1903.

HAJI SADOO SIDICK v. AYESHABAI.

of the appellants and had before been excusably unknown to them.

The proposal that this matter should now be re-opened is the more unreasonable as the decree appealed against contains a *dum casta* clause.

4. The only other point was as to the amount of aliment. No cause whatever has been shown for interfering with the careful decision immediately under review, which modified the decree of the Judge of first instance.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Payne and Lattey.*

Solicitors for the respondents—*Messrs. T. L. Wilson & Co.*

PRIVY COUNCIL.

P. C.*
1903.
April 28, 29.
May 12.

VERABHAI AJUBHAI AND OTHERS (PLAINTIFFS) *v.* BAI HIRABA AND OTHERS (DEFENDANTS).

Hindu Law—Adoption—Chudasama Gameti Garasias—Custom prohibiting adoption—Effect on adoption of the natural son having survived his father and attained ceremonial competence.

A custom alleged to exist in the Hindu caste of Chudasama Gameti Garasias prohibiting adoption was held to be not proved.

A member of that caste died in 1887 leaving a widow and a son, who died in 1889 between fifteen and sixteen years of age and unmarried. In 1891 the widow adopted a son to her husband.

Held, that the adoption was valid.

It was contended that the adoption was invalid on the ground that the natural son had survived his father and lived to attain ceremonial competence. Both the Courts below found that he was a minor and unmarried when he died.

Held, that as there appeared to be no fixed age at which a Hindu boy was supposed to have attained ceremonial competence, and as there was no proof in

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and &c. SIR ARTHUR WILSON.

this case that the son had, or was treated as having, attained such competence, the objection was not sustained.

APPEAL from a decision (24th June, 1896) of the High Court at Bombay, which affirmed a decision (30th October, 1893) of the Subordinate Judge of Ahmedabad by which the appellants' suit was dismissed.

The suit was brought by some of the surviving male descendants of one Bhojaji and his wife Nanibai to set aside a deed of adoption and an alleged adoption of one Raesangji purporting to have been made by Hiraba, widow of Hamjibhai Waghabhai, a grandson of Bhojaji, and for a declaration that they and the other surviving male descendants of Bhojaji were entitled after the death of Hiraba to the estate of Hamjibhai Waghabhai.

Bhojaji and Nanibai had five sons. Of these Waghabhai had one son, Hamjibhai Waghabhai, who married Hiraba. Hamjibhai died on 3rd June, 1887, leaving him surviving his widow Hiraba, three daughters, and a son Lalubha. Lalubha died unmarried on 25th August, 1889, being then between fifteen and sixteen years of age, having been born in December, 1873.

All the parties to the suit belonged to the Hindu caste of Chudasama Gameti Garasias, which caste inhabits certain tálukas in the district of Ahmedabad and the province of Káthiáwár.

On 13th July, 1891, Hiraba executed a deed purporting to adopt Raesangji Harbhamji as her son. The plaintiffs on 23rd September, 1892, instituted the suit, out of which this appeal arose, against Hiraba, Raesangji, the three daughters of Hamjibhai Waghabhai and others, alleging in their plaint that according to the custom of their caste a son could not be validly adopted, disputing the fact of the ceremony of adoption having taken place as alleged, and asserting that in any event it was void as having been carried out from corrupt motives and for other reasons. The plaint further alleged that by the custom of their caste the daughters of Hamjibhai were excluded from inheritance, and that the plaintiffs and defendants 3 to 8 were the persons then entitled on the death of Hiraba to succeed to the estate of Hamjibhai.

Written statements were filed by the defendants Hiraba, Raesangji and some of the others, in which the plaintiffs' allega-

1903.

VERABHAI AJUBHAI v. BAI HIRABA.

tions and contentions, except as to the custom of exclusion of daughters from inheritance, were disputed.

The only issues material on this appeal were :

5. Is the custom prohibiting adoption, as alleged in the plaint, proved ?
6. Is the alleged adoption proved ? If so, is it in any way invalid ?

The Subordinate Judge held that the special custom of inheritance was not proved save as regarded the exclusion of daughters; that the plaintiffs were not entitled during Hiraba's lifetime to a declaration as to who would succeed on her death to the estate of Hamjibhai Waghabhai; that the alleged custom prohibiting adoption was not proved; and that the adoption was proved and was not invalid either on the ground of the motives inducing the same or the survival by Lalubha of Hamjibhai. The Subordinate Judge therefore dismissed the suit.

From his decision the plaintiffs appealed to the High Court, and the appeal came before a Division Bench of that Court (Farran, C. J., and Hoskin, J.), the material portion of whose judgment was as follows :

The points which have been argued in support of the appeal are that the custom of the Chudasama Garasias prohibiting adoption has been proved ; that the alleged adoption has not been proved ; and that Hiraba having had a natural son Lalubha, who survived his father Hamjibhai, could not legally adopt a son.

It is contended that as Garasias are admittedly not bound by Hindu Law as to daughters, there is no presumption that the Hindu Law as to adoption is applicable. The object of the exclusion of daughters * appears to be to prevent the lands going by marriage to persons not belonging to the original proprietary families. A custom not to adopt might perhaps arise from a similar motive. Where, however, such a custom is set up, it ought, to use the words of Sir Charles Sargent in *Patel Vandravan Jekisen* v. *Patel Munilal Chunilal* (1) "to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden." In that case, although two hundred and two witnesses spoke to the existence of such a custom, it was held not to be proved. In the present case only thirteen witnesses have given evidence as to the existence of the alleged custom. These witnesses do not say that there is any rule of the caste prohibiting adoption. They merely state that it has not been the practice to adopt. One of these witnesses, Wajesing (Exhibit 50), who has himself brought a separate suit to

* West and Bühler's Hindu Law, 3rd Edition, page 430.

(1) (1891) 16 Bom. 470.

have the adoption set aside, deposed in a suit brought in 1886 before the disputed adoption, that adoption is allowed among Garasias (Exhibit 61). Ajubhai, one of the (plaintiffs) appellants, also stated, in the same former suit, that he had heard of an adoption by a Chudasama Garasia of Wagad (Exhibit 85). It is admitted that a Chudasama Garasia widow named Baiba adopted a son at Rojaka about thirteen years ago. It is now stated to this Court on affidavit that adoption has been set aside in a recent suit. There is, however, no allegation that any proceedings were taken by the caste against Baiba for contravening the alleged custom. The Subordinate Judge says in his judgment: "In Borradaile's Caste Rules, Gujarati* Translation, Vol. II, page 418, it is stated that there is no custom to adopt a son with religious ceremony, but that a *pálak* son is taken without any ceremony. This shows that there is a custom allowing a *pálak* son in place of an adopted son among the Garasias."

* This is a misdescription. The original work is in Gujarati. It is a compilation of answers of various castes in the Surat and Broach Districts as to their customs collected about the year 1827 under the direction of the Sadar Diwani Adalat and published, Vol. I in 1834 and Vol. II in 1837.

It is contended for appellants that a *pálak* or foster-son stands upon an entirely different footing from an adopted son. This is, no doubt, the case now under the rulings of the Courts. West and Bühler say at page 927: "The foster-son, however, has always been frowned on by the Shastris. He has failed to get recognition from the Courts" (*Nilmadhab Das* v. *Biswambhar Das*[1].) Again they say at page 1087: "A mere deed or declaration by the alleged adoptive father that he has taken a boy as a foster-son (*pálak putra*) does not produce the effect of adoption"; and at page 1202: "The Hindu Law does not recognize any legal status for the foster-son, either in the matter of performing ceremonies or of inheritance."

As appellants rely upon the answers given by the Garasias recorded in the compilation referred to by the Subordinate Judge, those answers must be taken in their entirety, and not only the part favourable to appellants.

Upon referring to them we find that the Garasias gave the *pálak* son all the rights of a legitimate son as to the performance of ceremonies and as to inheritance:

Answer 5. * * * * "The *pálak* son performs the *kriyá* of his adoptive father."

Answer 6. "The *pálak* son inherits in every way like a legitimate son."

Answer 7. "If a legitimate son is born after taking a *pálak* son, they both inherit equally."

Answer 8. "A widow who has not a son of her own may take a *pálak* son." (Borradaile, Vol. II, page 418; see also Note C, page 1213, West and Bühler.)

It is evident, therefore, that the custom of taking a foster-son instead of an adopted son was not due to any intention to exclude the foster-son from succession, and adoption with the usual ceremonies can scarcely have been against the conscience of members of the caste, though it was not formerly customary. It

(1) (1869) 3 B. L. R. (P. C.) 27: 13 Moore's I. A. 85.

1903.

VERABHAI AJUBHAI v. BAI HIRABA.

seems probable that the non-recognition by the Courts of the rights of foster-sons has led to the more recent practice of adopting a son in the manner required by Hindu Law.

There is sufficient evidence as to the adoption to leave no reasonable doubt as to the giving and taking having been duly performed. The ill-feeling of other members of the family prevented the adoption being as public as it might otherwise have been, but as it is in part evidenced by a registered deed, there can be no reason to suppose that any necessary formalities were omitted.

The last contention we have to deal with is that as Hiraba's son Lalubha survived his father, she had no power to adopt. Hamjibhai died in 1887. Lalubha was born in December, 1873, and died in August, 1889 : he therefore died before completing his sixteenth year and while still a minor according to the Hindu Law prevailing in this Presidency, and it is admitted that he was never married. The law on the subject of a second adoption was considered by Mr. Justice Ranade in *Gavdappa* v. *Girimallappa*.(1) He says : "In this Presidency no express authorization by the husband is necessary, but the widow's power to adopt, when there are no other vested rights which would be defeated by it, has been fully recognised in *Ramji* v. *Ghamau*.(2) In the higher castes it is usual to permit such an exercise of power when the son dies before he attains full ceremonial competency, and cases of a second and third adoption under such circumstances have occurred."

It is alleged for the appellants that Lalubha performed the funeral ceremonies of his father Hamjibhai. There is no evidence on the point, but assuming this to have been the case, still, as he died while a minor and unmarried, he had not attained full ceremonial competency.

This action was tried by an experienced Hindu Judge, doubtless well acquainted with the customs of his own country—Gujarát. We have, therefore, the less hesitation in accepting his findings as correct.

The High Court dismissed the appeal and affirmed the decision of the Subordinate Judge. The plaintiffs appealed to His Majesty in Council.

J. Jardine, K.C., *R. J. Parker*, and *S. R. Rana* for the appellants contended that the adoption made by Hiraba was invalid, firstly, as being forbidden by the custom of the caste to which the parties belonged, and on the evidence it was submitted that the appellants had proved the special custom they alleged prohibiting adoption. Important members of the caste had deposed that amongst them adoption did not take place and was not recognised. An adoption stated by the respondents to have taken place in the caste had been shown to have been treated

(1) (1894) 19 Bom. 331 at p. 337. (2) (1879) 6 Bom. 498.

as being invalid and had been set aside. Borradaile's Gujarát Caste Rules, Vol. II, page 418, was referred to. Secondly, the adoption was invalid on the ground that, as Lalubha survived his father and had at the time of his death in 1889 attained ceremonial competence, his mother had no right to adopt a son. Having succeeded as heir to her son, it was submitted, an adoption purporting to be made to her husband and under an implied authority from him was invalid, her power to adopt having become extinguished. Reference was made to *Bhoobem Moye Debia* v. *Ram Kishore Acharjee* (1); *Padmakumari Debi Chowdhrani* v. *Court of Wards* (2); *Thayammal* v. *Venkatarama* (3); *Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (4); *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (5); *Gavdappa* v. *Girimallappa* (6); *Awava* v. *Mahadgauda* (7); *Payapa Akkapa Patel* v. *Appanna* (8); *Venkappa* v. *Jivaji* (9); *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (10); *Patel Vandravan Jakisan* v. *Patel Manilal Chunilal* (11); *Ramchandra Bhagavan* v *Mulji Nanabhai* (12); and West and Bühler's Hindu Law, 3rd Edition, pages 985, 986. As to Lalubha having attained ceremonial competence, the case of *Rajendra Narain Lahooree* v. *Suroda Soondaree Debee*, (13) which was cited with approval in *Jamoona Dassya* v. *Bamesoondaree Dassya*, (14) was referred to as showing that ceremonial competence might be attained before actual majority by Hindu Law was reached.

The judgment of their Lordships was on the 12th May, 1903, delivered by—

LORD LINDLEY:—The appellants, who represent the original plaintiffs, are male descendants of one Bhojaji. He had a grandson named Hamjibhai, who died leaving a widow Hiraba and a son Lalubha surviving him. Lalubha died a minor and unmarried, but he was fifteen or sixteen years of age when he died.

(1) (1865) 10 Moore's I. A. 279 (303, 311).
(2) (1881) 8 I.A. 229 (244); 8 Cal. 302 (309).
(3) (1887) 14 I. A. 67; 10 Mad. 205.
(4) (1876) 4 I. A. 1; 1 Mad. 174
(5) (1892) 17 Bom. 164.
(6) (1894) 19 Bom. 331 (336, 337).
(7) (1895) 22 Bom. 416 (419).
(8) (1893) 23 Bom. 327 (330, 331).
(9) (1900) 25 Bom. 306 (309).
(10) (1896) 22 Bom. 551.
(11) (1890) 15 Bom. 565; (1891) 16 Bom. 470.
(12) (1896) 22 Bom. 558 (561).
(13) (1871) 15 W. R. 543.
(14) (1876) 3 I. A. 72; 1 Cal. 289.

1903.

VERABHAI AJUBHAI v. BAI HIRABA.

After his death Hiraba, the widow, adopted the son of a relative of her late husband. The validity of this adoption is contested by the appellants on two grounds, viz., (1) that adoption is not allowed by the custom of their caste; (2) that if it is, yet that as Lalubha survived his father and attained the age of ceremonial competence, there was no occasion or justification for any adoption.

In the Courts below the then plaintiffs attempted to impeach the validity of the adoption on the ground that it was not *bonâ fide*, but was attributable to corrupt motives and inducements. This ground of invalidity was, however, abandoned in the course of the argument before their Lordships, and no further notice of it will be taken.

All the parties concerned belong to the Hindu caste of Chudasama Gameti Garasias, and it is common ground that the ordinary Hindu Law applies to this caste unless excluded by special custom. The appellants allege that by the custom of the caste daughters cannot inherit and adoption is forbidden. The inability of daughters to inherit seems to have been established in the Courts below. Their Lordships have not to determine this matter and have not re-investigated it. The evidence adduced to show that adoption is forbidden by the custom of the caste consists entirely of what is said by a number of witnesses, who say that, if a man dies leaving a widow and no son, the widow cannot adopt a son and that no custom to adopt is recorded. But it appears that there are no written rules as to customs. Some instances to prove the statements made by the witnesses are adduced; but, as pointed out by the Subordinate Judge, they are all explicable on other grounds than the existence of the alleged custom. Moreover, one of the plaintiffs' principal witnesses (Vajesang) is discredited by his own inconsistent statements. Not one of the plaintiffs' witnesses goes so far as to say that he knows of any case or authority which shows that adoption is forbidden. On the other hand, the defendants adduce evidence showing that it is not forbidden, and they cite a case in point, viz., that of Ladhubha of Rojka. Their evidence is not very strong, and if the *onus* were on the defendants to prove a custom to adopt, their evidence might not suffice for the purpose.

Both the Subordinate Judge and the High Court have, however, properly held that it was for the plaintiffs to prove the custom on which they rely; and both Courts have come to the conclusion that the plaintiffs failed to prove it. Their Lordships, so far from differing from them, concur in their conclusion.

There remains the question whether, as Lalubha survived his father and lived to attain the age of fifteen or sixteen, the adoption was invalid. He died a minor and unmarried. Counsel for the appellants contended that Lalubha nevertheless ought to be held to have attained ceremonial competence, and that consequently the adoption was invalid. A great number of authorities bearing more or less on this subject were cited, but so far as they went they appear to their Lordships to be rather in favour of than against the validity of the adoption. Certainly no authority was cited which shows it to be invalid. Assuming that it would be invalid if it were shown that Lalubha had attained ceremonial competence, their Lordships are not in a position to decide whether he had or had not attained it. There does not appear to be any fixed age at which a Hindu child attains such competence. Nor is there any proof that Lalubha had attained such competence in fact, or that he ever acted or was treated as having attained it.

The Subordinate Judge, himself a learned Hindu, considered it to be clear that Lalubha had not attained such competence, as he died a minor and unmarried, and the High Court came to the same conclusion. Their Lordships are not prepared to say that he had attained such competence in the absence of evidence or authority to that effect. How the case would have stood if it had been proved that Lalubha had attained ceremonial competence may be open to controversy, but their Lordships are not under the necessity of pursuing the inquiry.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the appellants must pay the costs of the two respondents who appeared on the appeal.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Holman, Birdwood & Co.*

Solicitor for the respondents—*Mr. R. A. Biale.*