APPELLATE JURISDICTION (*a*)

Special Appeal No. 26 *of* 1865.

ARUNDÁDI AMMÁL and another.....*Special Appellants.*

KUPPAMMÁL.....*Special Respondent.*

A widow cannot make a valid adoption without either the authority of her husband or the assent of his sapindas.

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THIS was a special appeal against the decree of E. W. Bird, the Civil Judge of Tanjore, in Regular Appeal No. 294 of 1864, reversing the decree of the Principal Sadr Amin's Court of Tanjore in Original Suit No. 31 of 1861.

The Advocate General and *Branson* for the special appellants, the defendants.

Rajagopala Charlu for the special respondent, the plaintiff.

The facts of the case sufficiently appear from the following

JUDGMENT :—In this suit the result of the findings upon the issues sent down is that the form of an adoption was gone through by the 1st defendant, but that such adoption was without either the authority of her late husband, or the assent of any of his sapindas. It was necessary therefore to contend on behalf of the 1st defendant that the adoption was nevertheless valid. In support of this contention we were, of course, referred to the judgment of this Court reported in II M. H. C. Reps. 206. We do not intend to cast any doubt upon that decision ; on the contrary we quite concur in it, but we are not therefore disposed to carry the law any further, unless there is clear authority for so doing, and we think that there is not express authority for so doing, and further that the pervading principle of the Hindu law, which in that decision was elaborated and carried to its proper, if not unavoidable, result, does not admit of any further extension. In that case there had been the

(*a*) Present :—Collett and Ellis, J. J.

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assent of a majority of the husband's sapindas to the adoption on this behalf.

It was, it would seem, at one period, the practice among Hindus, that on the death of a man without male issue one of his sapindas should (to use the Hebrew phrase) "raise up seed unto him," and the son thus begotten upon the widow was treated as the son of the deceased husband. When this and other similar practices (for it was not only thus that a son might lawfully be procreated on behalf of a man) fell into disuse, the want of a son came to be supplied by the husband and wife concurring in the fiction of filiation by adoption. This fiction was extended by allowing the widow to adopt under authority left her by her husband for that purpose, and it was an obvious and justifiable extension of the fiction derived from the ancient practices that the adoption by the widow should also be valid if made with the assent of her husband's sapindas. This is what the case referred to decided, and the decision was, we conceive, as consistent with principle, as it was, we believe, in conformity with the actual usage of Hindus in this Presidency. But to go one step further and to suppose that a widow may without either authority or assent make a valid adoption, would seem to be as much inconsistent with the fiction which is the foundation of an adoption, as an immaculate and spontaneous conception of a son by the widow would be impossible in point of fact. There are, no doubt, in the course of the judgment cited one or two dicta which might be called in aid of the contention in the present case, but those dicta were not necessary for the decision of the case, nor are they much more than suggestive of doubts.

The passage from *Vasishta* so often quoted in the other case is relied upon by *Nanda Pandita* in *Dattaca Mimamsa*, Section 1, Art. 15 *et seq.*, in support of his contention that in *receiving* in adoption a widow cannot act without her husband's authority. In its unimpaired integrity the passage is an authority for the position that a woman cannot receive in adoption without her husband's assent; and if, as very probably was the case, by 'woman' *Vasishta* meant 'wife,' then it still is very sound law; or if by woman

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it was intended to include a widow, then certainly there was nothing in it to justify *Nanda Pandita's* contention that a widow could not after her husband's death act upon an authority given by him before his death. The same passage from *Vasishta* is cited by *Devanda Bhatta* in the *Dattaca Chandrica*, Section 1, Art. 31, in discussing the *giving* of a son in adoption. He then adds to what *Vasishta* had said by saying that the *giving* may, under certain circumstances, be without the husband's assent. Certainly this addition is not justified by what *Vasishta* said, though probably the mere authority of *Devanda Bhatta* might be now quite sufficient to maintain the position he has chosen to lay down. But he is expressly treating of the *giving* in adoption and not of the *receiving* in adoption; the passage from *Vasishta* relates to both *receiving* and *giving*, and therefore it was properly cited by *Nanda Pandita* when treating of the former, and by *Devanda Bhatta* when treating of the latter; but even if we did not consider the addition made by *Devanda Bhatta* unjustified by any thing in the passage itself, we should have great difficulty in inferring that *Devanda Bhatta* would have thought it right to make the same addition to the passage when treating of *receiving* in adoption. He certainly has not done so expressly, and we think that there is not that similarity between giving and receiving in adoption that would justify our inferring that the same capacity would be required or sufficient for the purposes of the one as the other. The fiction on which adoption is founded is concerned only with the parties receiving in adoption; it is a feigned procreation of a legitimate son; the child must therefore be such an one as might lawfully have been procreated by its adoptive father, and the feigned procreation upon its adoptive mother must be by, or on behalf of him, in a manner in which actual procreation might lawfully have taken place, that is to say either by himself, or by his authority, or by his sapindas on his behalf. Those who give the child in adoption are doing a mere act which, as far as they are concerned, is untinged by the fiction. Thus the son adopted, at one time at least, need not have been given by any one; he might be one who

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gave himself, one abandoned by his parents, or one bought by his adoptive father. Neither are the consequences, either religious or temporal, the same to the givers as to the receivers ; the primary purpose or consequence of an adoption is the religious benefit to the receivers ; the gift of a junior son is not attended by any religious consequence to the givers. Hence the restriction that an only son may not be given, for the adoptive parents are not to acquire the religious benefit of a son at the cost of the loss of the same benefit to the natural parents. Again the temporal consequences are very different, the adoption in the family of the receivers changes the whole course of what would otherwise be the descent of the family property ; in the family of the givers, the effect of the gift is merely to enlarge the shares of the remaining sons. We have therefore come to the conclusion that the position that a widow may make a valid adoption without either the authority of her husband or the assent of his sapindas is neither supported by clear authority nor consistent with principle.

The result, upon the facts as found by the Lower Appellate Court, is that the special appeal must be dismissed and with costs.

Appeal dismissed.