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The evidence against the accused showed that salt water was found in his house and that he admitted his intention to manufacture salt therefrom. But no salt was actually manufactured.

The District Magistrate was of opinion that the offence of manufacturing salt without a permit was not complete, and that the mere intention was not punishable under the Act.

The District Magistrate, therefore, referred the case to the High Court.

The reference came on for disposal before Parsons and Ranade, JJ.

There was no appearance for the Crown or for the accused.

PARSONS, J.:—The District Magistrate is right. The possession of salt water even with the intention of manufacturing salt therefrom is not made an offence under the Bombay Salt Act, 1890. We, therefore, reverse the conviction and order the fine to be refunded.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

LAKSHMIBAI AND ANOTHER (ORIGINAL, DEFENDANTS), APPELLANTS, *v.* SARASVATIBAI AND ANOTHER (ORIGINAL, PLAINTIFFS), RESPONDENTS.*

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Hindu law—Adoption by senior widow—Widow's capacity to adopt—Implied prohibition.

In the absence of express prohibition the husband's consent to an adoption by his widow is always to be implied.

The question of implied prohibition is one of legal inference from the facts found, and it is open to the Court to inquire into its correctness in second appeal.

Semble.—In the Bombay Presidency the widow's right to adopt is inherent and not merely delegated.

Semble.—In the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband.

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Sholápur with appellate

* Second Appeal, No. 689 of 1898.

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powers, confirming the decree of Ráo Sáheb M. Davlatrai, Subordinate Judge of Pandharpur.

Suit to set aside an adoption.

In April, 1894, one Yeknath Ramchandra died without leaving a son, but leaving two widows, *viz.*, Lakshmibai (defendant No. 1) and Sarasvatibai (plaintiff), and one daughter Mathurabai, the child of Sarasvatibai.

In September, 1894, the two widows partitioned Yeknath's estate, each taking a moiety.

In January, 1895, Lakshmibai adopted one Ganesh (defendant No. 2) whereupon Sarasvatibai and her daughter Mathurabai brought this suit to set aside the adoption, and for a declaration that Lakshmibai had only a life interest in the moiety of the property taken by her on partition, and that Ganesh (her alleged adopted son) had no interest in the property at all.

The plaintiffs contended that the adoption was invalid on the following grounds:—

(1) That Lakshmibai (defendant No. 1) had not only no authority from her husband to adopt, but had been forbidden to adopt.

(2) That she had refused to live with her husband, and as a fact had lived separate from him for twenty years.

(3) That the authority to adopt had been given to Sarasvatibai (the plaintiff) by Yeknath, the deceased husband.

(4) That at the time of the adoption, Lakshmibai was untonsured.

(5) That Ganesh, the adopted son, was older than Lakshmibai, who adopted him.

(6) That Lakshmibai had received half of the deceased husband's property on the express condition that she would not adopt.

The Subordinate Judge found that when partition of Yeknath's property was made between the two widows, it was not agreed that Lakshmibai No. 1 should not adopt; that the adoption was not invalid on the ground of Lakshmibai being untonsured; that Sarasvatibai (plaintiff No. 1) was not expressly authorized by

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Yeknath to adopt; that Lakshmibai was not expressly forbidden to adopt; that Ganesh was not older than Lakshmibai. He held, however, that the fact that Lakshmibai had been for a long time separate from her husband, and had been on unfriendly terms with him, prevented her from making a valid adoption. He, therefore, declared the adoption invalid.

On appeal by the defendants the Judge confirmed the decree, holding that a widow's power to adopt was not inherent, but delegated by her husband, and that under the circumstances of the present case no inference of such delegation could be made.

The defendants preferred a second appeal.

Setlur with *Balkrishna N. Bhajekar* for the appellants (defendants):—We contend that a widow's power to adopt is not a delegated power, at least in the Bombay Presidency. It is a privilege which she enjoys in right of her wifehood—of her being a *patni*. No doubt this power, like all other powers of hers, is subject to her paramount duty, namely, the duty of implicitly obeying the commands and wishes of her husband. It is this duty that prevents her from exercising this power without the permission of her husband during his lifetime—*Narayan* v. *Nana Manohar*[1]. But the Vyavahar Mayukha (Mandlik's Hindu Law, p. 57) distinctly lays down that even though alive, if he becomes infirm on account of age or otherwise and incapable of exercising his authority, she can herself adopt without waiting for his permission. After his death, unless he has expressed his wish, either in words or by conduct, that she shall not adopt, she has always the right to adopt. It has been held that a minor's widow can adopt—*Patel Vandravan* v. *Patel Manilal*[2]. Then, again, when there are several widows, the eldest alone can adopt, and, as pointed out in *Padajirav* v. *Ramrav*[3], the preference is based on the fact that the eldest widow alone is *patni* and as such is preferentially entitled to the privileges of that status.

[JENKINS, C. J.:—When a wife or widow adopts, to whom does she adopt—to herself or to her husband?]

(1) (1870) 7 Bom. H. C. Rep., A. C. J., 153. (2) (1890) 15 Bom., 565.
(3) (1888) 13 Bom., 160 at p. 166.

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We submit that the question in that form cannot arise, as the Hindu law regards the husband and wife as one individual. The identity of the wife with her husband is a leading principle, not only of the Mitákshara, but of the whole Hindu law—*Gojabai* v. *Shrimant Shahajirao* [1]. So when the husband adopts, he adopts for her, and when the wife or widow adopts, she adopts for him and for herself also. The circumstance that the husband has the authority at any time to deprive the wife permanently of the power to adopt, does not necessarily imply that the power is his and not hers. It is only an instance of the obedience which the wife owes to the husband according to Hindu law. This is shown clearly by the law as now settled relating to the power of a co-parcener's widow to adopt—*Vithoba* v. *Bapu*[2].

[JENKINS, C. J.:—What about the disqualified heir's widow; can she adopt?]

We submit she can. Such an adopted son, no doubt, would not get the share which the father would have got if he had not been labouring under a disqualification, but this disability of such adopted son is due to the Court's engrafting the principles of the law of property on the law of adoption which under Hindu law is a quasi-religious institution. The Full Bench decision in *Ramchandra* v. *Mulji Nanabhai*[3] on the question of the motive of a widow in making an adoption removes all doubts on this point, and we submit that so far as the Bombay Presidency is concerned, the power of the widow to adopt is her own and not a delegated power.

Even if the view we contend for be not upheld, still from the facts of the present case it is impossible to infer any implied prohibition. The Judge has relied on *Dnyanobx* v. *Radhabai* [4]. But the facts of that case were totally different.

[JENKINS, C. J.:—Is not the question of implied prohibition one of fact and the Judge's finding on it binding on us in second appeal?]

Implied prohibition is a mixed question of law and fact, and it is to be inferred from facts found, and this Court has the power to see whether the inference drawn is legal or otherwise. The plaintiffs

(1) (1892) 17 Bom., 114 at p. 122.
(2) (1890) 15 Bom., 110.
(3) (1896) 22 Bom., 558.
(4) P. J., 1894, p. 22.

have admitted, by giving us after the husband's death a half share in the property, that our status as *patni* was still existing, and that being so, we had a right to exercise the power of adoption incidental to that status.

Narayan G. Chandavarkar for the respondents (plaintiffs) :—We do not deny that in the Bombay Presidency the widow has always the power to adopt in the absence of the husband's prohibition, express or implied. In the present case the Judge has, after careful consideration of all the circumstances, found that there was an implied prohibition. Whether in a particular case there was implied prohibition or not, must be decided with reference to the circumstances of the case, and it is a question of fact. In the present case the detailed description given by the Judge of the scene that occurred at Ahmednagar at the time the defendant separated from her husband, can leave no doubt that she had given up all connection with her husband. Under these circumstances the inference drawn by the Judge, who is himself a Brâhmin, of implied prohibition is quite justifiable and it cannot now be disturbed. It would be unnatural to infer that the husband would have directed his widow, who separated from him in her very childhood, not long after the marriage, and who never cared to go back to him during the twenty-five years of his subsequent life, to adopt a son for himself while there was another widow of his who always lived with him and had borne him a daughter. These circumstances, we submit, clearly show that there was an implied prohibition by the husband.

Setlur, in reply :—To imply prohibition it is not enough to show that there was no affection between the husband and the wife. It must be shown that the husband applied his mind to the question, and indicated his desire that the wife should not adopt—*Ramji* v. *Ghamau*[1].

JENKINS, C. J.:—The plaintiffs have brought this suit to obtain a declaration that the adoption of Ganesh Yeknath Kowlagi (defendant No. 2) by Lakshmibai (defendant No. 1) is unauthorized and invalid. The adoption in question was made by defendant No. 1 as the elder co-widow of Yeknath Ramchandra Kowlagi; and it is impugned by the plaintiffs, who are the junior co-widow

(1) (1879) 6 Bom., 498 at p. 504.

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and her daughter, on the ground that defendant No. 1 was, by the implied prohibition of the deceased husband, disqualified from adopting. It is, so far as this present appeal goes, conceded that Lakshmibai, as the senior co-widow, could adopt in the absence of prohibition, and the only question to be determined is whether a prohibition is to be implied; for admittedly none is expressed. Both the lower Courts have found this in the affirmative, but it is contended before us on the part of the appellants, the elder co-widow and the boy whom she has purported to adopt, that this finding is based on inferences not justified by the facts, and that consequently it is open to us, even on second appeal, to enquire into its correctness. The respondents, on the other hand, maintain that this finding cannot be questioned in this Court, and in any case it is correct.

It appears to me that the determination of the question whether an incapacity on the part of the elder co-widow results from the facts found by the lower Court, under the circumstances of this case, involves matter of legal inference, and is in consequence properly open to us even on second appeal. It has been argued before us on the part of the appellant that a widow's power to adopt does not rest on any delegation from her deceased husband, but is her own inherent right, and it is obvious that the distinction may have more than an academic value. The commentaries, which prevail in this Presidency, seem to me strongly to favour the view thus contended for, but some at any rate of the more recent decisions in this Court contain expressions that point in the other direction. In the view I take of the present case, it is not necessary to decide the point, but the inclination of my opinion (though I reserve to myself the right to reconsider the matter hereafter, if necessary) is that in this Presidency the widow's right is inherent and not merely delegated.

Though at first sight it might appear that the husband's right to forbid, indicated that his authority, either express or implied, was necessary, still it may well be answered to this that his right to forbid and the widow's consequent inability to adopt are referable rather to the paramount duty incumbent on a Hindu wife to obey her husband's command, than to a delegation of

power from him. But even if it be that the widow's right is not inherent, still it must be conceded that at any rate the husband's consent is, in the absence of prohibition, always to be implied. In this case, as I have already said, there is no express prohibition, nor can I see in the circumstances anything to justify the conclusion that one should be implied. Let it be granted that the parties did not live together; still that alone cannot be sufficient, and I am wholly unable to see that the husband by any disposition of his property or in any other way has so acted that a prohibition proceeding from him can be implied. At the time of separation the elder widow was not deprived of the token of marriage, and her status and right to succeed to a share in her husband's property have been recognized by the compromise to which our attention has been called; nor has there been such unwifely conduct on her part as, according to the authority on which the respondents rely, would disqualify her from her right to adopt. I, therefore, hold that adoption made by her is valid. I think the decision under appeal is wrong: it must, therefore, be reversed and the suit dismissed with costs here and in the lower Courts.

CANDY, J.:—The question in this second appeal is whether, on the facts found by the lower Courts, the legal inference arises that there was an implied prohibition by the husband preventing his senior widow Lakshmibai from adopting a son.

This question is, in my opinion, one of law and not of fact. To borrow the language of the Privy Council in the recent case of *Lala Beni Ram et al.* v. *Kundan Lall et al.* (decided 11th March last)[1] with reference to the cognate question of acquiescence, implied prohibition is not a question of fact, but of legal inference from the facts found. It is unnecessary to recite at length those facts, which are fully set out by the learned Judge of the lower appellate Court, who fully believed the story told by the independent witness Mr. K. Patwardhan. That shows that in 1878 or 1879, when the wife was still almost a child, on the one side the wife and her father, and on the other side the husband and his mother, came to an agreement that for the future the wife

(1) (1899) 26 Ind. Ap., 58 at p. 65.

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should live with her father, and not with her husband, who should in no way be liable for her maintenance. It is unnecessary to discuss the question as to who was mainly responsible for this estrangement, but it is admitted that there never has been any charge made against the lady's moral character. In this respect, the case is entirely different from *Dnyanoba* v. *Radhabai* (1), quoted by the lower Courts. In that case, the husband repudiated his wife on account of her bad conduct, and she formed a *pat* marriage with other men. Under those circumstances this Court held that it was impossible to hold that there was any implied authority in the woman to adopt, and that express authority would, therefore, be necessary.

Here the learned Judge of the lower appellate Court has held that as a general rule in this Presidency where there is no express prohibition by the husband—and there was admittedly none in the present case—then there is implied authority, but that this general rule may be subject to exception under circumstances which show that there was implied prohibition. He held that in the present case there were such circumstances which showed not only that there was an implied prohibition, but also that an express authority was necessary. In my opinion such an inference was wholly unjustified by the facts. The story told by Mr. Patwardhan shows that while Lakshmibai absolutely refused to join her husband and mother-in-law in their pilgrimage to Paithan, asserting her great unhappiness with them, her father also refusing to let her go and asserting that she had been cruelly treated by her mother-in-law and pointing to a branding mark on her person, on the other hand the mother-in-law, not denying the branding, was willing that the girl should stay with her father, if he would be responsible in future for her maintenance, and if the girl would give up her ornaments. The mother-in-law even demanded the girl's *mangalsutra*, but this was not given up: only two ornaments were taken by the girl from her person and given to the mother-in-law, who then went away with her son, the latter having been a silent party in these proceedings. From that day Lakshmibai never saw her husband again. After some years—shortly after her husband's death—she went to his house

(1) P. J. for 1894, p. 22.

and claimed from the junior widow the half share in his property. Her position as his senior widow was eventually recognized, and she was given the property. Nothing was then said about any adoption; the idea did not apparently occur to the parties. Subsequently she adopted the second defendant.

On these facts, which are undisputed, it seems to me impossible to draw the inference that express authority was necessary, or that the husband impliedly prohibited adoption.

I have treated this case on the principle followed by the lower appellate Court, *viz.*, that it was for the party contesting the adoption to show that under the circumstances express authority from the husband was necessary, or that there was an implied prohibition on his part. It was contended by the learned pleader for appellants before us that the power of a widow to adopt is a right incidental to her position as widow, and does not depend upon any authority expressly or impliedly delegated to her by her husband, and that, therefore, in the absence of any express prohibition by the husband, the right remains unimpaired. In the view which I take of the case it is unnecessary to discuss the authorities quoted by the learned counsel. But I may allude to a recent case, not quoted by counsel, which is of the highest authority, and which may be used as supporting his contention. It is the case of *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* [1] decided by the Privy Council on the 11th March last. In that case the point was taken that the gift or reception of an only son in adoption, if not invalid in law, is so improper that in the absence of express authority given by a husband, his widow has no power to effect it. Their Lordships said: "The only authority for the argument of the appellants is the opinion of the late Sir Michael Westropp delivered in the case of *Lakshmappa* v. *Ramava*, which was decided in the High Court of Bombay in the year 1875 and a report of which was after a long delay * inserted in the 12th Bom. H. C. Rep., p. 364. That learned Judge

[1] See (1899) 26 Ind. App., 113; 22 Mad., 398.

* There is some mistake here. The decision in *Lakshmappa* v. *Ramava* was given and was reported in 1875. The previous decisions in *Mhalsabai* v. *Vithoba* (7 Bom. H. C. Rep., Appx., p. xxvi) given by Sausse, C. J., and Hebbert and Forbes, JJ., and which was overruled by the decision in *Lakshmappa* v. *Ramava*,

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held that, assuming that a man's only son may be given in adoption by himself, yet, if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. Now the power of a widow to *give or take* in adoption differs in different schools of Hindu law. Their Lordships are not retrying this Bombay decision. In Madras it is established that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule, and it seems to their Lordships most consistent with principle. The distinction taken by Westropp, C. J., appears to have been quite novel, and also at variance with a decision by his predecessor Sir Michael (? Matthew) Sausse. There may be some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordships' notice." In the present case no consent of sapindas was required: Yeknath was a separated Hindu. If, then, the principle to be followed in such a case in Bombay is that, in the absence of express prohibition by the husband, the widow's power to give or take in adoption is co-extensive with that of the husband, it is possible that some expressions in previous decisions of this Court regarding this important question will require modification.

I know of no peculiarity in the school of law which prevails in Bombay cutting down the widow's power to give or take in adoption. On the contrary, as Mr. Mayne says, (Hindu Law and Usage, § 118), in Western India the widow's power of adoption is even greater than in Southern India. As their Lordships in the Privy Council said in *Sri Raghunadha* v. *Sri Brozo Kishoro* (1), the law of Madras is something intermediate between the stricter law of Bengal and the wider law of Bombay.

In *Vithoba* v. *Bapu* (2) I had occasion to trace the development in the Bombay Presidency of the law regarding the right of a

was given in 1862 and was reported in the volume of 1870. So, too, the decision in *Bayabai* v. *Bala* (7 Bom. H.C. Rep., Appx., p. i.) in which Westropp, J., differing from Tucker and Warden, JJ., doubted whether, according to the Marátha School, a widow can adopt without the express authority of her husband given prior to his decease, was given in 1866 and was reported in the volume of 1870.

(1) 1876) 3 I A. 154, 191. (2) (1890) 15 Bom., 110 at pp. 118-125.

widow, not having the permission of her husband, to adopt a son. The tendency of later decisions has been in the direction of still further development. For instance, to take the question of a widow's motives in taking a son in adoption: the development of the law in force in this Presidency may be traced through the cases of *Patel Vandravan* v. *Patel Manilal* [1]; *Mahableshvar* v. *Durgabai* [2]; *Bhimawa* v. *Sangawa* [3]; while now we have the ruling of our Full Bench—*Ramchandra* v. *Mulji* [4]—that a widow in this Presidency having the power to adopt, and a religious benefit being caused to the deceased husband by the adoption, any discussion of her motives in making the adoption is irrelevant.

This disposes of the last shred of an objection which might possibly be raised to the adoption in the present case. I have no doubt that the plaintiff's claim to set aside the adoption should be dismissed, and I would do so, setting aside the decrees of the lower Courts with all costs on plaintiffs.

Decree reversed and suit dismissed.

(1) (1890) 15 Bom., 565.
(2) (1896) 22 Bom., 199.
(3) (1896) 22 Bom., 206
(4) (1896) 22 Bom., 558