APPELLATE CIVIL.

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

1892. *January* 18.

GIRIA'PA, (ORIGINAL DEFENDANT), APPELLANT, *v.* NINGA'PA', (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Inheritance—Share of adopted son where a son is subsequently born—Western India—Mitákshara—Vyavahar Mayukha—Point taken by appellant on second appeal not raised by him in his first appeal—Practice.

In Western India, both in the districts governed by the Mitákshara and those specially under the authority of the Vyavahar Mayukha, the right of the adopted son, where there is a "legitimate son" born after the adoption, extends only to a fifth share of the father's estate.

In a suit by an adopted son to recover his share in his adoptive father's estate a son having been born to the adoptive father subsequently to the plaintiff's adoption, the Court of first instance awarded the plaintiff a fourth share of the property in dispute. The defendant appealed to the District Court, but in appeal raised no question as to the extent of the share awarded to the plaintiff. On second appeal to the High Court it was contended that, in any event, the plaintiff was only entitled to a fifth share.

Held, that under the circumstances and having regard to the nature of the question, the point might be taken in second appeal on behalf of the defendant, and the High Court varied the decree by awarding the plaintiff a fifth share instead of a fourth share, but ordered the appellant (defendant) to bear his own costs of the appeal.

THIS was a second appeal from the decision of T. Hart-Davies, Assistant Judge of Dhárwár.

Suit by an adopted son. The plaintiff Ningápa alleged that he had been duly adopted twenty-three years previously by one Bhimápa Bhiksheti, and that after the adoption his adoptive father had executed a document in his favour, providing that, in the event of his (the adoptive father) having "legitimate sons" subsequently born to him, the plaintiff should receive a half share of his whole estate. Afterwards, and while the plaintiff was living with his adoptive father, the defendant was born.

The plaintiff, being dispossessed by the defendant, sued to recover a half share of the property.

The defendant, Giriápa Bhimápa, denied the plaintiff's adoption and his claim, and pleaded limitation.

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The Subordinate Judge (Ráo Sáheb Bábáji Lakshman) found the plaintiff's adoption proved, and his claim not time-barred. He allowed the plaintiff a fourth share in the property in dispute.

On appeal the District Court confirmed the decree.

The defendant then appealed to the High Court.

Mánekshá J. Taleyárkhán for the appellant.

There was no appearance for the respondent.

TELANG, J. :—The question raised in the argument of this appeal relates to the share of an adopted son, where a son is born to the adoptive father after the adoption. The original text to which all the authorities on this question go back, is a text of Vasishtha[1], which we find quoted in the various modern Digests. The different readings of that text as quoted in those works do not require to be considered in the present case[2]. All the principal text books of authority in Western India on the subject of adoption read the text so as to mean, that where a "legitimate son" is born after an adoption, the adopted son "shares a fourth part"[3]. And the question before us turns on the meaning of this equivocal phrase. The different significations of which the phrase is susceptible have been expounded in several modern text books[4]; but without examining the grounds for the various interpretations, it is enough to say that in Western India the weight of authority strongly preponderates in favour of the view, that where one legitimate son is born after an adoption, the legitimate son takes four-fifths of the estate of the father and

(1) See Bühler's Vasishtha in Sacred Books of the East, Vol. XIV, p. 76. And see also Baudhayana in the same volume, p. 336, where the words inserted b Dr. Bühler between brackets are to be noted (Comp. Stokes' Hindu Law Books, 595). The texts of Devala and Kátyáyana on the point are quoted in Dattaka Chandrika, Stokes' Hindu Law Books, pp. 657-8.

(2) See Colebrooke's notes at Stokes' Hindu Law Books, p. 421.

(3) Mitákshára, p. 420 (Stokes' Hindu Law Books); Mayukha, p. 66 (ditto); Viramitrodaya by G. C. Sarkár, p. 124; Samskara Kaustubha, p. 49, (Bom. A. E., 1861, quoting Baudháyana); Dattaka Mimamsa, p. 594 (Stokes' Hindu Law Books); Dattaka Chandrika, p. 657 (Stokes' Hindu Law Books).

(4) See Rájkumár Sarvadhikári's Tágore Lectures, pp. 537-9; Mr. Justice Bánarji's Tágore Lectures, pp. 367-8; Dr. Jolly's Tágore Lectures, pp. 132-4.

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the adopted son one-fifth. Taking the authorities in Western India on the subject of adoption as mentioned by Westropp, C. J., in *Náráyan Bábáji* v. *Nána Manohar*(1), we find that the Mitákshara sets out the text of Vasishtha, but says nothing about the interpretation of the phrase "a fourth share." It is to be noted, however, that Colebrooke's marginal note against this passage speaks of "a quarter of a share," thus probably indicating an interpretation identical with that which, as we shall see in the sequel, the Vyavahára Mayukha places on the phrase. A somewhat similar phrase occurs in connection with the provision for the marriage of unmarried daughters when a joint family is about to divide. And the Mitákshara has a long discussion on the interpretation of the phrase there used. But the words there (Stokes' Hindu Law Books, p. 398) are not identical with the words here, inasmuch as they do specify the estate or fund of which a fourth share is to be taken. And as we see from the Mitákshara's discussion of those words, they also have given rise to very considerable differences of opinion. But it is unnecessary to dwell on that passage further, as owing to the different language used, as already pointed out, it can throw no light on the meaning of the text which has to be construed here. The Vyavahára Mayukha to which we must next refer, is quite explicit as to the meaning of Vasishtha's text. In Chapter IV, section v, placitum 25, it is said: "He should take a quarter of the share allotted to a legitimate son of his adoptive father; from the (following) text of Vasishtha 'when a son has been adopted, if a son of the body be afterwards born, the adopted son shall be a sharer of a portion equal to a fourth.'" The "fourth share," therefore, according to this view, is to be a fourth not of the whole estate, but of the share allotted to the "legitimate son." The Viramitrodaya affords no light on the subject, nor does the Dattaka Chandrika, both only setting out Vasishtha's text, and not expounding this phrase in it. The Dattaka-Mimamsa only says that the adopted son "receives a quarter, not an entire share." But this explanation is not itself quite clear, and Mr. Sutherland proposes two different interpretations of it, one of which is in harmony with the view of the

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

Vyavahára Mayukha, while the other is not[1]. Looking, however, at the original text of the Dattaka Mimamsa as printed in the edition published at Calcutta in 1857, and also in the edition published at Benares in 1874, we find that "not an entire share" is not quite an accurate translation of the words used by Nanda Pandita. The correct translation is "not an equal share." This latter phrase, too, does not perhaps make the point perfectly clear. It seems to contain an allusion to texts which apparently lay down an equal division between the adopted son and the subsequently born "legitimate son." Such texts are to be found cited in the Samskara Kaustubha for instance, (see passage cited below), and in the Dattaka Mimamsa itself (Stokes' Hindu Law Books, p. 595, and compare West and Bühler, p. 1187 and note (*e*) there). But at all events the phrase "not an equal share" rather appears to indicate that, in Nanda Pandita's view, the word "quarter" points to the relation between the shares of the after-born son and the adopted son, not the relation between the share of the latter and the whole estate. It may, therefore, be said to be at least very probable, that Nanda Pandita's view was in accord with that of Nilakantha. And the opinion of the author of the Samskara Kaustubha[2] appears also to be the same.

It is true, that in the Smriti Chandrika, a text metrical in form, not aphoristic like the one under discussion[3], is quoted as belonging to Vasishtha, in which it is laid down, that "if after he is accepted (in adoption) a legitimate son is born, he becomes a sharer of a fourth share in the inheritance"[4]. And it is also

(1) See Stokes' Hindu Law Books, p. 678. The other interpretation of Mr. Sutherland may be compared with the Mitákshara's views about the provision for daughters, at p. 398 of Stokes' Hindu Law Books. See also Stokes' Hindu Law Books, pp. 55, 426.

(2) This work is stated in Steele quoted at West and Bühler, p. 1187, to hold a different opinion. But the phrase used there, according to the reading of the Bombay edition, though perhaps not a very happy one, can only mean "one quarter of his share," which meaning agrees with the interpretation put on Vasishtha's text by the Vyvahára Mayukha.

(3) See as to this West and Bühler's Digest, p. 43.

(4) See Smriti Chandrika, p. 57 (Calcutta Edition). In the translation by Mr. Krishnasvámi Iyer, (p. 146) the words "in the inheritance", which occur in this printed text, are omitted.

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true, as I suggested in the course of the argument, and as I find has been already pointed out by Professor H. H. Wilson (quoted by Mayne as well as in West and Bühler's Digest), that to interprete the phrase "a quarter share" to mean a fourth of the whole inheritance would reconcile the two readings of Vasishtha's aphoristic text with each other, and both with the metrical text now referred to, namely, by taking one-third, where it occurs, to mean one-third of the after-born son's share, and one-fourth to mean one-fourth of the whole estate. This is true, though there are difficulties even on this construction, as for instance in the case of four or more sons being born after an adoption. But, apart from this and other difficulties, it is pretty clear that, according to the principle laid down by the Privy Council in the case of *The Collector of Madura* v. *Mootoo Rámlinga Sethupati*(1), the Court must give effect to what it finds to be the interpretation of Vasishtha's text now actually current as shown by the modern Digests in general use, and not enforce as law a doubtful inference from the words of the ancient Smriti writers.

Passing now to the modern English text books, we find that Sir T. Strange leaves this point in uncertainty. In West and Bühler's Digest, it is said in one place that, "if a legitimate son be born after the adoption has taken place, the adopted son receives a fifth of the deceased's estate, according to the preceding question. According to the Mitákshara, Chapter I, section xi, placitum 24, the adopted son takes a fourth part"(2). The language thus used by the learned authors of that work seems intended to convey the impression, that the "fourth part" referred to by the Mitákshara means one-fourth of the deceased's estate. But, as we have seen, the words there used contain nothing that can be said to be decisive on this point, and nothing inconsistent with the view of the Vyavahára Mayukha. In other passages of West and Bühler(3), it is stated that the right of the adopted son is to "a fourth of a son's share" or to "a fourth part of a share" or "one-fourth of a share as compared with the full share taken by the begotten son." Mr. Mayne sets out the various

(1) 13 Moore's I. A. 1. (2) W. and B., p. 373.
(3) *Vide* pp. 388, 773, 935; also p. 1187.

views of the subject which have been taken, and adds, relying on West and Bühler, p. 373, that in Bombay the rule has been construed to mean that the adopted son takes a fourth of the legitimate son's share. Mr. Jogendra Chandra Siromani, in his Commentaries on Hindu Law, takes the fourth to mean a fourth of the legitimate son's share. Dr. Jolly's opinion is also in favour of this interpretation. And in the very recently published Tágore Law Lectures on adoption by Mr. G. C. Sarkar the same view is maintained. In Steele's book it is said that the proportion varies according to caste custom; but, in the case before us, no question has been raised with reference to any such custom.

As regards other authorities bearing on the subject, there is the answer of the Shástri quoted in West and Bühler in the case from Dhárwár[1], and the present case comes from the same part of the Presidency. There is also the answer of another Shástri to the same effect, which apparently was acted upon by the Sadar Adálat, and is also mentioned by West and Bühler[2]. And, lastly, there is the decision of the High Court of Madras in *Ayyavu Muppanar* v. *Niladatchi Ammal* [3], based principally on the authority of the Sarasvati Vilasa. All these authorities, judicial and *quasi*-judicial, concur in the opinion that the right of the adopted son extends to only one-fifth of the whole estate, where there is one "legitimate son" born after the adoption.

It appears to us, upon a review of all the authorities above referred to, that we ought to hold that in Western India, both in the districts governed by the Mitákshara and those specially under the authority of the Vyavahara Mayukha, the right of the adopted son, when there is a legitimate son born after the adoption, extends only to a fifth share of the father's estate.

The Subordinate judge in this case awarded a fourth share to the plaintiff, and the defendant in his appeal to the District Court did not raise any question about the correctness of that award. In this Court, however, Mr. Mánekshán has taken the point, and relied on the passage in Mayne's Hindu Law already quoted. We think, under the circumstances, and having regard

(1) Page 372 (3rd Ed.). (2) P. 373.

(3) 1 Mad. H. C. Rep., 45.

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to the nature of the question, that the defendant may be allowed the benefit of our opinion, but he cannot be allowed the costs of this appeal. The decree will, therefore, be varied by substituting a fifth share instead of a fourth share, and the appellant must bear his own costs in this Court.

Decree varied.

APPELLATE CIVIL.

FULL BENCH.

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

UMARKHA'N MAHAMADKHA'N DESHMUKH, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SA'LEKHA'N AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Interest—Enhanced rate in default of payment—Penalty—Liquidated damages—Contract Act (IX of 1872), Sec. 74.

A proviso for retropective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against, but a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties.

THIS was a second appeal from the decision of Ráo Bahádur Ganpat Amrit Mánkar, First Class Subordinate Judge of Thána with appellate powers.

The plaintiff, Umarkhán Mahamadkhán Dêshmukh, sued to recover from the defendants a sum due under a mortgage-bond.

The portion of the mortgage-bond material for the purposes of this report was as follows :—

"* * And as to the assessment and dues due to the Sarkár together with *zamíndár's* cesses which are now payable and which may hereafter, on a survey being made, be decreased or increased, the same are mine. I will be paying the same as I have been paying them up to this time. You have nothing to do with the (payment of the) *dhára* (*i.e.* assessment); should you perchance

* Second Appeal, No. 356 of 1890.