APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1896. *November* 23.

LAKSHMIBAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RAMCHANDRA (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Adoption—Adoption by widow—Untonsured widow—Delegation of authority to adopt—Ceremony of adoption.

Under the Hindu law the widow only can adopt a son to her husband, and she cannot delegate this authority to any other relation.

Where a widow performs the principal part of the adoption ceremony—namely, the gift and acceptance,—the fact that at her request the religious part of the ceremony is completed by a relation, does not vitiate the adoption.

In the case of a young widow, the fact that she was untonsured at the time of the adoption is not such a disqualification as vitiates the adoption.

APPEAL from the decision of Rão Bahádur Gangadhar V. Limaye, First Class Subordinate Judge of Dhárwár.

The plaintiffs sued, as reversionary heirs of one Shankar Malhar, to obtain a declaration that the defendant was not the adopted son of the deceased, and to recover possession of the property in dispute.

The property in suit originally belonged to Malhar Guddo. On Malhar's death it was inherited by his son Shankar, who died in November, 1885, leaving a childless widow Nagubai, about fifteen years old. Nagubai adopted the defendant in 1886, and immediately afterwards applied to the Revenue authorities to have her husband's kulkarni vatan entered in the name of her adopted son. The Collector thereupon entered the vatan in the defendant's name, and appointed him to the office of kulkarni.

In 1893 Nagubai died. Thereupon the plaintiffs sued, as the next of kin of the deceased Shankar Malhar, to set aside the defendant's adoption and recover the property from his possession.

The plaintiffs alleged (*inter alia*) that even if the *factum* of the adoption were held proved it was invalid on the ground that the adoptive mother was an untonsured Hindu widow, and, therefore, incompetent to adopt a son to her deceased husband by reason

* Appeal, No. 49 of 1896.

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of her religious impurity, and that as a matter of fact she did not herself take part in the adoption ceremony, but delegated the duty to her relative Krishnarao.

The First Class Subordinate Judge of Dhárwár, who decided the case, found that the defendant was taken in adoption by Nagubai; that she herself performed the essential part of the adoption ceremony, namely, the receiving of the boy from his natural father; and that at her request and direction the *Datta Homa* and other ceremonies were performed by her relation Krishnarao.

The Subordinate Judge held that though the adoptive mother was an untonsured Hindu widow, the adoption was not on that account invalid, or contrary to Hindu law or caste custom.

The suit was, therefore, dismissed.

Against this decision the plaintiffs appealed to the High Court.

Scott (with *D. A. Khare*) for appellants:—We contend that the adoption is invalid (first) because the adoptive mother did not take part in the adoption ceremony and (secondly) because she was incompetent to adopt. The evidence shows that Nagubai was untonsured at the time of the alleged adoption. According to the Shástras and usages of the Hindus she was in a state of religious impurity. She could not perform any religious ceremony, and so the *Datta Homa* and the other religious portions of the adoption ceremony were performed at her request by her relative. We submit that she could not delegate this duty to any relative. According to the Hindu law, a widow must herself adopt a son to her deceased husband; she cannot delegate this authority to others—*Bhagvandas* v. *Rajmal*[1]. In the present case the widow got the whole adoption ceremony performed by her relative. The adoption is, therefore, absolutely null and void.

The adoption is further vitiated by the fact that she was untonsured at the time of the adoption. The remarks of Farran, J., on this point in *Ravji Vinayak* v. *Lakshmibai*[2] are *obiter dicta* as not necessary for the decision of the case. The experts, who were examined in this case—the local Shástris and Pandits—stated

(1) 10 Bom. H. C. Rep., 241. (2) I. L. R., 11 Bom., 381.

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that an untonsured widow is incompetent to perfom a religious act like that of adoption and they are supported by the Dharmasindhu and other authorities.

Macpherson (with him *Manekshak Jehangirshah*) for respondent.—It is found as a fact by the lower Court, and the evidence conclusively shows, that the essential part of the adoption ceremony—namely, the gift and acceptance—was performed by the adoptive mother herself. It was Nagubai who asked for the boy, and received him in gift from his natural father. That being the case, the mere fact that the religious part of the ceremony was performed at her request by her relative does not invalidate the adoption. The essential requisites of an adoption are gift and acceptance. They are the operative part of the ceremony, being that part of it which transfers the boy from one family to another. Nothing else is so essential as gift and acceptance. Even the *Datta Homa* is treated as a mere matter of unessential ceremonial—Mayne's Hindu Law, section 141. That being the case, the fact that the religious part of the ceremony was performed in the present case by a relative at the widow's request, cannot invalidate the adoption.

As to the second objection to the validity of the adoption, there is no text, and no authority in support of the proposition, that an untonsured widow cannot adopt. The case of *Ravji* v. *Lakshmibai*[1] is a distinct authority to the contrary. The Dharmasindhu is a work of a very recent date, and cannot be treated as an authority on the subject.

RANADE, J.:—The appellants (original plaintiffs), who claim to be the reversionary heirs of Shankar Malhar on the death of Shankar's widow Nagubai, sought in this suit to set aside the adoption of the respondent by Nagubai, and also to recover possession of the property of deceased Shankar. The *factum* of adoption was not seriously disputed by the appellants' counsel, Mr. Scott, who, however, questioned its validity on the double ground that Nagubai, the adoptive mother, did not perform the ceremony of receiving the respondent in adoption herself, and that she was incompetent to take such a gift by reason of her ceremonial impurity.

(1) I. L. R., 11 Bom., 381.

As regards the first ground, it was contended that Nagubai took no part in the adoption ceremony, but delegated it, on account of her impurity, to her relation Krishnarao, into whose hands the respondent was made over by his natural father at the time of the adoption ceremony.

There can be no doubt that a widow alone can adopt a son to her husband, and that she cannot delegate this authority to any other relation—*Bhagvandas* v. *Rajmal*[1]. There is, however, no evidence in this case that there was any such delegation of authority on the part of Nagubai in respect of the principal portion of the ceremony, namely, the gift and acceptance. Not only is the deed of adoption, Exhibit 74, explicit on the point, but it was followed up by Nagubai's applications to the Collector, Exhibits 75, 76, of June 1886, and April 1891, in which applications she asked that the vatan might be entered in respondent's name. It was not till 1892, when Nagubai had attained majority, and the Collector made over the estate to her charge, that any objection was raised by Nagubai to the validity of the adoption (Exhibits 80, 81). As regards the oral evidence, the original plaintiffs Nos. 1, 2, had no knowledge on the point. Exhibits 64, 86 and none of the witnesses examined on their behalf gave any evidence in regard to the ceremony. They were all witnesses in regard to the effects of the alleged impurity (Exhibits 114, 115, 116). On the other hand, respondent's witnesses, including his natural father, the priest who officiated at the ceremony, and the relation and stranger who wrote and attested the adoption deed, distinctly swore that the boy, respondent, was made to sit on the lap of Nagubai, who asked him in gift from his natural father (Exhibits 100 and 103).

Nagubai was only a girl of fifteen years at the time, and had just lost her husband, and there is nothing surprising, therefore, in her remaining in the inner room, and asking her elderly relation to complete the *Homa* and the other religious portion of the celebration, which, indeed, as a woman, she could not directly take on herself to perform. The doubtful evidence given by witness Ganesh, Exhibit 95, and the total denial of all knowledge of the adoption by plaintiff No. 3, Exhibit 105, were very properly

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discredited by the lower Court, as Ganesh had a grudge against the respondent, being dismissed from Nagubai's service, and plaintiff No. 3 had an interest in completely ignoring the fact of adoption. On the whole, therefore, we must hold with the lower Court that Nagubai herself received the respondent in adoption and that her requesting Krishnarao to complete the religious ceremony did not in any way vitiate the act.

The second ground on which the validity of the adoption was questioned has reference to the alleged incompetency created by the fact that Nagubai had not removed the hair on her head, and was thus ceremonially impure. The lower Court has considered this point at great length, though in the appeal before us, Mr. Scott did not seem to lay much stress on it. In *Ravji* v. *Lakshmibai*(1) this same question was raised, but it was not found necessary to decide the question, as it was held that the party, who sought to raise it, was estopped by her acts from denying the adoption. Three witnesses were examined on this point in the present case, none of whom appeared to be entitled to any great weight. The Purohit of the family admitted that the receiving and giving must be done by the principals themselves, and the rest of the ceremony can be performed by a priest appointed for the purpose. As regards the impurity, the same witness was of opinion that the adoption by a widow, who had not removed her hair, required expiation—in other words, her act was not absolutely void, and the defect might be cured by certain payments made to Bráhmins. The only authority he cited was the Dharmasindhu, which is a very recent compilation by a Pandharpur Shástri. Nirnayasindhu and Dharmasindhu indeed quote texts said to be found in Skanda Puran to the effect that "if a widow braids her hairs, the braided hair prevents the liberation of the husband, and that, therefore, the widow must remove her hair by shaving them." This is only a Puran text and of doubtful validity. The Smriti texts of Yama, Parashar and Apasthamba, which are superior in authority to such Puran texts, expressly provide that in the case of women who have to perform penance either for cow-slaughter or other equally heinous sins, the "*mundana*", or shaving of the head, is to be performed

(1) I. L. R., 11 Bom., 381.

by holding up the hair, and cutting off the ends to the extent of one or two fingers. Other texts are cited by the authors of Smriti Ratnakar and similar collections, which direct, on the authority of Apasthamba and Vyas, that "*wapan*" is obligatory on sons and widows and other sorrowing relations of the deceased, but *wapan* must be understood here, and in fact has been described, to be equivalent to *mundana* as defined above, and it must reasonably be interpreted in the same sense both for male and female relations.

There is thus admittedly no authoritative Smriti text on the point, and whatever the efficacy of ceremonial strictness may be, the Courts which administer the law in British India must be guided by what is the received practice and custom of the country or the class to which the parties belong. Plaintiffs' own witness Guracharya admitted that ceremonial strictness, such as the texts advocate in the case of Brâhmin widows, is now not observed in the vast majority of cases, and another witness on appellants' behalf stated that no exception was taken to Nagubai's conduct by the head priest of the caste. The adoption deed bears the signatures of many persons, and it is in evidence that a large number of persons dined in Nagubai's house on the day of adoption.

It is well known that among the Deshasta Brâhmins in the Deccan, widows are allowed, in most cases, to retain their hair, and among all classes there is no compulsion in the case of young girls before they attain majority. The observations in West and Bühler, pp. 998, 1084, reflect the view of the Pandits and not of the learned authors, and the observation relates to purely religious acts and observances, and not to secular acts such as adoption, &c. On the whole, therefore, we feel satisfied that the alleged impurity of Nagubai was not, in the case of a young girl like her, such a disqualification as vitiated the adoption.

As we find in favour of the adoption, it is unnecessary to discuss the question of limitation incidentally raised in the pleadings before the lower Court. We reject the appeal and confirm the decree with costs on appellants.

Decree confirmed.