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Sept. 1, 3, 10.

MHA'LSA'BA'I, widow.......................................*Appellant.*
VITHOBA' KHANDA'PPA' GULVE,........................*Respondent.*

Adoption—Shúdrás—Only Son—Mother's power to give her son in adoption —Vibhut Vidá—*Custom—Certificate—Discretion in requiring Security—Act XXVII. of* 1860, *Sec.* 5.

Under Act XXVII. of 1860, Sec. 5, the Court granting a certificate has a discretion to determine whether or not it will require security to be given by the person to whom it grants it. The High Court will not, on appeal, review or interfere with the exercise of such discretion by the lower courts.

An adoption amongst Shúdrás is not necessarily invalid because the person adopted is an only son and is married, and has been given in adoption by his mother after her husband's death and without his authority. *

There is nothing in the books of authority amongst Hindús to show that a Vaishya who has undergone the ceremony of *vibhut vidá* is incapable of adopting a son. If a custom to that effect exists, it should be proved by satisfactory evidence.

THIS was an appeal to the High Court from an order made by Mr. Tucker, Judge of the District of Thánú, granting a certificate under Act XXVII. of 1860 to one Viṭhobá Khanḍáppá Gulve, enabling him to get in the debts and outstandings due to Khanḍáppá Moráppá Gulve, deceased.

Mhálsábái, the appellant, was the widow of Khanḍáppá Moráppá Gulve. From the evidence taken by the lower court, it appeared that after the death of Khanḍáppá Moráppá Gulve the respondent had been in the possession and management of the property of the deceased for four or five years—as he alleged, as owner, but as the appellant alleged, as agent and manager for her.

The respondent contended that he had been adopted by the deceased in his lifetime, and relied in proof of the adoption on a will alleged to have been made by the deceased subsequent to the adoption. When granting the certificate, the Judge did not require any security from the respondent under Sec. 5 of the Act

The appellant alleged that Viṭhobá was the only son of his natural parents, and had been given in adoption by his mother after his father's death, and without his previous sanction.

The appeal was argued before SAUSSE, C.J., and HEBBERT and FORBES, JJ.

Westropp (with him *Dhirajlál Mathurádás*), for the appellant :— The Judge below has refused to take security from the certificate-

* See *Raje Vyankatrav Nimbalkar* v. *Jayavantrav bin Malharrav Ranadive*, 4 Bom. H. C. Rep., A. C. J. 191. See also *Balvantrav Bhaskar* v. *Bayabai et al.*, 6 Bom. H. C. Rep., A. C. J. 85, and *Subbaluvammal* v. *Ammakutti Ammal*, 2 Mad. H. C. Rep. 129.

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holder, as he ought to have done, in analogy with the practice in the case of the grant of letters of administration, and under the provisions of Sec. 5 of the Act (XXVII. of 1860). [HEBBERT, J.:—Has this court any jurisdiction to interfere with the discretion of the court below on the question of security?] [SAUSSE, C.J.:—Have you any authority, to show that there is an appeal in cases where the court below has refused to take security?] Under the general powers of the court given by Reg. II. of 1827, Sec. 5, cl. 2 and 3, it could even now order the security to be taken, and Act XXVII. of 1860 must be considered as requiring that security should be taken. The word "may" occurring in statutes is often construed as "shall." Certainly it was the duty of the Judge to take security when persons other than the petitioner were entitled to, or interested in the property. If the Judge below has exercised an unwise discretion, this court, as a court of extraordinary and superintending jurisdiction, will review it. It ought especially to have been required in this case, for if the adoption is not proved the petitioner has no right whatever to the certificate he has obtained. The evidence of the adoption is quite untrustworthy, and the existence of a will rather tends to disprove it; but even granting that the *factum* of adoption did take place, the adoption is invalid: (I.) Because Vithobá was the only son of his parents, was married at the time of his adoption, and was given in adoption by his mother after the death of her husband and without his authority: Vyavahára Mayukha, Chap. IV., Sec. V., plac. 9, 36. [SAUSSE, C. J.:—Sir Thomas Strange, in the case of *The Rajah of Tanjore*, decided that the adoption of an only son was good.] But the boy must be given by his natural father, and must be given as a *dvyamushyayana*, as a son to both his natural and adoptive father. However, admitting for the sake of argument that the adoption of an only son is merely reprehensible, and not invalid, when given by the father, there is not any authority *to show that the widow may give in adoption an only* son. [SAUSSE, C.J.:—In case the father and mother of an only son were dead, and the son consented, could he not be adopted?] No. The father has a right to religious services from his son. The father can, however, consent to share them, but his consent is absolutely necessary for that purpose: Strange H. L. 85, 86. There is no authority for holding that an *only* son can give himself* or can be given in adoption by the mother without the father's consent, though she may so give a younger son under some *circumstances*. (II.) This adoption is invalid, because Khandáppá, at the time of the adoption,

* See 2 Mad. H. C. Rep. 129 and 6 Bom. H. C. Rep., O. C. J. 85, reported since the case in the text was decided.

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had undergone the ceremony of *vibhut vidá*.* This would appear to be similar in its effects, amongst the people of the caste to which the parties here belong,† to the ceremony of *sanyás* amongst Hindús of a higher caste. After undergoing that ceremony Khandáppá became *civiliter mortuus*, and no act of his could divest his widow, Mhálsábái, of her estate. That the ceremony was performed before the adoption, was proved by Mhálsábái herself.

White and *Reid* (with them *Vishnu Moreshvar*), for the respondent:—The Court has no power to interfere with the discretion of the District Judge as to the taking of security. The Act (XXVII. of 1860) itself gives no appeal in such a case, and by implication takes away any right to appeal that might have been conferred by previous enactments. There is ample evidence of the adoption having taken place, and the objections to its validity are groundless. The rule of Hindú law which prohibits the adoption of an only son is merely directory, and does not invalidate the adoption of such a son actually completed: I. Strange H. L. 87; Dig. H. L., Bk. V., Ch. IV., Sec. 8, pl. cclxxii. and cclxxiii. The maxim *quod fieri non debuit factum valet* is followed in such cases. The text of Vasishtha in the last-quoted passage apparently applies as well to the taking in adoption as to the gift, but it would seem to be rather in the nature of a religious injunction than a legal prohibition: see Miták., Ch. I., Sec. XI., pl. 11, and notes by Colebrooke; and Vyavahára Mayúkha, Ch. IV., Sec. 5, pl. 2. The restriction, if it exists, does not affect Shúdrás, and when the adopted son is, as here, the son of the sister of the adopter: Vyavahára Mayúkha, Ch. IV., Sec. 5, pl. 10, 11, and 36; Steele, pp. 51, 184 (1st ed.). Then it is said that there was no one empowered to give Vithobá in adoption, his father being dead, and the mother not having the power; but that is not so: the mother is fully competant, without the sanction of her husband, to give in adoption after the death of her husband: Vyavahára Mayúkha, Ch. IV., Sec. 5, pl. 17 and 18; Macn. P. H. L., Ch. VI. The adoption of a youth like Vithobá would, however, seem to be rather a case of self-giving, like the *arrogatio* of the Civil Law and the *Svadat* of the ancient Hindú Shástra, still partially surviving in modern customary law. Chandeshvar and other Hindú jurists seem to have taken this view of such cases: Digest (Jagannáthji), Bk. V., Ch. IV., Sec. VIII. See too

* *Vibhut* (विभूत), ashes applied to the forehead by the Lingáyat Shaivas. *Vidá* (विडा)—*pán supári*, &c. made up into a small parcel ready to be eaten.

† In the lower court the case was argued on the footing of the parties being Shúdrás, but Mr. Westropp in argument stated that his instructions were that they were really Vaishyás or Lingáyats. See Steele's Hindú Caste, p. 105 (edn. of 1827).

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the cases collected in I. Morley's Digest (Adoption), pl. 62-64, 69. As to Viṭhobá's age, twenty-five is the limit as to the age of the adoption in the great majority of Maráṭhá castes, and even the few castes which require that the boy should be given before the *munj* ceremony or before marriage allow the adoption of a near relation's son after that period : Steele, Appx. A.

With reference to the second objection, that the adopter, Khanḍáppá, was incapacitated from adopting by reason of his having undergone the ceremony of *vibhut vidá*, there is no allusion even to the existence of such a ceremony to be found in the books on Hindú law. It would require precise and reliable evidence to establish a custom giving to this ceremony the effects contended for, but the testimony adduced before the court below on this point, and on the fact of such a ceremony having been undergone by Khanḍáppá, is vague and unreliable.

Westropp, in reply :—Assuming that with the father's sanction an only son may be adopted amongst Shúdrás, we contend that the authorities do not show that an only son can be given, or give himself, in adoption without his father's consent. The reason is a religious one. The natural father is entitled at the hands of his only son to plenary funeral rites, and of this he cannot be deprived without his consent, and *ex post facto*, by his son or widow, though he may doubtless in his lifetime agree to share the future right to those ceremonies with another person if he be so minded. There may be a moral duty on the part of the widow of a childless husband to adopt a son, but the duty of the widow or wife of a man having an only son is, for the same reason, wholly opposed to the giving of such a son in adoption. The father's consent cannot be implied to an act so fatal to his spiritual interest.

At the close of the argument the court directed the following question to be put to the Shástri :—

Question.—"To A'zam (exalted) Vináyak Lakshmaṇ, Shástri of the High Court, the question of the said court is as follows :—There being an only son of the Shúdrá class, (and) his father being dead, could he, after he has come of age, become by consent of his mother the adopted son of his maternal uncle? Let the answer hereto be written below this, with the passages in support thereof from the books (of authority). 3rd September, *Anno Christi* 1862."

Answer.—"In Mayúkha, a Smṛiti (recollection) of (the sage) Vasishṭha is thus (given) :—'One, meaning perhaps an only son, is neither to be given nor received?' The meaning of this Smṛiti is written by the author of Mitákshará thus : —'The prohibition regarding the giving of one (only) son applies only to the giver. Nevertheless this meaning of the author of the Mitákshará is not consistent with what is the plain meaning of the Smṛiti passage. Therefore, the giving of one (only) son seems to be prohibited.

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Now among Shúdrás, if a mother gives her son, of age, to her brother to be adopted, there is no objection. So it is stated in Mayúkha. May this be known to the Khudávans (divine personages).

Authorities.—"Mayúkha, p. 107, line 7:—'One (only) son should neither be given or received, (because) he saves persons.' (The Shástri's meaning:) One son should not be given and received, because he saves his foreborn (*i.e.*, predeceased). [That is, by performing their funeral rites, the *Shráddhs* at Gaya, &c., he conveys his foreborn upwards (to heaven)].

"Mitákshará Vyavâradhaya, leaf 54, side 1, line 3:—'From the use of poverty (it follows that) in prosperity (the son) should not be given.' This prohibition is the giver's (*i.e.*, applies to him). Meaning: Because it is said that in adverse time the son should be given, in the absence of adverse time (the son) should not be given. This prohibition applies to the giver. So the prohibition that one (only) son should not be given (also) applies to the giver alone.

"Mayúkha, p. 109, line 3:—"He who is married, and even he who has a child (or children), can become an adopted son.' Meaning: He who is married, or even he who has a son, (can) become an adopted son. (From this there seems to be no objection to a grown-up son being an adopted son.)

"Mayúkha, page 102, line 4:—'Let the mother or father give.' Meaning: Either the mother or father should give the son to be adopted.

"Mayúkha, page 105, line 8:—'A daughter's son and a sister's son should be given to a Shúdrá only.' Meaning: A daughter's son and a sister's son should be given to a Shúdrá.

VINA'YAK LAKSHMAN SHA'STRI.

4th September, Anno Christi 1862.

Sept. 10. SAUSSE, C.J., delivered the judgment of the court:—

Our judgment in this case is formed without reference to the opinion of the Shástri. This was an application for a certificate of administration under Act XXVII. of 1860. The certificate under the Act gives merely a power to collect the debts of a deceased person, and make over the money, when collected, to the person entitled to them as owner. This Act gives the court a discretion in taking security from the person to whom the certificate is granted, and so did Act XIX. of 1841; and the whole course of legislation on this subject proceeds on the assumption that the court below is to exercise its discretion; and we do not think we should be justified in interfering with that discretion.

The appellant Mhálsábái is the widow of Khandáppá. Khandáppá died as a separated brother without natural issue. *Primá facie* Mhálsábái would be the legal heir, and be entitled to the certificate to collect debts. But Vithobá interfered with her *primá facie* title. He said that he was brought up from his infancy by the deceased; that his marriage was performed by him at his own ex-

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pense; that he was living at his house up to the time of his death, and that shortly before his death he was adopted by him. The adoption was made in a public manner; the respondent continued after his uncle's death to manage the estate; and he was treated as his adopted son by Mhálsábái herself and by others. There is no doubt in our mind as to the fact of the adoption. Two objections to it were, however, raised. They are legal objections such as, if well founded, would make the adoption invalid, and leave the whole property to the widow. The first objection is that Khandáppá was not in a legal position to adopt a son, because he had undergone the ceremony of *vibhut vidá* some days before his death, the effect of which, like that of *sanyás*, was said to be that the person undergoing it abandoned worldly matters. We have great doubt as to whether this ceremony took place at all; or that its effects proved to be similar to those of *sanyás*. No authority has been shown as to the existence of this ceremony having been recognised by works on Hindú law; and if there is no written law on the subject, the only mode of proving its effects is by evidence of custom or usage having the force of law. It is clear, upon the evidence before us, that there is no custom or generally established usage proved as to the effect of this ceremony, even if we were of opinion that it took place. As there is no written law, and as no custom or usage has been proved, effect cannot be given to the objection. We, therefore, think that we must treat Khandáppá as having been at perfect liberty to adopt a son.

The second objection to the legality of the adoption is that there can be no adoption without the consent of the father; that a widow cannot give her son in adoption without authority, express or implied, from her husband. That proposition is at variance with the books on Hindú law. In I. Strange 82 it is thus laid down: "Of her own mere authority, the mother cannot, in general, give her son to be adopted, any more than she can adopt, her husband living; unless he have emigrated, or entered into a religious order. But his assent may be presumed; and after his death she does not want it, a widow having this power, and a wife also, if the distress be urgent." But this power does not exist only in distress. I. Strange 81: "Nor is it necessary that it should proceed, as commonly supposed, from any public calamity, such as actual famine, provided it be sufficiently urgent. And though there should be no distress to justify the gift, it will be good notwithstanding: not being vitiated by the breach of a prohibition which regards the giver only, not affecting the thing done." And I. Strange 95: "There must be gift and acceptance, manifested by some overt act. Beyond this,

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legally speaking, it does not appear that anything is absolutely necessary." In the Mitákshará, to which Sir Thomas Strange refers, it is said that if the son is given by the mother in the father's absence, or in case of his death, it is a good adoption; and, with reference to distress the same authority says that the prohibition regards the giver only. It is very clear, upon the evidence, that Viṭhobá's mother was present when the ceremony took place; and her consent must, therefore, be presumed. There is then the giving in adoption of a son after the death of his natural father and with the consent of his mother. That he is an only son can make no difference, for it is plain that the father can give an only son in adoption; and the mother, after the father's death, can exercise his power of giving in adoption, and if he have not previously in his lifetime manifested dissent, his assent will be implied: Dattaka Chandriká, Sec. I., pl. 31, 42; Colebrooke's note to Miták., Ch. I., Sec. II., pl. 9; Vyavahára Mayúkha, Ch. IV., Sec. V., pl. 17. And no authority has been cited to show that she has not this power in the case of an only son. In the Vyavahára Mayúkha, Chap. IV., Sec. V., pl. 19, it is said that "a married man, who has even had a son born, may become an adopted son." The authorities appear, upon the case argued, to bear out the view of the Judge below.*

The widow however, unfortunately, is not concluded by the opinion given with reference to the evidence adduced upon the application for the certificate. She may institute a regular Civil suit. Upon the whole, we think that the certificate was properly granted, and the Judge's discretion with regard to the taking of security was properly exercised. The adoption took place in the presence of Mhálsábái, who could then have made any objection she had to it. As she made no objection at the time, and allowed Viṭhobá to manage the estate for six years, during which it was notorious that he went by his adoptive father's name, the opposition made by her, when Viṭhobá applied for a certificate, was clearly vexatious. The certificate would not have deprived her of her rights (if any), as it was a certificate merely to collect debts. She must be ordered to pay the costs of this proceeding.

Order accordingly.

* See *Vishram Baboorow* v. *Narainrow Kasee*, 4 Morris' S. D. A. Rep. 26.— ED.