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Aug. 29.

Suit No. 612 *of* 1868.

VINA'YAK RAGHUNA'TH.....*Plaintiff.*

THE GREAT INDIAN PENINSULA RAILWAY COMPANY.....*Defendants.*

Adoption—Son adopted after Death by Widow of Deceased—Legal Representative—Child—Damages—Measure of Damages—Act XIII. of 1855.

A son adopted by the widow of a deceased Hindú (in respect of whose estate no probate, letters of administration, or certificate of heirship has been granted) is the legal representative of the deceased, and, as such, is entitled to maintain a suit under Act XIII. of 1855 for the benefit of the persons, if any, entitled to compensation for the injury occasioned to them by the death of the deceased against those whose negligence caused that death.

Such an adopted son is not, however, entitled to have any portion of the damages awarded in the suit allotted to him as a child of the deceased.

Quære—Whether a son, if adopted by the deceased in his lifetime, would be entitled to damages under that Act?

Measure of damages in actions brought under Act XIII. of 1855.

THE facts of this case appear from the judgment of the court.

The suit was tried in a Division Court by WESTROPP, J.

The Honorable A. R. Scoble (Acting Advocate General) and *McCulloch* for the plaintiff.

Marriott and *Ferguson* for the defendants.

Cur. adv. vult.

29th August 1870. WESTROPP, C. J.:—Raghunáth Náráyaṇ, chief Diváṇ or minister of His Highness the Rájá of Dhár, was travelling in a second-class carriage, part of a train, upon the defendants' railway, early on the morning of the 26th of June 1867. The train then met with an accident at that part of the line where there is a bridge over the Sūki *nallá*, between Bhosáwal and Nimbora. The Diváṇ was, by that accident, so much injured, that he died upon the 28th of the same month. The evidence contained in the reports of the accident, made by the defendants' own officers, was so strong, that the learned counsel for the defendants, at an early stage of the trial, admitted that they could not deny negligence on the part of their clients. They also admitted

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that the Diván was a passenger in the train, and that his death was occasioned by the accident. These admissions confined the case to the fourth and fifth issues. The fourth issue is whether the plaintiff is entitled to recover any damages for his own benefit in respect of the grievances alleged in the plaint, and, if so, how much. The fifth issue is whether the plaintiff is entitled to recover any damages on behalf of the widow and daughter of Raghunáth Náráyan in respect of the grievances in the plaint mentioned, and, if so, how much?

The deceased Diván, Raghunáth Náráyan, had a son who predeceased him by only eight days. The deceased left surviving him a widow, named Jánkibái, aged about thirty-six years at the time of her husband's death, and four daughters, three of whom were married before his death; the fourth, named Mathrá or Mathurá, is about five or six years of age, and still unmarried. Jánkibái has, since her husband's death, adopted the plaintiff as son of the deceased. There is not any evidence of express authority having been given to her by her husband to adopt a son, but, on the other hand, there is not any evidence of his having refused to adopt, or of his having enjoined her not to adopt; and, accordingly, under the Hindú law prevailing in the Dakhan, to which he belonged, his sanction of the adoption will be implied: *Rakhmábhái* v. *Rádhábhái* (*a*). The adoption being valid, and no probate, or letters of administration, or certificate of heirship having been granted in respect of the estate of the deceased, the plaintiff, as his adopted son, is his legal representative, and as such is, under Sec. 1 of Act XIII. of 1855, entitled to maintain this action on behalf of the parties upon whom that Act confers the right to damages from the defendants, as having, by their neglect and default, in not having properly constructed their bridge, caused the death of the Diván. His widow and unmarried daughter are clearly within the Act as persons entitled to damages proportioned to the loss resulting from his death to them respectively.

It is unnecessary for me to decide, and I, therefore, wholly abstain from giving any opinion, whether a son, adopted in

(*a*) 5 Bom. H. C. Rep., A. C. J. 181.

the lifetime of the deceased person in respect of whose death the action is brought under the Act, would be entitled to damages; but I think that the word "child" (which under the glossarial clause [Sec. 4], is defined as including the "son and daughter, and grandson and granddaughter, and stepson and stepdaughter," of the deceased) must be limited to mean one who is the child of the deceased at the time of his death; and herein might perhaps be included a child of which the widow was then *enceinte*, but not a son adopted, after the death of the deceased, by her. The word "child" is, in the English Stat. 9 & 10 Vict., c. 93, defined in the same way as in Act XIII. of 1855, and has been held to mean a legitimate child. Accordingly, where the mother of a woman who was killed brought, as administratrix, an action on behalf of herself and her deceased daughter's illegitimate child, damages were given to the plaintiff on her own account only, and none for the illegitimate child: *Dickinson* v. *The North-Eastern Railway Company* (*b*). As the plaintiff in this suit has been lawfully adopted by the widow, and, therefore, cannot be regarded by Hindú law as illegitimate, that case applies to the present one no further than as showing that the Court of Exchequer, in construing the word "child," was not disposed to give any further extension to the legal meaning of that word than the statute itself, in its glossarial clause, had already given to it beyond its ordinary signification in law. The action had no existence at Common Law—it is the creature of legislation, and the Act ought not to be interpreted so as to impose upon parties who may be sued under it any wider or greater liability than is distinctly within the particular reason for which it was passed. Act XIII. of 1855 is intituled "an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong." Before the passing of the Act, "actionable wrong" meant any such wrongful act, neglect, or default, as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.

(*b*) 33 L. J. Ex. 91.

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Actio personalis moritur cum personâ was then the rule. But this Act continued the right of action to his "executor, administrator, or representative, for the benefit of the wife, husband, parent, and child, if any, of the person whose death shall have been so caused," and the damages to be given shall be such as the court "may think proportioned to the loss resulting from such death to the parties respectively for whom and for whose benefits such action shall be brought." The plaintiff was the Diván's first cousin once removed, and lived, it has been said, in his house at Dhár, but at the time of the occurrence of the accident or of the Diván's death had not been adopted, and could not then, either by the law of nature, or the Hindú law, be considered to have been his child. Furthermore, the plaintiff was then seventeen years of age, *i.e.*, one year more than the Hindú law deems full age. Even assuming that the adoption relates back to the death of the deceased, the injury supposed to have been suffered by him, in virtue of the retrospective operation of the adoption, was one to which he was voluntarily subjected by himself and his parents by giving him in adoption. They then knew of the death of the Diván, and, nevertheless, assented to the adoption by the widow, which was to make the plaintiff the son of one whose death had been caused by the negligence of the defendants. In that view the case would seem to be one for the application of the maxim *volenti non fit injuria*. So far, however, from any loss resulting to the plaintiff by the death of the Diván, the plaintiff has been considerably benefited by it, inasmuch as that event was the reason for the plaintiff's adoption, by which he has acquired a right to succeed to the property of the deceased, who, it has been deposed, had an *inám* village in the Dhár territory, and other property. It is vehemently probable that the plaintiff would never have been adopted if the deceased had lived, as he was only forty years of age when he met with the accident, and may fairly have expected to have sons born to him. Under such circumstances, were any damages recoverable by the plaintiff, they could only be nominal damages. But I see no reason for supposing that the Indian Legislature intended to confer upon the widow of

a deceased Hindú the power of imposing upon persons sued under the Act a greater liability than existed at the death of her husband. That Legislature has not shown itself unmindful of the necessity of making in the Act a provision especially suitable to India, not to be found in the English Stat. 9 & 10 Vict., c. 93, by introducing the word "representative" after the words "executor and administrator." So many cases might occur in India in which there would be neither executors nor administrators as to render such an addition indispensable. A later English statute (28 & 29 Vict., c. 95) has made a somewhat similar provision for England. The Indian Legislature being thus alive to the special circumstances of Indian society, and having carefully enumerated, in the glossary to the Act, persons as coming within the scope of the word "child," as used in the Act, who cannot be regarded as within the ordinary legal meaning of that word, I should have expected to find the case of a posthumously adopted son specially mentioned in the Act, if it were intended that he should be included. The fourth issue must, for these reasons, be found in the negative, and in favour of the defendants.

The next question is as to the amount of damages which should be awarded to the plaintiff, not on his own behalf, but on that of the widow and daughter of the Diván. The Diván's father, Náro Jagganáth Gune, stated that the Diván was thirty-eight years of age at the time of his death; but this old man was not a very accurate witness, and it is safer to assume that the Diván was of the age of forty years, which is that named in the plaint. He had formerly been in the British service as a Kárkún at Ratnágirí, in the Collector's department, at Rs. 75 to Rs. 100 per mensem, and had been educated at the High School of Puná. Three or four years ago, having left the British service, he became Diván to H. H. the Rájá of Dhár, at Rs. 250 per mensem as salary, with a further allowance of Rs. 6 per month; as a Bráhman writer, Vishvanáth Náráyan, a person attached to his suite, deposed. The Diván's father spoke also of Rs. 131 per month being allowed to the deceased as wages for twenty-six attendants.

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These were not mentioned by the Bráhman, and I understand them to have been persons allotted to him as assistants in his office of Diván, and not as personal attendants. I, therefore, do not reckon their wages as forming any personal allowance to the deceased, or as increasing his dignity. Rs. 256 per mensem equal Rs. 3,072 per annum. Mr. Slater, an insurance company's agent, has been examined to prove that the price of an annuity of Rs. 3,100 on the life of a Hindú aged 38 would be Rs. 40,259-11-10, *i.e.*, allowing him about twenty-two years to live. But that evidence is inapplicable to such a case as the present. The deceased was liable at any moment to dismissal from his office of Diván, which he held neither for life, nor *quamdiu se bene gesserit*, but *quamdiu principi bene placeat*. It is, therefore, impossible to regard his annual income of Rs. 3,072 as Diván in the light of an annuity for life, or for any given number of years. However, looking at his education; his appointment at the time of his death; the probability, if he had lived and lost that appointment, of his getting another; the position in society enjoyed by his widow and daughter while he held his office of Diván; and lost to them by his death; and looking also at his age, which I take to have been forty, and the ages of his wife and unmarried daughter, which were then thirty-six and six years respectively: I think that Rs. 10,000 will be a fair sum at which to assess the damages payable to them—whereof Rs. 7,000 must be allotted to the widow, and Rs. 3,000 to the daughter.

It having appeared, in the course of the above case, that the plaintiff (who was a boy of seventeen years of age) had executed a *mukhtiárnámá* in favour of one Krishnáji Shideshwar, and that the latter had appointed one Náráyan Bálkrishna to bring the suit (who for so doing was to receive one-half of whatever should be received, subject to a private understanding that he was in reality to retain one-third only, and to hand over the difference between one-third and one-half to Krishnáji Shideshwar), and that such *mukhtiárnámá* had not been signed by the widow or the daughter (who was a minor), the court held that, though the plaintiff

had a right to sue, and to appoint an agent for that purpose, he had no right to make such a bargain as the above on behalf of those interested. The court, therefore, directed the solicitors for the defendants, in conjunction with the solicitors for the plaintiff, to transmit her share of the damages to Jánkibái, the widow of the deceased, at Dhár; and the court further directed that the Rs. 3,000 allotted to Mathurá, the infant daughter of the deceased, should be paid over to the Official Trustee, to be invested in Government paper and held in trust for her: the annual income and dividends to be paid to Jánkibái for the maintenance, education, and clothing of the infant; and Rs. 1,000, part of the principal, to be paid to Jánkibái on the marriage of the infant, for her marriage expenses, and the balance, Rs. 2,000, to be paid to the infant Mathurá on her attaining her full age according to law. Costs of this suit to be paid to the plaintiff by the defendants as between solicitor and client.

Decree accordingly.

Attorneys for the plaintiffs: *Dallas & Lynch.*

Attorneys for the defendants: *Hearn, Cleveland, & Peile.*

NOTE.—Two other cases brought against the same defendants under similar circumstances were decided by the Chief Justice the day before judgment was given in the above suit.

In the first, *Sorábji Ratanji* v. *The G. I. P. Railway Company*, the damages were laid at Rs. 14,400.

The suit was brought by the plaintiff as administrator of his deceased father, on behalf of himself and Ratanbái, the wife, and Chándábái, the mother, of the deceased.

Ratanji Nánábhái, the deceased, was about sixty or sixty-two years of age at the time of his death He was a carpenter, in good health, and an excellent workman. He earned about Rs. 80 *per mensem*, including *dasturi* allowed him by his employer. The plaintiff was in delicate health, unable to earn his livelihood,

WESTROPP, C.J., in giving judgment, said:—Looking at the probable age of the deceased, his state of health, the probable length of time during which he would have sufficient strength to exercise his calling, and the state of dependence of his family upon him, and without pretending to make, or to be able to make, any minute arithmetical calculation of these elements, I think that the sum of Rs. 8,500 will be fair damages; and of this sum I direct that Rs. 4,000 shall be allotted to the plaintiff, Rs. 3,000 to Ratanbái, the widow of the deceased, and Rs. 1,500 to Chándábái, his mother. The defendants must pay the costs of the suit

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as between solicitor and client. [His Lordship added that he made such order as to costs, that the plaintiff and the other persons interested might have the amount allotted to them without deduction, and not as any special mark of disapprobation of the conduct of the defendants.]

In the second case, *Ratanbái* v. *The G. I. P. Railway Co.*, the damages were laid at Rs. 77,500.

The suit was brought by the plaintiff (a woman of forty-nine or fifty years of age), as widow and administratrix of Pálanji Jivanji, on behalf of herself, three sons of the deceased—namely, Dorábji, said to be aged seventeen or eighteen, but who was married and had a son, and was learning the trade of a carpenter; Bezanji, said to be aged sixteen years, but who had been living with his wife for two years, and was learning the trade of a *mistri*; and Ratanji, said to be aged twelve years—and also on behalf of Kharsetji, an infant grandson, aged about three years, a son of a deceased son, Hormasji, of the deceased. "That grandson," his Lordship said, "comes within the meaning given to the word 'child' in the glossary to the Act (XIII. of 1855); but the widow of Hormasji, in whose behalf also the plaintiff sues, does not come within the range of the Act, and is not entitled to any share in the damages."

Pálanji Jivanji, the deceased, was aged fifty-three years at the time of his death (26th January 1869). He was a contractor for building houses and making repairs to ships in the harbour. He had become insolvent, and filed his schedule on the 12th of March 1868. According to the schedule (as finally amended), the total earnings of the deceased for the seven years preceding his insolvency amounted to Rs. 19,000, or Rs. 2,714 per annum = Rs. 226 per mensem, and his losses in contracts during the same period were stated to aggregate Rs. 19,446-14-0. His expenses far exceeded his means, and at the time of filing his schedule he was overwhelmed in debts, his debts amounting to Rs. 1,22,359-14-0. He appeared to have lived very extravagantly. After stating the above facts his Lordship said: What I have already said shows that the amount of damages claimed is quite preposterous. My difficulty is, satisfactorily to myself, to fix any amount. In the case of such a person as the deceased, who, as the evidence shows, even in the last year he was in trade suffered serious loss, and who was habitually a reckless borrower of money, and certain thus to incur a heavy outlay for premium and interest, it is extremely difficult to say what portion of his gross earnings would in his future career have been properly available for his own use and that of his family. His prudence in making, and skill in executing, contracts as a ship and house carpenter, judging from his losses heretofore, would seem to have been but small. Assuming, however, as I think a jury might do, that his past experience and passage through the Insolvent Court would not have been wholly lost upon him, but still not losing sight of his previous career and character, and of the probability that, if he had lived, his subsequent career would have borne, if not a complete, at least a strong, resemblance to it, it is perhaps not unreasonable to suppose that out of his gross earnings, taken at Rs. 226 per mensem, which would appear to have been the average during the last seven years, he might legitimately expend on himself and family Rs. 50 per mensem, *i. e.*, Rs. 600 or £60 per annum, or Rs. 60 per mensem, *i. e.*, Rs. 720 or £72 per annum. That is, I believe, allowing a far more liberal monthly sum than during the seven years

previous to his insolvency he could, having regard to his losses and general position, have legitimately expended. He did, in fact, expend a great deal more, but not legitimately, when his circumstances as respects losses and debts are taken into account.

I am, in such a case as this, necessarily compelled to resort to conjecture, and have to come to the best conclusion that, as jury, I may:—I should have been very glad indeed to have the power of calling in the aid of twelve jurors in such a case.

Mr. Slater has deposed that an annuity of £60 on the life of a Pársi aged fifty-three should be valued at about Rs. 6,185.

Allowing for what the deceased would have expended on himself alone, and for the probability of his power to work or carry on business diminishing as he advanced in age, I think that Rs. 6,500 will be fair damages.

Of that sum Rs. 2,500 should be allotted to the plaintiff (the widow of the deceased); Rs. 700 each to his sons Dorábji and Bezanji, who are, I think, old enough to earn a livelihood for themselves; Rs. 1,100 for Rustamji, the youngest son of the deceased, who is still only a school-boy; and Rs. 1,500 to his grandson, Kharsetji, who, being only three or four years of age, will not for a long time to come be able to gain a living. The shares of Dorábji, Bezanji, Rustamji, and Kharsetji, who are minors, are to be paid to, and invested in Government papers by, the Official Trustee, Mr. Loudon, in trust for them, and to be paid over to them respectively on their attaining their full age of eighteen years. The interest and dividends on their said respective shares are to be paid, during their respective minorities, to the plaintiff for their support and maintenance.

The defendants must pay the plaintiff her costs as between solicitor and client, and simple interest at six per cent. per annum on the amount of this judgment from this 27th day of August until payment, such interest to be divided amongst the plaintiff and her said three sons and grandson in the proportions in which the damages have been allotted to them. Should it be made to appear to the Official Trustee that it is for the benefit of any one or more of the said minors that his said share, or their said shares, respectively, or any part thereof, should be applied in the advancement, or for the benefit, of such minor or minors during his or their minority, the Official Trustee is to be at liberty, personally or by counsel or attorney, to apply to a Judge in chambers for an order or orders to that effect.