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for which it was necessary to make provision under Order XX, rule 12. I agree, therefore, with the learned Chief Justice that it ought not to be held that the present suit was barred by *res judicata*.

[The rest of the judgment is not material for the purposes of this report]

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Baker.

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December 18.

SUNDRABAI KOM HANMANTRAO KULKARNI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* HANMANT BIN GURNATH KULKARNI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu Law—Adoption—Deshastha Smarta Brahmins in Dharwar District—Daughter's son—Adoption valid by custom.

Amongst Deshastha Smarta Brahmins in Dharwar District the adoption of a daughter's son is valid by custom.

APPEAL against the decision of V. R. Gutikar, Joint First Class Subordinate Judge at Dharwar.

The facts material for the purposes of this report appear in the judgment of His Lordship, the Chief Justice.

Nilkanth Atmaram, for the appellants.

R. A. Jahagirdar, for the respondents.

BEAUMONT, C. J.:—This is an appeal from a decree of the Joint First Class Subordinate Judge at Dharwar, and the question which arises on the appeal is as to the validity amongst Deshastha Smarta Brahmins in the Dharwar District of an adoption of a daughter's son. The question arises in this way. One Hanmant was the owner of certain watan lands, and he died leaving a widow Sundrabai, who is defendant No. 1. In 1914 Sundrabai adopted one

*First Appeal No. 3 of 1927.

Narayan, who was her daughter's son. Narayan died in 1917, and on November 16, 1923, Sundrabai adopted or purported to adopt defendant No. 2, who in point of fact is Narayan's father. Now, if the original adoption of Narayan was valid, it is not disputed that Sundrabai, as the mother of the last watandar, would not be entitled to adopt again in respect of watan lands, and therefore the adoption of defendant No. 2 would be invalid, and it is again not disputed that the watan lands in that event would belong to plaintiffs Nos. 1 and 2 as the heirs of the last holder. Plaintiffs Nos. 1 and 2 sue defendants Nos. 1 and 2 and the other defendants, who are tenants of the land, for recovery of the land, their contention being that the adoption of Narayan was valid. In the Court below the fact of the adoption was disputed. The learned Judge held the fact proved, and that finding has not been challenged on appeal. The only point which has been argued is whether the adoption of Narayan was invalid as being the adoption of a daughter's son. The issue raised by the learned Judge on that point was "Is the adoption valid as being that of a daughter's son by custom among the Deshastha Smarta Brahmins ?"

The general law on the subject is stated in Sir Dinshah Mulla's Hindu Law, 7th Edition, at p. 529, in these terms :—

"Subject to the following rules, any person who is a Hindu, may be taken or given in adoption :—

(1) * * * * *

(2) * * * * *

(3) he must not be a boy whose mother the adopting father could not have legally married ; but this rule has been restricted in recent cases to the daughter's son, sister's son, and mother's sister's son. This prohibition, however, does not apply to Sudras. Even as to the three upper classes, it has been held that an adoption, though prohibited under this rule, may be valid, if sanctioned by custom ;"

So that under the general Hindu law adoption of a daughter's son is invalid, and the only question is whether there is a custom applicable to Deshastha Smarta Brahmins in the

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Dharwar District making such an adoption valid. No doubt, as Mr. Nilkanth says, when a party relies on a custom as establishing an exception to the general law, the burden is upon him to establish the custom. And, as was said by the Privy Council in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*,[1] the custom proved must be both ancient and invariable, and the evidence by which it is established must be clear and unambiguous.

The evidence called by the plaintiffs in this case consisted, first of all, of decisions in suits determined in this Presidency, the judgments in which are, I think, relevant under section 42 of the Indian Evidence Act, though under that section they are not conclusive; and the evidence of witnesses who spoke to specific cases of adoption of daughter's sons with which the witnesses were familiar.

The previous cases referred to were, first of all, Civil Suit No. 846 of 1878, in which the Subordinate Judge at Haveri in the Dharwar District held the custom of adopting a daughter's son to be proved among the Deshastha Brahmins. The judgment of the learned Judge shows that he correctly appreciated the principles of evidence applicable to the case. There was no appeal from that decision. The next case is Civil Suit No. 53 of 1903. There the Subordinate Judge of Bagalkot held the custom proved amongst Deshastha Brahmins, and that decree was upheld by the District Judge of Bijapur. Then there was Suit No. 347 of 1907, in which the District Judge of Dharwar upheld the custom among Deshastha Brahmins. The last suit was Suit No. 423 of 1913, in which the Subordinate Judge at Dharwar upheld the custom. There was an appeal from his decision to the High Court, and one of the grounds of the appeal was that the learned Judge was wrong in upholding this custom. The High Court in a very short judgment dismissed the appeal on the ground that the only point argued before them

[1] (1872) 14 Moo. I. A. 570 at p. 585.

was whether the suit was barred by limitation, and they held it was not barred. The judgment seems to show that the question as to the validity of this custom was not argued, but as the appeal was dismissed, the decision of the High Court is in favour of the validity of this custom, although the point was not expressly argued and was probably not considered. These decisions are, I think, entitled to great weight as being decisions of Judges in the particular neighbourhood. Mr. Nilkanth maintains that the decisions are not entitled to any weight in this case, because the parties in those suits were in fact Deshastha Vaishnava Brahmins and not Smartas; he points out that the issue raised in this case is only whether the custom prevails amongst Deshastha Smarta Brahmins, and says that it might have been possible for him to call evidence that the customs of Smartas and Vaishnavas differed had an issue been framed to cover Deshastha Brahmins generally. But the answer to that is that he did call in the Court below evidence to which I will refer presently, and the plaintiffs very wisely cross-examined his witnesses as to whether there was any distinction between Smarta and Vaishnava Brahmins in respect of customs of adoption, and all witnesses said that they were not aware of any such distinction. I think, therefore, that we must take the decisions as being what in terms they are, decisions dealing with Deshastha Brahmins generally, and covering both Vaishnavas and Smartas.

The next class of evidence called by the plaintiffs consisted of witnesses who spoke to specific instances of adoption of daughter's sons. I can deal with them shortly, because they are criticised in detail by the learned Judge in his judgment. There were 12 witnesses, 6 of whom were Smartas, 4 Vaishnavas, and 2 Kanvas. Most of them spoke to their own adoptions, though I think two spoke to the adoption of a father, and one to the adoption of a younger brother's son. Two of the adoptions spoken to go back to 1866 and 1870

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respectively; the others are mostly between the years 1901 and 1908. When witnesses are speaking to their own adoptions, they cannot, in the nature of things, go very far back. Mr. Nilkanth challenges that evidence mainly on the ground that the witnesses do not produce the deeds of adoption, and he says their evidence ought not to be believed. But as Mr. Jahagirdar points out, the witnesses were not called in support of their own titles; they were merely called to give evidence of the fact of adoption, and it is not, therefore, very remarkable that they did not produce their deeds. The learned Judge says that they were all subjected to severe cross-examination, and he accepts their evidence, and I see no reason why we should not do the same. The learned Judge attached some importance to Exhibit 122, which is a document by which a Swami recommended to some of his followers a boy who had recently been adopted, and according to the evidence of Exhibit 120, the adoption in that case was of a daughter's son, but I think, myself, that that evidence is not entitled to great weight, because the document Exhibit 122 does not disclose the relationship of the person adopted to the person adopting, and there is nothing, therefore, to show that the Swami ever had his mind directed to the relationship between the parties.

The defendant called certain evidence, 8 or 9 witnesses, who said that in their opinion this custom did not prevail among the Deshastha Smarta Brahmins. Their opinions, according to their evidence, seem to me really to be based on the fact that they themselves have never come across any instances in which this custom has been acted upon. The evidence, therefore, is of a purely negative character, and not sufficient to justify the Court in disregarding the positive evidence for the plaintiffs. In my opinion, the learned Judge was right in holding this custom proved.

[The rest of the judgment is not material for the purposes of this report.]

BAKER, J. :—There is a large body of evidence in this case both oral and documentary on which the learned Subordinate Judge has come to the conclusion that the alleged custom is established. Although the matter does not appear ever to have been directly argued and dealt with by the High Court, it is to be observed that in the appeal from the judgment, Exhibit 162, p. 144, which dealt with the existence of this custom, the validity of the custom was attacked in the grounds of appeal, but that point was not argued in the High Court, presumably because it was thought not possible to maintain it. That will appear in the High Court judgment, Exhibit 161, p. 143, of the record. The four judgments in four suits which have been put in are based on a large number of instances, and there are a large number of instances of the existence of this custom in the present suit. The learned advocate for the appellants has attacked the evidence of these witnesses on the ground that they have not produced their own adoption deeds, and that in most cases the adopting mother, the widow, was still alive, and therefore the adoptions could not be attacked. These persons were not called to prove their title to particular property, and therefore they were not summoned to produce their deeds of adoption, and most of these adoptions are prior to the decision in *Doddawa* v. *Yellawa*,[1] before which it was understood to be the law that the validity of an adoption must be attacked within 6 years of its taking place. Apart from this, it does not appear likely that these persons, who had no interest to serve, by giving false evidence, would set up a false story that they had been adopted by their own mother's father if it were not the case. It is difficult of course to give evidence of adoptions that took place a long time ago, but the cases referred to in the judgments were a good many years before, and there seems to be no doubt that this custom does exist in the southern Maratha country, instances having been brought

[1] (1921) 46 Bom. 776.

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from various places in Dharwar, Mysore, Bijapur and the adjacent parts of Bellary, in which the daughter's son has been adopted amongst Deshastha Brahmins.

As to the argument that no instances amongst Vaishnavas should be regarded as of any use for proving a custom where the parties are Smartas, as they are in the present case, it has been admitted by all the witnesses for both sides that Smartas and Deshasthas freely intermarry, and although there may be external differences, there is no reason to suppose that there is any fundamental difference between them as to the main tenets of Hindu law.

In these circumstances, I am of opinion that the custom alleged is established, and therefore the appeal must fail.

Appeal dismissed.

J. G. R.

ORIGINAL CRIMINAL.

Before Mr. Justice Wadia.

1932
January 29.

EMPEROR *v.* RAMRAO MANGESH BURDE AND OTHERS.*

Criminal Procedure Code (Act V of 1898), Secs. 233, 234, 235—Joinder of charges—Offences forming part of the same transaction—Forgery—Cheating—Conspiracy—Indian Penal Code (Act XLV of 1860), Secs. 467, 468, 471, 420, 109, 120B—Indian Evidence Act (I of 1872), Sec. 73—Specimen signatures and writings made by accused while in police custody—Comparison of such writings by expert—Admissibility in evidence.

Where more persons than one are charged with conspiring together to forge and use as genuine certain letters and cheques, with the object of cheating a bank by inducing it to cash those cheques, they can all be tried at one trial for all the offences together even though there may be more than three offences alleged to have been committed within a period of twelve months. This is so because the charges against the accused are based on a series of acts alleged to have been committed by them with one continuous purpose and design, and the acts are so connected together in point of time that they really form one transaction.

*Case No. 11, First Criminal Sessions, 1932.