant that the custom which obtained in the Kadwa Kunbi caste at Surat, prohibiting adoption, cannot bind the Kadwa Kunbi caste at Ahmedabad to which the parties belonged. The High Court, thereupon, sent down the following issue for the report of the Subordinate Judge:—

"Whether, according to the custom or caste usage of the Kadwa Kunbi caste of Ahmedabad, the adoption by a widow is forbidden, without the express consent of her husband?"

On the above issue the finding of the Subordinate Judge was in the negative, and against the plaintiff.

In his reasons for the above finding the Subordinate Judge made the following remarks:—

"It appears from the judgment of the High Court, and from the wording of the issue sent back for inquiry, that the adoption by a male, or by a widow with her husband's express

1891.

PÁTEL VANDRA'VAN JEKISAN v. PÁTEL MÁNILÁL CHUNILÁL.

consent, was allowed in the caste of the parties; but the adoption by a widow without her husband's express consent was not *allowed*. Plaintiff's own witnesses Nos. 36, 105 and 110 prove that a male can adopt a son in the caste of the parties.

"Instead of proving the special caste custom prohibiting a widow to adopt a son without her husband's express consent, plaintiff has now tried to show that nobody, either male or female, can adopt a son by the custom of the caste. Plaintiff admits (No. 133) that he is the head of the caste. Many of his witnesses also say this. There is, then, no wonder that he can command the whole caste, and make the caste people say as he likes. My predecessor has observed in his judgment: 'In Borradaile's Collection of Caste Rules, it is said that Kadwa Kunbis at Surat cannot adopt.' Taking advantage of this, plaintiff has called the whole caste (*vide* exhibit 112) to say that nobody can adopt a son according to the usage of the caste. * * The number of those who were present to speak for plaintiff is * two hundred and two. Considering the fact that the plaintiff is the head of the caste, and that the witnesses have come forward to say more than what the issue implies, * * * I am not at all inclined to give any importance to the number of witnesses.

"Plaintiff and many of his witnesses admit that one breaking the caste rules is excommunicated, and that a widow who would adopt a son would be excommunicated; but there has not been a single instance of such an excommunication, though there have been three cases of adoption by a widow. In the disputed case, plaintiff says he knew of the defendant's adoption when it took place. A public notice of it was given in a paper (*vide* exhibit 36). Had the custom been true, the plaintiff's first remedy would have been to excommunicate Rupáli * . As he was the head of the caste, this was very easy for him. Plaintiff's own conduct, then, shows that Rupáli's act was not such as would make her liable to be excommunicated. * * * Considering all the above facts and the circumstances of the case, I am satisfied that a very large number of plaintiff's witnessess are tutored and cannot be relied upon."

Against the finding of the Subordinate Judge the plaintiff (respondent) presented objections to the High Court, under section 657 of the Civil Procedure Code (Act XIV of 1882).

Lang, Acting Advocate General (with *Ganpat Sadáshiv Ráo*) for the respondent:—The lower Court has recorded a negative finding upon the issue sent to it by this Court, and has held that there is no custom among the Kadwa Kunbis at Ahmedabad prohibiting adoption by a widow. The Subordinate Judge has fallen into an error, having thought that the High Court meant that an adoption by a male, or by a widow with express consent of her husband, was allowed among the Kadwa Kunbis at Ahmedabad. Our case was that an adoption either by a male, or by a widow, was not allowed by the custom of the caste—Borradaile's Collection of Caste Rules, Vol. II, pp. 401, 402. We called two hundred and two witnesses to prove the custom, and have thus amply proved it. In answer to the evidence tendered by us, the appellant cited two instances of alleged adoptions in the caste: but we contend that in those cases there was no adoption at all. In one case the natural father of the boy agreed to give him in adoption for Rs. 1,000. This was, in fact, a purchase of the boy, and not an adoption. In former times a boy bought was recognized to be a son, but he is not now so recognized—Mayne's Hindu Law, section 74. The other instance relied on by the appellant is an alleged adoptionby Bái Jamna, who had a son called Buláki, and a daughter named Diváli. Diváli had two sons, one of whom was adopted by Bái Jamna on the death of her son, Buláki. That was, therefore, the adoption of a daughter's son, and was, consequently, invalid. Further, in that case there was a deed of adoption, and, notwithstanding the adoption, and the deed of adoption, Bái Diváli took out a certificate of heirship to her deceased brother Buláki, and not a certificate of administration and guardianship of her son who was given in adoption. In that case, therefore, there was merely an attempt at adoption, and no real adoption. It was, practically, a case of a foster son: not that of an adopted son.

[SARGENT, C. J.:—Still the factum of adoption would remain untouched.]

1891.

PÁTEL VANDRÁVAN JEKISAN v. PÁTEL MÁNILÁL CHUNILÁL.

The factum of adoption would be of no avail when the system of adoption itself was not recognized by the caste.

Both the above instances are very recent, having taken place in 1881 and 1882; and, at best, they merely show fosterage. In India there are instances of foster sons—*Bhagván Dullabh* v. *Kála Shankar*(1); West and Bühler, pp. 924,927.

In the present case there are three witnesses (Nos. 130, 156 and 158) called who say that they have given up the name of their natural father, and have instead assumed the name of the person whose property they have got. We argue that, if adoption had been recognized in the caste, these persons would have been adopted by those whose property they got, and would not have merely changed their patronymic.

Borradaile's Collections relate, no doubt, to Surat. But if there is a particular custom obtaining among the Kadwa Kunbis at Surat, it would be strange that that custom should not exist among the Kadwa Kunbis at Ahmedabad.

Govardhanrám Mádhavrám Tripáthi for the appellants:—On the former occasion the Court held that, so far as law was concerned, Bái Rupáli was entitled to adopt. The case, as it was then put forward by the respondent, both before the Subordinate Judge and the High Court, was that a widow of the Kadwa Kunbi caste could not adopt according to custom. When the issue was sent down by this Court to the lower Court, the respondent changed his case, and contended that it was not customary in the caste to adopt. As he tried to make out a new case on remand, the Subordinate Judge very properly disbelieved the evidence adduced in support of his new case.

We submit that the evidence adduced by the other side is not sufficient to prove the custom which they set up. In order that a custom should be binding, it must be ancient and invariable, and must be distinctly proved—*Mathura Náikin* v. *Esu Náikin*(2); *Shidhojiráv* v. *Náikojiráv*(3). The evidence

(1) I. L. R., 1 Bom., 641. (2) I. L. R., 4 Bom., 545.

(3) 10 Bom. H. C. Rep., 228.

adduced by the respondent merely shows that there have been no adoptions in the caste; but the mere absence of adoptions cannot prove that adoption was prohibited by the caste. If adoption had really been prohibited, then in the two instances of adoption on which we rely, the persons who took the boys in adoption would have been punished and excommunicated by the caste. But nothing of the kind was done. Even in the present case, Bái Rupáli, our adoptive mother, was not excommunicated. With regard to one of the above two instances, a question did actually come before a Court of law, but yet no one raised any objection against the adoption on the ground of caste custom. Our deed of adoption is attested by several leaders of the caste. This itself shows that the conscience of the caste was not against an adoption being made by a widow.

In the case of the adoption by Bái Jamna, Bái Diváli took a certificate of heirship to her brother for the sake of convenience, and with the consent of the guardian of the minor boy. With respect to the other case of adoption there was, no doubt, an agreement to pay some money to the natural father of the boy, in consideration of his giving his son in adoption. Even admitting, for the sake of argument, that it is not right to accept any money in this way, still that circumstance will not make the adoption invalid. What the Court has to consider is, whether the adoption was impugned by the caste on the ground of custom.

The Subordinate Judge disbelieved the evidence given by two hundred and two witnesses, because he considered them to be tutored.

Lang, in reply :—With respect to the conscience of the caste, some of the witnesses have deposed that they do not like that the old custom should be departed from; and there is one witness who distinctly states that he is assisting us in this suit that a new custom should not creep in.

We do not admit that after remand we changed our case. The former judgment of the Subordinate Judge clearly shows that what we say now has been our case from the beginning. We say that no widow can adopt, because from time immemorial, as the witnesses say, no widow has ever made an adoption. Ab-

1891.

PÁTEL VANDRÁVAN JEKISAN v. PÁTEL MÁNILÁL CHUNILÁL.

sence of adoption from time immemorial is conclusive of a custom against adoption. The two recent instances are no evidence as to the custom of adoption, and they cannot over-ride the custom we rely upon. We find that till the year 1881 there was no adoption in the community. When this circumstance is taken into consideration, along with the result of Borradaile's inquiry, namely, that among the Kadwa Kunbi caste at Surat it is not customary to adopt, the conclusion is inevitable that among the Kadwa Kunbis at Ahmedabad the custom of adoption does not prevail. Another circumstance to be borne in mind is that this is the first time that the question is litigated.

The fact that the parties who made the alleged adoptions, were not excommunicated, or otherwise punished by the caste, cannot establish the custom of adoption; nor does it in the least tell against a custom prohibiting adoption.

SARGENT, C. J.:—Although the spiritual efficacy of adoption is probably not much regarded by the members of the Kunbi castes, a caste custom prohibiting widows from adopting is one which, before the Court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden. That evidence, we think, was not forthcoming in the present case. The statements of two hundred and two witnesses called by the plaintiff doubtless show that it has not been the practice in the caste for widows to adopt; but it also shows that there has been no caste resolution forbidding such adoptions. At the same time the evidence establishes that there have been, as a matter of fact, two adoptions by widows, as far back as 1881, and 1882, without any caste protest against them; and that the latter of these adoptions was actually impugned in Court, but nothing was stated at the time as to its being contrary to caste custom—and, lastly, that the adoption in question was attested by sixteen pátels of the caste, which could scarcely have taken place had there been a well-established custom forbidding such an adoption. This evidence, as a whole, leads, we think, to the conclusion that, in the language of Mr. Mayne, "a uniform and persistent usage has not moulded the life of the caste." It is also to be observed

that this particular caste is not mentioned in Borradaile's Caste Customs when alluding to other Kunbi castes of Gujarát in connection with such a custom. We must, therefore, reverse the decree of the Court below, and dismiss the plaintiff's suit, with costs throughout on the plaintiff.

1891.

PÁTEL VANDRÁVAN JEKISAN *v.* PÁTEL MÁNILÁL CHUNILÁL.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

APPA KÁLGA NA'IK AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MALLU BIN MOWNA AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1891. *August* 31.

Practice—Judgment omitting mention of important documents—Presumable omission to consider important portions of the evidence—Finding based on statements not on evidence—Reversal and reconsideration.

The lower Court, in its judgment, having omitted to make any mention of certain important documents, or their bearing on the terms of a tenancy which were in question;

Held, that the lower Court having presumably omitted to consider important portions of the evidence, the findings arrived at by it ought not to be accepted.

Held, also, that the finding of the lower Court as to the plaintiffs' claim being barred by limitation being based on statements without referring to any evidence to establish them, could not be accepted.

Case sent back for reconsideration and fresh decision.

THIS was a second appeal from the decision of G. McCorkell, District Judge of Kánara.

This was an action instituted by the plaintiffs, Appá Kálga Náik and others, to recover possession of certain garden land, together with past mesne profits. The plaintiffs had claimed future mesne profits also.

The defendants, Mallu bin Mowna Pátil and others, contended (*inter alia*) that they held the land in dispute as *ardheli* tenants, and that the claim was time-barred.

The Subordinate Judge (Ráo Sáheb R. D. Páranjpe) awarded the plaintiffs' claim; and in doing so he relied, among other documents, on exhibits 96 and 97 in the case. Exhibit 96

* Second Appeal, No. 490 of 1890.