the object of that enactment, requires us to restrict its operation in the manner contended for by the opponents in this case.

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BHAT VYANKATESH, *In re.*

Rule made absolute.

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APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

SHRIPAD DATTATRAYA KAMAT (ORIGINAL PLAINTIFF), APPELLANT *v.* VITHAL VASUDEOSHET PARKER AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

1925. *February* 23.

Hindu law—Adoption—Widow—Husband's brother.

Under Hindu law a widow can adopt her husband's brother.

THIS was an appeal against the decision of C. C. Dutt, District Judge at Ratnagiri, confirming the order passed by G. H. Salvi, Subordinate Judge of Deogad.

Suit to recover a sum of money.

The defendants' father had passed a mortgage in favour of one, Damaji Raghunath. After the death of Damaji his widow, Anandibai, adopted Dattatraya. On Dattatraya's death his widow adopted the plaintiff, brother of her deceased husband, Dattatraya.

The plaintiff on May 11, 1921, filed the present suit against the defendants to recover money on the mortgage by sale of the mortgaged property. The defendants contended *inter alia* that the plaintiff had no right to maintain the suit as he could not validly be adopted by Dattatraya's widow. The trial Court upheld the defendants' contention on the ground that the Dattaka Mimansa expressly forbade the adoption by a widow of her husband's brother and dismissed the suit. The District Judge summarily dismissed the plaintiff's appeal.

* Appeal No. 700 of 1923 from Appellate Decree.

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The plaintiff appealed to the High Court.

P. B. Shingne, for the appellant :—The opinion of Nanda Pandita, as expressed in his work Dattaka Mimansa, if not supported by texts in Smritis, should be taken as recommendatory. It has been so held in the following cases : *Bhagwan Singh* v. *Bhagwan Singh*[1] ; *Yamnava* v. *Laxman Bhimrao*[2] ; *Puttu Lal* v. *Parbati Kunwar*[3] ; and *Ramchandra* v. *Gopal*[4].

The prohibition to the adoption of a brother, therefore, laid down by Dattaka Mimansa, is, in the absence of any support from the Smriti texts, not absolute : see *Mallappa Parappa* v. *Gangava*[5].

Moreover, the theory that no one can be adopted whose mother the adopter could not legally have married is no longer accepted : see *Ragavendra Rau* v. *Jayaram Rau*[6] and *Vyas Chimanlal* v. *Vyas Ramchandra*[7].

The *ratio decidendi* of the decisions in *Gajanan Balkrishna* v. *Kashinath Narayan*[8] and *Mallappa Parappa* v. *Gangava*[9] places it beyond doubt that the adoption of the appellant is valid.

G. B. Chitale, for the respondents :—Dattaka Chandrika specifically prohibits the adoption of a brother. The prohibition should, therefore, be accepted as mandatory. It has been held that a brother cannot be adopted : see *Sriramulu* v. *Ramayya*[10], see also Dattaka Mimansa, S. II, pl. 30, S. V, pl. 17.

MACLEOD, C.J. :—This was a suit to recover money due on a mortgage by sale of the mortgaged property. The

(1) (1899) L. R. 26 I. A. 153.
(2) (1912) 36 Bom. 533 at p. 535.
(3) (1915) L. R. 42 I. A. 155.
(4) (1908) 32 Bom. 619
(5) (1918) 43 Bom. 209
(6) (1897) 20 Mad. 283.
(7) (1899) 24 Bom. 473.
(8) (1915) 39 Bom. 410.
(9) (1918) 43 Bom. 209.
(10) (1881) 3 Mad. 15.

mortgage was admittedly passed to one Damaji Raghunath. After Damaji's death his widow, Anandibai, adopted Dattatraya. On Dattatraya's death his widow adopted the plaintiff, the brother of Dattatraya. The defendants disputed the fact of both adoptions, and also contended that, Dattatraya being plaintiff's brother, plaintiff could not validly be adopted by Dattatraya's widow. The adoption was held proved but the plaintiff's suit was dismissed on the ground that the "brother" was expressly mentioned as a person who could not be adopted in the Dattaka Mimansa, section V, clauses 16 to 19. The appeal to the District Judge was summarily dismissed for the same reason. It is unfortunate that neither learned Judges in the Courts below considered the series of Bombay authorities on this question.

In *Mallappa Parappa* v. *Gangava*[1] it was held that the adoption of the father's first cousin was not invalid under Hindu law. Mr. Justice Shah at p. 216 said :—

"There is nothing in the Mitakshara or the Vyavahara Mayukha expressly bearing on this point. I mean there is no express prohibition to adopt the father's first or distant cousin. As to the opinion expressed by Nanda Pandita in the Dattaka Mimansa, section V, clause 17 relating to the paternal uncle, I am by no means clear that the word used there for paternal uncle, viz., pitrivya (पितृव्य) means anything more than father's brother (पितुर्भ्राता); but assuming that it includes an elderly relation in the position of the first cousin of the father, it is clear that the opinions expressed by Nanda Pandita in clauses 16 to 20 have been held in a series of decisions of this Court ending with *Gajanan Balkrishna* v. *Kashinath Narayan*[2] to be recommendatory and not mandatory except as to the three specific cases of daughter's son, sister's son, and mother's sister's son as regards the three regenerate classes."

In *Yamnava* v. *Laxman Bhimrao*[3] Sir Narayan Chandavarkar expressed his conclusion as follows :—

"Now, in the present case we have the light thrown upon the placita referred to by other placita in the Dattaka Mimansa. In section 2, placita 107

[1] (1918) 43 Bom. 209. [2] (1915) 39 Bom. 410 at p. 419.

[3] (1912) 36 Bom. 533.

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and 108, Nanda Pandita, after discussing among other questions the question who is eligible for adoption, clinches the matter by citing the authority of *Cakala* who says: 'Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son, the offspring of a Sapinda relation particularly; or also next to him, one born in the same general family; if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son and the son of the mother's sister.' And then in placitum 108, Nanda Pandita draws his conclusion: 'By this it is clearly established that the expression 'sister's son' is illustrative of the daughter's son, and mother's sister's son, and this is proper, for prohibited connection is common to all three.' 'Prohibited connection' here means what is called '*viruddha sambandha*'. Nanda Pandita in clear terms tells us that the words 'sister's son' stand for the sister's son and also for the daughter's son and mother's sister's son and the implication is that they do not extend to any other son. Where a general rule is prescribed and an exception is made to it, the latter must be confined to the cases specified as falling within the exception....If that is so, then it is a reasonable inference to draw from the whole of the Dattaka Mimansa that Nanda Pandita intended that anybody could be adopted, so long as he was not within the cases specified as prohibited. So long as, that is, he was not the sister's son, or the daughter's son, or the mother's sister's son."

This decision was followed in *Ramkrishna* v. *Chimnaji*[1] and *Gajanan Balkrishna* v. *Kashinath Narayan*[2]. And if we were to hold in the face of those decisions that the adoption of the husband's brother was invalid, we should be going contrary to the opinion expressed by so many of the Judges of this Court in the cases we have referred to.

But the question appears to have been conclusively settled by the decision of the Privy Council in *Puttu Lal* v. *Parbati Kunwar*[3] where it was held that a Hindu widow making an adoption by virtue of her deceased husband's authority could validly adopt her brother's son. Reference was made to the decision of Mr. Justice Banerji in *Jai Singh Pal Singh* v. *Bijai Pal Singh*[4], where it was pointed out that on this question as to whether a widow can lawfully adopt to

[1] (1913) 15 Bom. L. R. 824.
[2] (1915) 39 Bom. 410.
[3] (1915) L. R. 42 I. A. 155.
[4] (1904) 27 All. 417 at p. 433.

her deceased husband a son of her own brother, Nanda Pandita in the Dattaka Mimansa extended to adoption by females the rule of Hindu law that no one can be adopted as a son whose mother the adopter could not legally have married, an extension which was not based upon the authority of any of the Smritis or institutes of sages, and their Lordships said (p. 161) :—

"As Banerji J. further pointed out in the same case, the extension of the rule by Nanda Pandita is not supported by any text of the Dattaka Chandrika, or by any of the texts of the sages Saunaka and Sakala from which most of the rules of the Dattaka Mimansa were deduced. It has not been shown to their Lordships that the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least, so far as the adoptions by widows to their deceased husbands are concerned."

We allow the appeal and pass a decree for the plaintiff for Rs. 350, and costs throughout, and interest on Rs. 200 at six per cent. In default of paying the decretal amount within six months of the proceedings reaching the lower Court, the plaintiff to be at liberty to apply for a final decree for sale.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

KATHU JAIRAM GUJAR (ORIGINAL DEFENDANT NO. 1), APPELLANT *v.* VISHWANATH GANESH JAVADEKAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 2), RESPONDENTS*.

1925.

March 3.

Pleader—Contract for services—Inam in cash and part of property in suit agreed to be given to pleader for religious purposes—Public policy—Agreement void—Part of single consideration unlawful—Indian Contract Act (IX of 1872), sections 23 and 24.

* First Appeal No. 336 of 1923.