1868. Aug. 26.

Regular Appeal No. 17 *of* 1867.

RAKHMA'BA'I .....*Appellant.*
RA'DHA'BA'I .....*Respondent.*

Adoption—Hindú Law—Widow's Power to adopt—Elder Widow's Power to adopt without the Consent of a Younger Widow.

In the Maráṭha Country a Hindú widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him if the act is done by her in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive.

An elder Hindú widow has the power to adopt a son to her deceased husband without the consent of a younger widow.

THIS was an appeal from the decision of C. F. H. Shaw, Judge of the District of Dhárwár, in Original Suit No. 28 of 1864.

The facts appear fully in the judgment of the Court.

The appeal was argued before COUCH, C. J., and NEWTON and WARDEN, JJ., on the 4th, 11th, and 18th of December 1867, and on the 8th and 15th of January 1868.

White (with him *Vishvanáth Náráyan Mandlik* and *Ganpatráv Bháskar*) for the appellant.

Pigot and *Green* (with them *Dhirajlál Mathurádás*) for the respondent.

The following authorities were cited in the course of the arguments:—

For the appellant—*Rajah Haimun Chull Sing* v. *Koomer Gunsheam Sing* (*a*), Bom. S. D. Select Cases, 24, 30; *Virbudru Hurrybudru* v. *Bace Ranee and others* (*b*); *Sree Brijbhookunjee Muharaj* v. *Sree Gokoolootsaojee Muharaj* (*c*); *Huebut Rav Mankur* v. *Govind Rav Bulwunt Rav Mankur* (*d*); *Collector of Madura* v. *Srimatu Muttu Sethupati*[3] (*e*); *Papammal* v. *Ramaswámi Chetti* (*f*); *Rámán Ammál* v. *Subhan Annavi* (*g*); *Maharajah Juggunáth Sahaie* v. *Mukhun Koonwur* (*h*); S. A. No. 369 of 1865, decided September 28th, 1865;

(*a*) 2 Knapp, P. C. C. 203, 221. (*b*) Morris, Selected Decisions, Pt. II., p. 1.
(*c*) 1 Borr. 181, 183, 201. (*d*) 2 Borr. 75.
(*e*) 2 Mad. H. C. Rep. 206. (*f*) *Ibid.* 365. (*g*) *Ibid.* 99.
(*h*) 3 Calc. W. Rep., Civ. R. 29.

1868.
RAKHMA'BA'I v. RA'DHA'BA'I.

S. A. No. 165 of 1865, decided August 28th, 1865; R. A. No. 15 of 1866, decided September 4th, 1867; S. A. No. 323 of 1867, decided September 11th, 1867; S. A. No. 507 of 1863, decided October 13th, 1864; S. A. No. 153 decided September 1st, 1831; *Rungama* v. *Atchama* (*i*); *Mussumut Golab Koonwur* v. *Collector of Benares* (*j*); *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (*k*); *Dhurm Das Pandey* v. *Mussamut Shama Soondri* (*l*); *Soondur Koomaree Debreea* v. *Gudahur Pershad Tewarree* (*m*); *Bamundas Mukerjea* v. *Mussamut Tarinee* (*n*); *Abajee Dinkur* v. *Gungadhur W. Gosavee* (*o*); 1 Morley's Dig. 15, 26, 27, 38, 39; Vyavahára Mayúkha, c. IV., Sec. v., pp. 16, 17, 18; Dattaka Mímánsá, Sec. v., pp. 40-42; Steel, Hindú Castes, p. 32 *et passim*.

For the respondent—Miták., Ch. I., Sec. xi., p. 9; 2 Borr. 93; 2 Strange, Hindú Law, 90, 91, 93, 96, 105, 115; *Arundadi Ammal* v. *Kuppamal* (*p*); S. A. No. 369 of 1865, 1 Borr. 190.

Cur. adv. vult.

Aug. 26. COUCH, C.J.:—The appellant and respondent in this appeal are the widows of Murárav Desái of Nipáṇi, the adopted son of Shidojiráv, late Chief of that place and Sar Lashkar of the Peshvá, who died childless on the 23rd of June 1864. The appellant was the first married, but both she and the respondent were wives by *lagna*, and are of the same caste as their late husband, namely, Shudra. The suit was brought by the respondent, Rádhábái, who claimed to be joint heir with the appellant of the estate of the deceased, and alleged that the appellant had set up a claim to the entire estate on the ground that she was the eldest widow and that she had sold ornaments to the value of Rs. 82,000. Rakhmábái, by way of defence, stated that she was the eldest widow, and, according to Hindú Law, she had authority to adopt, and on the 21st of December 1864 she adopted Ráv Sáheb, the grandson of

(*i*) 4 Moo. Ind. App. 1.
(*j*) *Ibid.* 246. (*k*) *Ibid.* 414. (*l*) 3 Moo. Ind. App. 242.
(*m*) 7 Moo. Ind. App. 64. (*n*) *Ibid.* 184. (*o*) 3 Morris S. D. Rep. 420.
(*p*) 3 Mad. H. C. Rep. 283.

Vithalráv, the brother of her husband's father, Shidojiráv; and he, therefore, was the lawful heir to the entire estate. The plaint was filed on the 19th of December 1864, and before the date of the alleged adoption. Rakhmábái further stated in her defence that she had not in her possession the property as stated in the plaint, and that the claim was needlessly overestimated. The suit was tried by the Judge of the District Court of Dhárwár, who decided that, unless it could be shown that Rádhábái had forfeited her right to share in her deceased husband's estate by misconduct, or had been deprived of it by the act of her late husband in a manner legally binding on her, she was entitled to a half-share of his estate; that the eldest widow had a right to adopt, and failing her the other widows according to priority of marriage; that a son duly adopted at once inherited the property of the deceased; that Rakhmábái must be considered the elder widow; and that Ráv Sáheb, the grandson of Vithalráv, had not been properly adopted. The District Judge finds distinctly that the adoption was not authorised by Muráráv, but the part of his judgment which follows this finding appears to us to be somewhat vague, and we have a difficulty in determining upon what precise ground he came to the conclusion that the adoption, which he does not appear to doubt was made on the 24th of December 1864, was invalid. He then found that the property left by Muráráv was as correctly stated in the plaint as was possible under the circumstances; that the claim was properly valued; and that Rádhábái was entitled to the share sued for. Against this decree Rakhmábái has appealed.

The first question which we have to determine is whether Ráv Sáheb was in fact adopted by Rakhmábái. Upon this question there is a considerable body of evidence. [His Lordship here reviewed the evidence upon which the Court came to the conclusion that the adoption did in fact take place, and proceeded.]

It being then, in our opinion, proved that there was an adoption by Rakhmábái, it becomes necessary to consider whether it was valid, either by reason of its having been

1868.
RAKHMA'BA'I v. RA'DHA'BA'I.

made by the authority of the deceased Murárav, or by virtue of the power which Rakhmábái had by the Hindú Law, by which these parties were governed. Upon the first of these questions there are eight witnesses, Nos. 177, 188, 190, 191, 194, 196, 197, and 199, who depose that the deceased directed Rakhmábái to make the adoption; and, if they are to be believed, there was an express authority. These witnesses also all depose to the fact of the adoption, but, although they may be speaking the truth as to that, it does not follow that they are to be believed with regard to the other matter. There are circumstances in the case which it is necessary to consider in determining this question. The delay in making the adoption is accounted for by Appáji Sádáshiv, No. 177, by saying that the next month after the death of Murárav was Ashád, in which the ceremony could not be performed; the next month Rakhmábái fell sick; the next month was Bhádrapad, in which also the ceremony was forbidden; and the next, in consequence of the Shukrásta, was also unfavorable. Krishnabhat Govindbhat, No. 191, gives the same reasons. It may be that the delay is satisfactorily accounted for: and certainly, if there had been no other circumstances, it could not have been of any weight against the direct testimony. But neither of the exhibits Nos. 126 and 189 (the former being the instrument of gift by Murárav to Rakhmábái of his son in adoption, and the latter the instrument of acceptance by her) although they allude to the deceased, make any mention of the directions to Rakhmábái to adopt, and 189 contains the expression "of my own accord."

Considering the particularity of narrative which is generally found in Native documents, the above omission, if there was a direction to adopt, is remarkable. The inference, that the direction was not mentioned because it had not been given, is supported by the facts that in the written statement of Rakhmábái there is no allusion to any authority to adopt having been given to her by the deceased; nor is there, in her letter to the Judge, exhibit No. 120, or in the statement made by her *vakil* on the 3rd of January 1865, or

in the statement, exhibit 20, made by her in October 1865, and verified. The first mention of the authority to adopt appears to have been made at the hearing on the 11th of December 1866, when the witnesses were examined. In the issues laid down by the Court on the 24th of October 1866 there is no reference to it. It appears to us that the case of a direction to adopt was an afterthought, and the statements about it were made by the witnesses with the view of strengthening their evidence as to the fact of adoption. It may be also remarked that there is not satisfactory evidence of the state of Murárav during his last illness. It does not appear that his death was so sudden, or that he was in such a state, that he might not himself have made the adoption; or, if that could not have been done, that having about him, as he undoubtedly had, persons capable of preparing it, he could not have executed a written instrument giving Rakhmábái authority to adopt. Nor does it seem probable that if he had intended an adoption to be made, he would have left the younger widow without any provision. These circumstances have led us, notwithstanding the direct testimony, to the conclusion that there was no direction by the deceased to adopt, and it becomes necessary to consider whether the adoption without it was a valid one.

The Mitákshará is silent on the point in question; and it is necessary for us to resort to the Mayúkha, which in the part of India to which these parties belonged must be regarded as the next authority. In the Vyavahára Mayúkha, Ch. IV., Sec. v., Art. 17, it is said—"Therefore, if there must be an order from the husband, it is for a married woman only, as above shown; but for a widow, even without it, [adoption] may be made, with the permission of her father, or, on failure of him, of the relations [Nyáti] under this precept: 'let a female be taken care of, by her father while a child, by her husband when married, and by her sons in her old age. If none of these exist, let her other relations [Nyáti] take care of her. A woman is never fit for independence.' This has been declared by Yájnavalkya only with reference to difference of age, and the circum-

1868.
RAKHMA'BA'I v. RA'DHA'BA'I.

stances of a woman, being under the power of her husband. In case of his being dead, or [unable] from old age, or other [disqualification], or from helplessness, then [she is] indeed under the power of her sons or other relatives." And Art. 18 is "By Kátyáyana also it has been said—'If a woman, without the orders of her father, husband, or son, should perform obsequies, such obsequies are of doubtful validity.' What is here said of the orders of her father, husband, &c. relates only to the difference of age. *Obsequies* here means rites performed for the other world; wherefore, at whatever age a married woman may [require to] receive the command of her husband, that very command is in the case of a widow not required, since the command of any other person, not here mentioned, is nowhere declared requisite. Therefore, the right of adoption, even without the order of her [late] husband, does pertain to a widow."

Sir W. H. Macnaghten (Principles of Hindú Law, 2nd ed., 68, note) says—"According to the Vyavahára Koustabha and Mayúkha, authorities of the highest repute among the Mahrattas, which in this respect follow the doctrine of the Dattaka Chandriká, the sanction of the husband is not requisite; but in this respect the authorities above cited differ from most others." The text of the Dattaka Chandriká thus alluded to appears to be the following section, I., Arts. 31, 32:—

"But by a woman the gift may be made with her husband's sanction if he be alive; or even without it, if he be dead, have emigrated, or entered a religious order.—Accordingly Vasishtha: 'Let not a woman either give or receive a son unless with the assent of her husband:" Art 31. "Now, if there be no prohibition even there is assent: on account of the maxim, 'The intention of another, not prohibited, is sanctioned.' Yájnavalkya suggests the independency of the woman: 'He whom his father or mother gives is a son given.' Also, in another place: 'deserted by his father and mother, or either of them:" Art 32. This work, according to Colebrooke, is considered one of the sources of the Hindú

Law on this side of India, and the above passages may assist us in ascertaining the meaning of the Vyavahára Mayúkha.

In *Sree Brijbhookunjee Maharaj* v. *Sree Gookoolootsaojee Maharaj*, reported in 1 Borr. 181 (ed. 1825), which appears to have been a case of great importance, an adoption by a widow made without the express consent of her relations, which had been confirmed by the Emperor of Delhi and the local authorities of Súrat, was held to be valid. In answers to questions put by the provincial court of appeal to their Law Officers, the Shástris said that "a widow, notwithstanding she has no written permission from her husband, may, if she be desirous of adopting a son, do so legally, by obtaining the sanction of the caste, and informing the ruling authorities. This law is written in the Mayúkha, and corresponds with the custom of the country;"—that "it is laid down in the Mayúkha that a widow ought, in adopting a son, to obtain consent of the caste;"—that "it is written in the Mayúkha that it is necessary that the person to be adopted be of a virtuous disposition, learned, beloved by him who adopts him, and also be the nearest of kin to him." The provincial court of appeal decreed that, although the whole of the conditions prescribed by the Vedas and Shástra for the adoption of a son had not been satisfied in that case, yet, as many of the omissions appeared to have been involuntary and unavoidable, and as it had not been made to appear how an adoption, completed with the ceremonies read and performed as laid down in the Vedas and Shástra, and afterwards confirmed by the local authorities of the Nawáb and English Chief at Súrat, and finally ratified by the Emperor of Delhi, can be set aside, the decree of the Zillá Judge was affirmed. The Ṣadr Adálat having laid the opinions of the Pandits of the Zillá Court and those delivered by the Pandits of the Provincial Court separately before their Law Officer, demanded his opinion of their being according to the Shástra or not. He stated his opinion that they were perfectly correct and according to the Shástra, and the decisions of the lower courts were affirmed. Another case on this point is *Huebut Rao Mankur* v. *Govindrao Bulwunt Rao Mankur*,

1868.
RAKHMA'BA'I v. RA'DHA'BA'I.

2 Borr. 75, where an adoption by a widow of the son of her husband's brother was held to be valid without proof of the consent of any of her relations except the father of the person adopted. The answer of the Shástris of the Ṣadr Adálat was: "A widow can by her husband's injunction adopt a son, but not without it; but the prohibition is meant against her taking any other person when the son of her husband's brother exists, whom she may adopt even without such injunction; for from the words (of Manu, Ch. IX., v. 182, quoted by the Zillá Shástris) found in the Mitákshará, Book II., leaf 55, page 1, line 3, it appears that, even without the injunction of her husband, a widow may adopt the son either of her husband's eldest or youngest brother." Subjoined to the report of this case are the officially recorded opinions of nine Shástris of Puṇá, some of them, it is said, being considered to rank among the highest living authorities on Hindú Law on this side of India. The question put to them was: "Can a woman adopt a son after her husband's death without his order for the purpose, given on his death-bed?" One merely said that authors differed on the point, some saying that a widow might, and others that she might not; all the remaining eight said that she might, and only one referred to the consent of relations, saying, "It may be done, and it is the best way, by the consent of the father and other relations within the seventh degree, and of the caste. It is also done without any order or consent at all."

In 2 Borr. 446 (*q*) there is another case in which the Shástris quoted from the Dattak Darpan (or Mirror of Adoption): "a husband's commands to adopt are required for a married woman; but for a widow to adopt without such command, the permission of her father, or if he be not alive, then of the caste (Nyáti), must be obtained." The Shástris have here construed Nyáti as caste, and not relations.

In the Selected Decisions of the Ṣadr Diváṇi Adálat, Bombay, reported by Mr. Morris, there is a case, Part II., page 1 (*r*), in which where a Hindú woman of the Nágar Bráhman

(*q*) *Thukoo Baee Bhide* v. *Ruma Baee Bhide.*

(*r*) *Virbudru Hurrybudru* v. *Baee Runee.*

1838.
RAKHMA'BA'I v. RA'DHA'BA'I.

caste had adopted a son, it was held that it was not essential that she should have obtained the authority of her husband to make the adoption valid. In this case no authority from Government for the adoption had been obtained. The Shástri of the Court in answer to the question: "Can a widow of the Nágar Bráhman caste adopt a son without having obtained the permission of her husband?" replied: "If the husband forbade the adoption of a son, the widow could not adopt; but if he did not probibit it, it must be understood that he assented to it. For it is commanded in the Shástr that a person who has no male issue must adopt a son; and if the widow adopted under such circumstances, in the way required by the Shástr, her act would be valid. Some law-books deny this right to the widow, but the greater number allow it. To give publicity to the adoption, it should be made known to the ruler, though if this was not done the adoption would not be invalid, if otherwise in accordance with the Shástr." And this view was adopted by a full Court, reversing the decree of the Zillá Judge.

In the case of *Abajee Dinkar* v. *Gungadhur Vasdeo Gosavee*, in the same Court, reported in 3 Morris S. D. Rep. 420, an adoption by a widow without the consent of her husband was upheld; and one of the Judges said that the restriction in the answers of the Shástris in *Huebut rao Mankur* v. *Govindrao Mankur* of the power of the widow to adopt, without her husband's injunction, to the son of her husband's eldest or younger brother, appeared to him a very strained deduction from any part of the chapter of Manu upon which it was said to be founded, and was, moreover, opposed to the later *dicta* of the Shástris, who agreed that, even if it was not strictly according to the Shástris, the Mayúkha and books of the Maráthá Pandits had established it. Another case on this subject is *Bhasker Buchajee* v. *Narro Rugoonath*, Bombay Selected Cases 25. There a widow, after having repeatedly applied to her husband's brother and his relations to give her a son to adopt, and been refused, adopted the appellant. The Collector of Puná, before whom the suit was first instituted, threw out the claim, on the ground that

1868.
RAKHMA'BA'I v. RA'DHA'BA'I.

the adoption took place without the consent of the relations, which decree was affirmed on appeal by the Ṣadr Diváṇi Adálat. On a motion for a revision of this decree, Mr. Sutherland, the Sitting Judge before whom it was heard, recorded his opinion, that "it has not been established by sufficient proof that the custom in the Dakhaṇ prevents an adopted son, such as the present, from inheriting in as full and complete a manner as he could do in any other part of India under Hindú law or custom;" and recommended a revision of the judgment. The Court, after referring to its Law Officers, finally reversed the former decree, and decreed in favour of the appellant. This was in 1826, and previously to the decision of the last two cases, which were decided in 1847 and 1856. More recently, in Special Appeal No. 369 of 1865, an adoption by a widow with the consent of one of the kinsmen was held by two of the Judges of this court (Mr. Justice Newton and Mr. Justice Janárdhan) to be valid.

Since the present case was argued before us, we have received a copy of the judgment of the Judicial Committee of the Privy Council in the case of *The Collector of Madura* v. *Muttu Ramalinga Satthupathy* (*s*), on appeal from the High Court at Madras, which was delivered on the 21st of May last. In that case their Lordships say they have excluded from their consideration what is the positive law of Dravada, the peculiarly Maraṭhá treatises (the Mayúkha and Kaustabha), and the judgment does not determine what is the law in this part of India. But the following passage in their judgment applies forcibly to the opinions of the Shástris which we have quoted:—"The evidence that the doctrine for which the respondents contend has been sanctioned by usage in the south of India, consists partly of the opinions of Pandits and partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed, and long directed to be taken by the courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindú Law in various parts of British

(*s*) 10 Calc. W. R., P. C. 17.

India. Upon such materials the earlier works of European writers on the Hindú law, and the earlier decisions of our courts, were mainly founded. The opinion of a Pandit which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country." Their Lordships held that there was enough of positive authority to warrant the proposition that according to the law prevalent in the Dravaḍa country, and particularly in that part of it wherein the property in dispute was situate, a Hindú widow, not having her husband's permission, might, if duly authorised by his kindred, adopt a son for him, and that there should be such evidence of the assent of kinsmen as sufficed to show that the act was done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive.

Upon the review which we have made of the authorities applicable in this part of India, we are of opinion that in the Maráṭhá country, wherein the property in question in this suit is situate, a Hindú widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and *bónâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case the boy adopted is the person who, on the death of the widows, would succeed to the property if then living. The assent of one of the kinsmen, the father of the boy, was given, and there is no evidence to warrant the supposition that the act was done either capriciously or from a corrupt motive. If the elder of two widows has power to adopt without the consent of the other, we think the adoption must be held to be valid.

It remains, therefore, to consider the authorities on this point. In the case in Strange's Hindú Law, Appx. 83, where the answer is, that if the widows cannot agree to adopt, the estate is divisible between them, the question

1868.
RAKHMA'BA'I
v.
RA'DHA'BA'I.

whether the elder could adopt without the consent of the other was not put. The same remark applies to the case at p. 90. The Chief Justice of the Supreme Court here, on the 22nd of June 1861, after consideration, and obtaining answers from the Shástris of the Ṣadr Adálat and at Puṇá, held "that if there be more than one widow, each of them is entitled to an equal share of the property," following the Mayúkha, Ch. IV., Sec. IV., Art. 19, and this was also held by the High Court in the case *In the Goods of Dadoo Mania*, Ind. Jur. October 25th, 1862, p. 59. It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish. But, on the other hand, if the adoption is regarded as the performance of a reigious duty and a meritorious act, to which the assent of the husband is to be implied wherever he has not forbidden it, it would seem that the younger widow is bound to give her consent, being entitled to a due provision for her maintenance; and if she refuses, the elder widow may adopt without it.

In West and Bühler's Digest of Hindú Law of Inheritance; 89, there is the answer of a Shástri, dated Puná, March 31st, 1852, that where a deceased man has left two widows, the right of adoption belongs to the elder, quoting as authorities Mit.; Vyav., p. 137, l, 5; and Saṁskára Kaustubha.

In Steele's Summary of the Law and Custom of Hindú Castes in the Dakhaṇ, published by the authority of the Government of Bombay in 1827, it is said, p. 37, para. 14: "Of several wives being of the Bráhman caste, the one first married enjoys the precedence; if they are of different castes the Bráhmani is considered the elder. The elder wife sits by her husband at marriages and other religious ceremonies (see Yadn. C. Dig. 2, 405), is head of the family, and entitled to adopt a son on her husband's death." And at page 54: "If there be two widows, they ought to adopt by mutual consent; otherwise the elder should have the preference in point of right." The precedence of the eldest wife in acts of religion is supported by the texts in the Digest, Book IV., Ch. I., Sec. 2, xlviii, xlix., l.; and it would seem that the

opinion of the Pandits given in Steele is supported by authority. Considering the act of adoption as the performance of a religious duty, we think these authorities are sufficient to justify us in holding that Rakhmábái, the elder of the two widows, had the right to adopt. In the judgment of the Privy Council their Lordships say that "in the case of an undivided family, if there be no father of the husband living, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." The interest of the younger of two widows cannot, we think, be regarded in the same light as that of a member of an undivided family, and probably their Lordships would not consider the remark applicable in cases where, by the law which governs them, no consent of kinsmen is required.

We must not omit to notice the judgment of Mr. Justice Westropp in Regular Appeal No. 17 of 1863, which was cited by the respondent's counsel. That judgment was not a written one, and we have no report of it, but we understand that the opinion given by the learned Judge was that a widow had no power to adopt a son to her husband where he had expressly, or by his conduct impliedly, forbidden her to do so. In this we quite concur, and the Judicial Committee have so held in the judgment we have referred to. There is no question of prohibition by the husband in this case.

The result of our opinion is, that the decree of the District Judge in favour of the plaintiff is wrong, and must be reversed; but, as she is entitled to maintenance, before a final decree can be passed, it must be referred to the lower court, to inquire and determine what, having regard to the rank of the deceased and the property left by him, is a proper sum to be allowed for her maintenance, and the lower court will return its finding to this court; and we think that each party should pay her own Costs of this appeal, and of the proceedings in the lower courts.

Decree reversed and suit remanded.