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We are, therefore, of opinion that the decree of the lower court should be reversed, and the case remanded in order that the papers referred to may be taken into consideration, and the witnesses named in Darkhást No. 79 may be examined with the view to determine what amount the defendant is entitled to receive on account of any loss he may have sustained during his management of the village.

KEMBALL, J., concurred.

Decree reversed and suit remanded.

Special Appeal No. 231 *of* 1870.

Oct. 10.

NA'RA'YAN BA'BA'JI, *alias* NA'RA'YAN PURSHOTAM, and SUNDRA'BA'I .....(*Defendants*) *Appellants.*

NA'NA' MANOHAR *et al.* .....(*Plaintiffs*) *Respondents.*

Hindú Law—Adoption—Wife's Right to adopt—Sanction of Husband necessary—Recognised Authorities on Hindú Law—Opinion of Devanda Bhatta—Custom varying general Law—Strict Proof of Custom required—Partition—Joint Property—Burden of Proof.

According to the highest authorities in repute in the Maráthá country, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime.

Comparative weight, as legal authorities on this side of India on the question of adoption, of the Mitákshará, Mayúkha, Dattaká Mímamsá, Dattaká Chandriká, Smriti Chandriká, Viramitrodaya, Dharmasindhu, and the Nirnayasindhu pointed out.

Dictum in the case of *The Collector of Madura* v. *M. Ramalinga Sethupati* (*a*) "that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving" (by the wife in adoption), questioned.

The general rule of Hindú law is that if a man die separate in estate from his kinsmen without leaving male issue or a widow surviving him, his daughters inherit his moveable and immoveable property. An alleged custom to the contrary with respect to any particular kind of property must be proved by ample and satisfactory evidence before the courts will admit it as established.

Although Hindú law presumes joint tenancy to be the primary state of a Hindú family, and the general rule is that the burden of proof that

(*a*) 2 Mad. H. C. Rep. 220.

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partition has taken place lies upon him who asserts it, there are exceptions to this general rule, *e.g.*, when it is admitted or proved that property in dispute was not acquired by the use of patrimonial funds, the party alleging such property to be joint must prove his averment. So, too, when it is admitted or proved that partition has already taken place, the presumption is that it has been a complete partition, and it lies upon a person alleging that family property, in the exclusive possession of one of the members of the family after such partition, is liable to be partitioned, to make good his allegation by proof.

THIS was a special appeal from the decision of F. D. Melvill, Acting Joint Judge of the Puṇá District, in Appeal Suit No. 10 of 1869, affirming (except as to costs) the decree of Krishṇaráv Sadáshiv, Ṣadr Amín at Soláp ur.

One Purshotam Chimṇáji, the natural brother of the plaintiffs, Náná, Chinto, and A'bá Manohar, had been adopted by his uncle Chimṇáji, and hence became first cousin to the plaintiffs. More than twenty years before the filing of the suit, Purshotam left his native country upon a pilgrimage, leaving behind him a wife, Ramábái, and an only daughter, the defendant Sundrábái. He never returned. Purshotam was entitled to a share in the proceeds of the offerings to the goddess Rukmini and the goddess Rádhiki, and also to two *varshásans*.

The present suit was instituted by the plaintiffs to establish their right to the abovementioned property of Purshotam. They alleged in their plaint that the whole family, including Purshotam, was joint; that Purshotam had absconded, and that his wife, Ramábái, had been maintained by them until her death. That on Ramábái's death the defendant Náráyaṇ obtained a certificate of heirship, on the ground that he had been adopted by her; but that Ramábái, her husband being alive, had no authority to adopt, and that the adoption was not performed in accordance with the Shástrás. They also relied upon an instrument (exhibit No. 109, dated 27th September 1865), executed in their favour by Ramábái previously to the adoption by her of Náráyaṇ, as either a will or a deed of gift made in their favour by Ramábái.

The defendant Náráyaṇ answered that he was the adopted son of Ramábái, the wife of Purshotam Chimṇáji, and that

the adoption was a valid adoption; that the property in dispute was not common family property, for that his adoptive father and mother enjoyed their share separately and independently, and that after them he was in the enjoyment of it; and that the plaintiffs' statement, that so much only of Purshotam's property as was sufficient for her maintenance was given to Ramábái, was untrue. An instrument of adoption, bearing date 2nd December 1865 (exhibit No. 7), was put in evidence by Náráyaṇ.

Sundrábái, the daughter of Purshotam, who was added as a defendant in the suit, answered that the property claimed by the plaintiffs had belonged to her father, Purshotam, who had been separate from the plaintiffs for many years; that he enjoyed his property till he absconded, and then that her mother, Ramábái, did the same; that she (Ramábái) adopted Náráyaṇ according to the Shástras, and with her (Sundrabái's) consent, and that, therefore, he became owner of the property; that otherwise she would have been the heir of Ramábái, and that the plaintiffs had no claim.

Ramábái did not put on mourning for her husband, but always lived as a wife, nor did she perform funeral obsequies for Purshotam, but about a month after her death, which took place about the 13th of December 1865, funeral obsequies for Purshotam were performed by his relations.

Náráyaṇ in his evidence stated that Ramábái had told him that she had sent people to make inquiries, and had got information of her husband within ten years, and that within six years certain pilgrims from Pandharpur, and again within three years certain pilgrims from Benáres, had brought her information of his existence. That to the people who had seen her husband on the first occasion he had said: "I will not *now* again come to Pandharpur; an adopted son should be taken, and the lineage and the *vritti* should be increased;" and that he gave the same directions to those who had seen him on the second occasion. Witnesses were called on behalf of the defendants to prove that they had seen Purshotam alive, and that he, through them, had given

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Ramábái authority to adopt, but they were disbelieved by the lower courts, and no mention of any authority to adopt given to Ramábái by Purshotam was made in the instrument of adoption (exhibit No. 7).

The Ṣadr Amín, upon issues laid down by him, found (I.) that the plaintiffs and Purshotam were separate in interests. It is true, he remarked, there is no *phárkat* in the case, but there is sufficient evidence to show the division of interest. (II.) That the defendant Náráyaṇ had not been adopted by Ramábái according to Hindú law, as the adoption was made by Ramábái not as a widow, but as the wife of a living husband (*savbhágyavatí*), in which case the husband's consent was necessary, and that such consent had not been obtained by her, as he disbelieved the defendant's witnesses who said that they had seen the husband of Ramábái within the last ten years, and that he gave her permission to adopt a son, which permission they communicated to Ramábái. (III.) That the instrument executed in favour of the plaintiffs by Ramábái (exhibit No. 109) was a will, and that its execution was proved, and that it was not cancelled by the subsequent adoption of Náráyaṇ, as that adoption was invalid. And (IV.) that though exhibit No. 109 would not otherwise be binding on Sundrábái, she had consented to its execution, and that it was, therefore, binding upon her.

The Ṣadr Amín, accordingly, made a decree in favour of the plaintiffs, with costs to be borne by the defendants equally.

The defendants appealed from this decree to the Joint District Judge at Puṇá, who laid down the following issues for determination:—(I.) Had Ramábái authority to adopt Náráyaṇ, and if not, can the adoption now be set aside? (II.) Were the parties so divided in their interests, as far as the property in dispute is concerned, that the plaintiffs are not entitled to it by right of inheritance? (III.) If the adoption be declared null and void, does the property in question pass to Náráyaṇ under exhibit No. 7 (the instrument of adoption)? The District Judge held that as

Ramábái, at the time of adopting Náráyaṇ, considered herself a wife (*savbhágyavati*), and not a widow, she required her husband's authority to adopt, which she had not received. He decided the second issue in the negative, remarking—"The real question is whether the family was divided in respect of the property now sued for. It is not disputed that the family is divided in many respects, but it is urged by the plaintiffs that the property in question has not been divided, and that property of the kind now sued for, namely, the proceeds of offerings to certain deities, cannot, by the custom of the family, descend in the female line—that is, that Sundrábái can under no circumstances inherit now. I see no reason why the ordinary rule should not be followed in the present case, namely, that the party pleading separation and division of the property should prove their plea. It makes no difference whether the whole, or only a very small portion, of the family property remains to be divided; the presumption still remains that the property in question is joint family property, and it is for the defendants in the present case to prove that the property now sued for is not joint. This they have not done. It is unnecessary for me then to consider the question whether any particular custom has been proved which would prevent Sundrábái from inheriting the property in question." The Joint Judge found the third issue likewise in the negative, and affirmed the decree of the court of first instance, varying it, however, as to costs, as he found that the claim of the plaintiffs had been overvalued.

The special appeal was argued before WESTROPP, C. J., and GIBBS, J., on the 23rd and 24th of August 1870.

Shántárám Náráyaṇ, for the appellants:—The adoption in this case was valid. Ramábái's husband must be presumed to have been dead at the time of the adoption: *Ghasee* v. *Jusondee* (*b*). It is true that she describes herself in exhibit No. 109 as *savbhágyavati*, but that is controlled by her subsequently stating that "her husband had gone on a

(*b*) 2 A'grá Rep. 226.

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pilgrimage; for many years there has been no trace of him —for twenty or twenty-five years." She speaks, too, of being owner of one half, and the plaintiffs as owners of the other half, of the family property, and alludes to her husband's property as "my property," "my house," and she says: "So long as I live, I myself shall be the owner, and shall keep the management, as I have hitherto done." These passages are inconsistent with the belief on her part that her husband was then alive. But, even assuming that Purshotam should be taken as then alive, Ramábái had still power to adopt, under such circumstances as existed in this case, without Purshotam's express consent. A wife, in the lifetime of her husband, may adopt without his express authority. In this case the Judge has held that she had no express authority. I have not been able to find any case in which the proposition I contend for has been upheld, but it is fairly deducible from the following authorities: I. Strange, H. L., pp. 79, 81, 82; Miták., Ch. I., Sec. 11, para. 9, and note thereto (*c*); Steele, Part I. (Law), para. 45, p. 54 (1st ed.); Part II. (Existing Custom), para. 45, p. 188 (1st ed.) The relations of Purshotam, though not his nearest kinsmen, have assented to this adoption. See too Strange's Manual, para. 66.

If the adoption is invalid, Purshotam's daughter is entitled to succeed to her father, as he and the plaintiffs were, partially at least, admittedly divided; and the admitted partial division of family property throws the *onus* of proving that the family, as regards the property now sued for, was undivided, upon the plaintiffs, and the *onus* is not, as the Judge has held it to be, upon Sundrábái to prove that it was divided: I. Strange H. L., pp. 232, 233; Grady H. L., p. 389; *Ram Gobind Koond* v. *Moulvie Syud Hossein Ali* (*d*); *Somangouda* v. *Bharmangouda* (*e*); S. A. 113 of 1862 (24th Jan. 1863).

Vishvanáth Náráyan Mandlik, for the respondents:—It is not open now to the appellants (defendants below) to

(*c*) Stokes' H. L. B., p. 415.

(*d*) 7 Calc. W. Rep., Civ. R. 90. (*e*) 1 Bom. H. C. Rep. 43.

contend that Ramábái was a widow. The defendant Náráyaṇ Bábáji states that Ramábái informed him that her husband was living, and witnesses have been called by him to depose to the same effect. He cannot now be permitted to allege that Purshotam was dead, and so the Judge has held. Besides, it is admitted that Ramábái never adopted the appearance of a widow or wore mourning. Purshotam must be taken, therefore, to have been alive. A wife cannot adopt in her husband's lifetime without her husband's assent: Manu, Ch. IX., pl. 168, 169. The words "with her husband's assent" in pl. 168 are a gloss of Kalluka Bhaṭṭa, and explain the meaning of the passage: Vyavahára Mayúkha, Ch. IV., Sec. V., paras. 1, 16, 17, 36 (*f*); Mitákshará, Ch. I., Sec. XI., para. 9, and note of Vasishṭha 15, 1, 2; Sutherland's Synopsis, Head I., para. 3 and note vi. (*g*); Steele, pp. 188 and 54 (1st ed.). It has been decided on the Bengal side that the authority given by the husband need not be in writing, but must be express. The true deduction from all the texts is that a wife must have her husband's express consent to adopt, but that a widow may adopt without such express consent, provided she has not been prohibited: I. Strange H. L. 78; II. *Ibid.* 84; Jagannátha's Digest by Colebrooke, Bk. V., Ch. IV., pl. 275 (*h*); Viramitrodaya, leaf 188 (Calc. ed., p. 2), last two lines: "While the husband is living, the son to whom he (the husband) does not consent cannot be made a son by the wife;" Kaustubha, leaf 44, p. 1, line 6 (lithographed ed., Bombay, of Shake 1783 [1861]): "The wife shall not give nor receive (a son in adoption) except by the command of the husband, (there is) a prohibition of acceptance by the woman." The case of *Rakhmábái* v. *Rádhábái* (*i*) was an adoption by a widow, not by a wife. The *onus* of proof in this case has been properly laid by the Judge on the defendants. We say that portion of the property of Purshotam was left with Ramábái for her maintenance, and that such property would have, upon Ramábái's death, reverted to the plaintiffs, had not Náráyaṇ obtained

(*f*) Stokes' H. L. B., pp. 58, 63, and 70. (*g*) *Ibid.*, pp. 664 and 672. (*h*) p. 398, Madras ed. (1865). (*i*) 5 Bom. H. C. Rep., A. C. J. 181.

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a certificate of heirship to Rámábái as her adopted son. Hence the plaintiffs were compelled to sue him. Sundrábái was originally not a party to the suit. She was, however, subsequently joined, and took part apparently, with Náráyaṇ, alleging that her father had been divided, and that Náráyaṇ's adoption was made with her consent. We never admitted that there had been a partition, though there may have been separate occupation of parts of the joint estate, but this does not prove partition: *Bábúsheṭ* v. *Jirsheṭ* (*j*). The alleged will of Rámábái is not in fact a will, but an agreement relating to immoveable property, and, being unregistered, cannot have any effect given to it.

Shántárám Náráyaṇ, in reply, cited, on the question of a widow's right to adopt, *The Collector of Madura* v. *Muttu Ramalinga Satthupathy* (*k*), which was acted on in *Rakhmábái* v. *Rádhábái* (*suprà*). The Ṣadr Amín has found that there has been a partition; that finding was not objected to on appeal, and the Judge was, therefore, justified in holding that the partition was admitted.

Cur. adv. vult.

10th October. WESTROPP, C. J.:—In this cause the original plaintiffs, Náná Manohar, Chinto Manohar, and A'bá Manohar, are all deceased, but are represented by Bháu Aṇṇá, the son of Náná, and he (Bháu Aṇṇá) is the present respondent in this special appeal. The appellants are the original defendants, namely, Náráyaṇ Bábáji, *alias* Náráyaṇ Purshotam, and Sundrábái, only daughter of Purshotam Chimṇáji.

Dhoṇḍu, the grandfather of the three original plaintiffs, had two sons, named Manohar and Chimṇáji. Manohar had four sons, namely, the three original plaintiffs and Purshotam, who was adopted by his said uncle, Chimṇáji, and thereby, instead of remaining a brother of the plaintiffs, as born, became their first cousin, and was called Purshotam Chimṇáji. Purshotam Chimṇáji had a wife, named Rámábái, and, by her, a daughter, Sundrábái, the second defendant

(*j*) 5 Bom. H. C. Rep., A. C. J. 71.
(*k*) 10 Calc. W. Rep., P. C. 17.

and appellant. Purshotam Chimṇáji, several years ago—it is said so many as twenty or twenty-five years—left his native country and went upon a pilgrimage to Benáres and elsewhere, leaving his wife, Ramábái, and daughter, Sundrábái, behind him. Ramábái, up to the time of her death, treated him as still living; she never went into mourning for him, and described herself in the documents No. 109 and No. 7 (presently again to be mentioned) as "*savbhágyavati*," that is, the wife of a living husband. About eleven days before her death she adopted the first defendant, Náráyaṇ, as son to herself and her husband, Purshotam Chimṇáji. This adoption the defendant Náráyaṇ has (in his evidence in this cause taken in the Court of the Ṣadr Amín) alleged to have been made by Ramábái with the consent, and indeed by the direction, of her husband, Purshotam Chimṇáji, given by him within recent years; and Náráyaṇ examined witnesses for the purpose of proving that this was so. The Acting Joint Judge has nevertheless found, and apparently with good reason, that no such direction or consent was given by Purshotam Chimṇáji. By that finding this court is bound. Before the Acting Joint Judge, however, on appeal, and here on special appeal, it was attempted to be argued for the defendant Náráyaṇ that Purshotam Chimṇáji had not been heard of for twenty-five years previously to the adoption of Náráyaṇ, and that Purshotam Chimṇaji must, therefore, be presumed to have been then dead, and that the word "*savbhágyavati*" used by Ramábái in two documents executed by her, namely, exhibit No. 7 (the deed of adoption, dated 15th Márgshirsha Shudhya, Shake 1787, *i.e.*, 2nd December 1865), and exhibit No. 109,* dated Ashvin Shudhya 7, Shake 1787, *i.e.*, 27th September 1865 (which latter document, produced and relied upon by the original plaintiffs, was partly in the nature of a will and partly of a deed) was not to be rendered according to its literal meaning, which is "the wife of a living husband."

* This exhibit is, by mistake, referred to by the Acting Joint Judge in his judgment as No. 107.

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We, however, concur with the Acting Joint Judge in holding that the defendant Náráyaṇ cannot be permitted thus to shift his course in the higher courts. The plaintiffs objected to the validity of the adoption of Náráyaṇ, on the ground that Ramábái must be regarded as a wife, and not a widow, at the time of the adoption, and that the death of Purshotam could not be presumed to have taken place until afterwards. In fact, neither the plaintiffs nor the defendant Náráyaṇ went into mourning for Purshotam Chimṇáji until about one month after Ramábái's death. Both parties have chained themselves to the assertion that Purshotam Chimṇáji survived Ramábái. Assuming then, as we are bound to assume, that this was so, Ramábái, even if Purshotam Chimṇáji were completely severed, as regards property, from the original plaintiffs, would not have had any power whatever, either by will or deed, to deal with, or create any estate in, his property.

But Mr. Shántárám, for the appellants, though admitting that he could not quote any case in which it had been ruled that an adoption by a wife, in the lifetime of her husband, without his express assent, is valid, contended that, under the special circumstances existing in this case, such a proposition might be maintained upon the authority of writers on Hindú law. He cited the following passage from 1 Stra. H. L. 81, 82:—"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." At page 79 of the volume, however, Sir Thomas Strange admits that a wife cannot adopt without the authority of her husband. And the passage at pp. 81, 82, cited by Mr. Shántárám, plainly relates to the giving, and not to the taking, of a son in adoption. This becomes still more apparent by referring to the Dattaka Chandriká, Sec. I., plac. 31, 32, whence the allusion to emigration is taken. The passages are these: 31. "But by a woman *the gift* may be made with her hus-

band'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.'" 32. "Now if there be no prohibition even there is assent; on account of the maxim, 'The intention of another, not prohibited, is sanctioned.' Yájñavalkya 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.'" A passage in the very learned and able judgment of the High Court of Madras in *The Collector of Madura* v. *Ramalinga Sethupati* (*m*) was referred to, as showing that "the opinion of Devanda Bhatta must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving: for if the words of Vasishtha require this explanation in the one case (that of giving), they require it in the other;" and, therefore, it was argued here that Devanda Bhatta must be considered as an authority for the proposition that if a man without male issue emigrated, his wife might, in his absence and without his sanction, adopt a son. I adhere to the opinion expressed by me in 1866 in the Khándesh adoption case *Bayábái* v. *Bálá urf Venkatesh Rámákánt* (*n*), in which the construction given to the above-quoted passages from the Dattaka Chandriká by the High Court at Madras was much discussed. My observations were these:—"After a careful consideration of the remarks of the High Court of Madras (2 Mad. H. C. Rep. 219, 220), and with all due respect to the note at page 68, 1 Macn. H. L., I think that Devanda Bhatta ought not to be held responsible for anything more than he actually did say. The two placita immediately preceding pl. 31 and 32, above quoted, from the Dattaka Chandriká, show that he was there dealing with the case of giving only. They are these:—'29. In answer to the question by whom is a son to be *given?* Caunaka declares: "By no man having an only son is the *gift* of a son to be ever made. By a man having several sons, such *gift* is to be an-

(*m*) 2 Mad. H. C. Rep. 219, 220. (*n*) *Post*, Appx., p. 1.

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xiously made." 30. "The author, apprehending an extinction of lineage in case of the *gift* of a son by one even having two sons, says, 'by one having several sons.'" The 4th and 7th placita of the same section (1), referred to in the judgment of the Madras High Court, do not seem to support the conclusion to which it came as to the views of Devanda Bhaṭṭa. On the contrary, the concluding portion of the 7th plac.—'Women, with the sanction of their husbands, are competent to adopt: as Vasishṭha shows: 'Let not a woman either give or receive a son in adoption, unless with the assent of her husband,'" where Devanda Bhaṭṭa treats of the competency of a woman to take in adoption—furnished him with a suitable opportunity to express, if he entertained it, the opinion attributed to him by the High Court of Madras. The fact that he not only carefully refrained from giving utterance to such a doctrine, but when again, in plac. 24 of the same section, he touches upon receiving in adoption by a woman, he says, as already above mentioned: 'So also, in the case in question, the affiliation of a son, by a woman *proceeding legally, with the sanction* of her husband, to constitute for him male issue, only takes place where no son of that person may exist,' and thus treats the husband's sanction as necessary to the taking in adoption; and the further fact that, in the passage quoted by that court from the Smṛiti Chandriká (namely: 'The objector says that the gift of a son by his mother is not proper, notwithstanding her power. The reason of this is her want of independence. Refutation:—True, but it is right if it be authorised by an independent male. Hence only Vasishṭha says: "No woman shall give or receive a son unless with the permission of her husband.") the same learned commentator (Devanda Bhaṭṭa) exhibited the like abstinence, lead strongly to the conclusion that his intention was to expand the text of Vasishṭha only so far as it related to the giving of a son. I should say that Devanda Bhaṭṭa is doubly entitled to the benefit of the rule *expressio unius est exclusio alterius*, he having twice expressed himself in favour of the expansion of the text of Vasishṭha in the case of a woman giving a son, and preserved a rigid silence on each

occasion as to any such expansion being proper in the case of a woman taking a son in adoption. His glosses upon that text are open to this further—and, I humbly conceive, conclusive—remark, that throughout them he avoids making any distinction between a wife and a widow, and if those glosses be intended to comprise as well the taking as the giving in adoption, he must be considered as sanctioning a taking in adoption, without the authority of her husband, by a wife, as well as by a widow: for his remarks as to giving in adoption include both wife and widow; whereas no Hindú jurist of reputation has, so far as I can discover, ever affirmed that a wife may, without the authority of her husband, take a son in adoption. It is vehemently improbable that Devanda Bhaṭṭa would have gone to such a length. Had he done so, the result of his comments would, instead of an explanation, have been a complete contradiction of Vasishṭha's text—an intention which, without very clear proof, ought not to be attributed to the commentator, and which he was not likely to leave to mere implication. Assuming, however, that my view of the meaning of Devanda Bhaṭṭa is not well founded, it must be remembered that his work, the Dattaka Chandriká, though it may rank higher in the Dravida country than the Dattaka Mímaṁsá of Nandá Pandita, is inferior in authority to the latter in Maháráshṭra, and, in cases of conflict, does not there prevail against it, except when supported by other authorities of high standing, which is, in such instances of difference, sometimes the case. Of the Dattaka Mímaṁsá, Mr. Sutherland, in the Preface (p. ii., 1st ed.; p. 527, Stokes' ed.) to his translations of it and of the Dattaka Chandriká, says that 'The Dattaka Mimansa is the most celebrated work extant on the Hindú law of adoption.' Mr. Colebrooke, in his letter to Sir John Royds, printed at pp. 132, 133 of Vol. 2 Stra. H. L., says: 'The Datta Mimansa is, no doubt, the best treatise on Hindú adoption.' It appears to be included in the Puṇá Catalogue of Authorities printed by Mr. Steele, * though somewhat disguised in spelling as 'Dut Meemans,' and is stated by him to be a work well known in the Carnatic Country; but neither the Dattaka Chandriká nor the Smriti Chandriká is included in

* p. 22, 1st ed.; p. 18, 2nd ed.

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the Puṇá or the Khándesh Catalogue, and the omission of the lastmentioned work is noticed by Mr. Steele. * In Mahárâshṭra, however, both the Dattaka Mímansá and Dattaka Chandriká must yield in authority to the Mitákshará, and generally also to the Vyavahára Mayúkha."

Since my judgment in the Khándesh adoption case was given, from my notes of which the above remarks have been extracted, the case of *The Collector of Madúra* v. *Ramalinga Sethupati* has been heard on appeal in the Privy Council. The judgment refers to the Dattaka Chandriká thus: "The Dattaka Chandriká (Sec. I., Articles 31 and 32) allows a widow *to give* a son in adoption where her husband has not forbidden her to do so, implying his assent from the absence of prohibition. The Smṛiti Chandriká also permits a mother to give her son if she be authorised to do so by an independent male. *And it is argued* that what these two last authorities lay down concerning a widow's right to give, must by parity of reasoning be taken to be laid down concerning her right to receive, a son in adoption." † We do not understand that, by that cautious mode of referring to the argument of counsel, their Lordships of the Judicial Committee are to be regarded as having implicitly adopted that argument as a correct exponent of the doctrine of Devanda Bhaṭṭa. Portions of the valuable work of Messrs. West and Bühler have also been published since the Khándesh case was decided. From the Introduction (p. ii.) to the first Book we take the following passage:—"The relative position of these works to each other may be described as follows: In the Marâṭhâ Country and in Northern Kânarâ the doctrines of the Mitâksharâ are paramount; the Vyavahâra Mayûkha and the Viramitrodaya are to be used as secondary authorities only. They serve to illustrate the Mitâksharâ and to supplement it. But they may be followed so far only as their doctrines do not stand in opposition to the express precepts or to the general principles of the Mitâksharâ. Amongst the secondary authorities the Vyavahâra Mayûkha takes precedence of the Viramitrodaya. The Dattaka Mîmaṁsâ and Dattaka Chandrikâ,

* pp. 24, 25, 1st ed.; p. 19, 2nd ed.

† 10 Calc. W. Rep., P. C. 22.

the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance, but that they may be set aside on general grounds, in case they are opposed to the doctrines of the Vyavahâra Mayûkha, or the Dharmasindhu and Nirṇayasindhu." We have quoted the passage in full, but wish to reserve our opinion as to the weight of the Dharmasindhu and Nirṇayasindhu as *legal* treatises. In their list of Hindú law-works (p. i.), Messrs. West and Bühler give precedence to the Nirṇayasindhu over the Dharmasindu. At p. ii. they also discuss their value on questions of ceremonies and penances. At p. iii. they mention that in Gujarát in some cases the Vyavahára Mayúkha is preferred to the Mitákshará.*

Before stating the views of Nanda Pandita in his Dattaka Mímaṁsá, it is convenient to refer to those of some other writers.

Manu † is silent as to adoption by a woman, either as wife or widow. As to *giving* in adoption he says: "He whom his father or mother gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given by water:" Ch. IX., pl. 168. Sir William Jones, in his translation of Manu, inserts in italics after the word "mother" in that text the words "with her husband's assent"—a gloss, apparently, of the celebrated commentator Kalluka Bhaṭṭa (see preface to Sir W. Jones' translation of Manu, p. xviii., and 3 Dig. [Jagannátha], p. 261, pl. cclxxv., Ch. IV., Bk. V.) In the next placitum (169), Manu, in speaking of the "son made," says: "He is considered as a son made whom a man takes as his own son," &c., and does not suggest the intervention of the taker's wife.

The Mitákshará, which stands foremost amongst legal authorities in Mahárâshtra, ‡ is also silent as to adoption

* See also West & Bühler, Bk. I., p. 138.

† As to his great authority in this Presidency, see 1 Bom. H. C. Rep. 131.

‡ Borradaile's Preface to the Mayúkha; Colebrooke's Preface to the Miták. and Dáyá Bhága; Steele, Preface, p. vi., 1st ed.; *Ibid.* p. 26; Elberling, pl. 33.

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by a woman. Ch. I., Sec. XI., relating to sons by birth and by adoption, opens with a passage (pl. 1) from Yájñavalkya, presenting the same contrast as contained in the quotations just now made from Manu: "He whom his father or his mother gives for adoption shall be considered a son given. A son bought is one sold by his father and mother. A son made is one adopted by the man himself." Here the writer mentions the wife of the giver as intervening, but says nought of the wife of the taker. As to giving, he further says, at pl. 9 of the same section: "He who is given by his mother with her husband's consent while her husband is absent, or after her husband's decease, or who is given by his father, or by both, being of the same class with the person who is given, becomes his given son (dattaka);" and then the author quotes Manu. Certain interpolations from Bálambhaṭṭa (omitted above) have been made in that text of the Mitákshará, of which interpolations it is unnecessary here to say more than that they are in extension of the mother's power. Mr. Shántárám Náráyaṇ, on behalf of the alleged adopted son, referred to the doctrine attributed by Mr. Colebrooke, in his note upon that text of the Mitákshará, to Bálambhaṭṭa, and argued that Bálambhaṭṭa drew no distinction between the power of a wife and that of a widow in taking a son in adoption. As to that argument, we must first observe that it is stated at pp. 24, 25, 1st ed.,* and p. 19, 2nd ed., of Mr. Steele's work on the law and custom of Hindú castes, that Bálambhaṭṭa is amongst the names omitted in the catalogue of authorities held in regard at Puṇá. The present is a case from the Puṇá zillá. Messrs. West and Bühler's Introduction to the 1st Book of their Digest contains the following notice of Bálambhaṭṭa: "The explanation of the Mitâksharâ is facilitated by two Sanskṛit commentaries, the beforementioned Subhodinî of Vis'ves'varabhaṭṭa, and the Lakshmîvyâkhyâna, commonly called Bâlambhaṭṭaṭika, the work of a lady, Lakshmîdevi, who took the *nom de plume* of Bâlambhaṭṭa. Vis'ves'vara's comment explains selected passages only, whilst Lakshmîdevi gives a full verbal interpretation of the Mitâk-

* See also his Preface, pp. vi., vii., 1st ed.: p. viii., 2nd ed.

shará, accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation to every term of Yâjñavalkya. Instances of this tendency may be seen in the quotations given: Introd. Rem. to Dig., Ch. II., Secs. 14 and 15. But her opinions are held in small esteem, and hardly ever brought forward by the Shâstris, if unsupported by other authorities. Her commentary is generally considered as a performance highly creditable to the female intellect, but as showing a good deal the author's intellectual petticoats." We may add that she frequently betrays too strong a bias in favour of the claims of her own sex. Some further information as to this commentatrix is to be found at page 359 of Messrs. West and Bühler's work, Bk. I.

The Smṛiti text of Vasishṭha, * "Let not a woman either give or receive a son in adoption, unless with the assent of her husband," to Devanda Bhaṭṭa's commentary on which we have already referred, is also discussed by Nandá Pandita in his Dattaka Mímaṁsá, Sec. I., pl. 15 to 29. He maintains that text in its integrity, indeed in its widest possible meaning; admitting that the wife may, with the assent of her living husband, adopt (pl. 27), but denying the competency of the widow to adopt at all, even with the assent of the kinsmen, because he says "the assent of her husband is impossible" (pl. 16), and "the term 'husband' would become indefinite, and the purpose would not be attained," if the assent of the kinsmen were accepted in lieu of his consent (pl. 18).

The Vyavahára Mayúkha by Nilakaṇṭha (which ranks next in authority in the west of India and in the Maráṭhá school to the Mitákṣharâ, † and to a certain extent differs from the Dattaka Mímaṁsá on the law of adoption) having dealt with

* See 3 Jagannátha's Digest, Bk. V., Ch. IV., pl. cclxxiii., p. 242 *et seq.*, 253, 261.

† Per Mr. Colebrooke in 1 Stra. H. L. 318; Colebrooke's Preface to Miták., p. iv., 1st ed.; p. 173, Stokes' ed.; Elberling, pl. 33; 1 Bom. H. C. Rep. 68, 122, 127, 131, 211; 5 *Ibid.* 185 A. C. J.; West & Bühler, Bk. I., Introd., pp. ii., vi., *et seq.*; Borradaile's Preface to the Vyavahára Mayúkha, pp. i., vi., *et seq.*; 1 Macn. H. L. 35.

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that law, so far as it touches the rights of women, more fully than the Institutes of Manu or the Mitákshará, is the most important treatise to which resort can be had upon the present occasion. At pl. 15 of Sec. V., Ch. IV., the right of women to celebrate the acceptance of a son, through the instrumentality of a Bráhman, with a Homa, is admitted. At pl. 16 Vasishtha's already mentioned text is recited. Plac. 17 and 18 are as follows :—17. "*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 (*Nyati*), 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 (*Nyati*) take care of her. A woman is never fit for independence.' This has been declared by Yájñavalkya only with reference to difference of age, and the circumstances 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 relations." 18. "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."

Here then we have a clear distinction taken between the wife and the widow. For the former the "order" or "command" of the husband is held to be indispensable in order to entitle her to adopt, whereas in the case of a widow the author says that it is unnecessary. The use by Nilakantha,

in the above passages, of the phrases "order" or "command," and not of the word "consent," was mentioned by me in the Khándesh case as particularly worthy of notice. It appeared to me that adoption, whether by the wife or the widow, in every case depended on the consent of the husband, but that some schools, in the case of adoption by the widow, in consideration of the spiritual benefit supposed to result to him by adoption, dispensed with an express direction, or authority, from the husband, and allowed that his consent might be implied. And that even the Maráṭhá school, which has perhaps gone furthest in permitting adoption by the widow, admitted that, if the husband in his lifetime prohibited adoption, she could not adopt after his decease, and, by making that admission, conceded that the adoption by the widow in the absence of express authority from him, proceeded upon his implied consent, for if this were not so, his prohibition should be regarded as futile.

There are manifest reasons why a distinction should be made between the wife and the widow. Were a wife to be permitted to adopt in her husband's lifetime without his express order, she might adopt some person hostile or obnoxious to him; or the husband, if in a distant part of the country, might, in ignorance that the wife had already adopted, or was about to adopt, a son for him, adopt another for himself. To prevent such a dilemma from arising, the doctrine of Nilakantha, that a wife cannot adopt without the order or command of her husband, seems highly reasonable, and necessary. So long as he lives, the argument as to spiritual necessity does not apply, and when he dies, if he die without male issue, the now apparently (though not without considerable opposition) judicially established usage, as well as juridically established doctrine, amongst the Maráṭhás, permits his widow, even without his order or command, to adopt for him, provided he has done nothing to destroy the implication of his consent. In the Dravida country the consent of kinsmen would appear also to be necessary, according to *The Collector of Madura* v. *Ramalinga Sethupati* (*o*). There is

(*o*) 10 Cal. W. Rep., P. C. 17; 2 Mad. H. C. Rep. 206.

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a recent decision in this court by Couch, C. J., and Newton and Warden, JJ. (*Rakhmábái* v. *Rádhábái* (*p*),) which lays down that, in the Maráthá Country, even the consent of the kinsmen of the husband is not essential to adoption by a widow, provided the act of adeption is done in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. How this may be, it is quite unnecessary for us now to express any opinion.

Were consent of relatives an element of importance in this case, it could not be contended that the consent of Purshotam's daughter, Sundrábái, and her husband, would suffice where the adoption has not been assented to by Purshotam's three nearest male relations, the original plaintiffs. I have been happy to find the view which I expressed in the Khándesh case—that, if there be not express assent, there must at least be implied assent, on the part of a husband, to validate adoption by the widow—has been since put forward by Couch, C.J., on behalf of himself and his colleagues, in *Rakhmábái* v. *Rádhábai* (*q*), and in the judgment of the Privy Council in the Madras case already mentioned that view is maintained with admirable perspicuity thus:—"All the schools accept as authoritative the text of Vasishtha which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithilá school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaka form, at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayúkha and Kaustubha, treatises which govern the Maráthá school, explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus, upon a careful review of all these

(*p*) 5 Bom. H C. Rep., A. C. J. 181.
(*q*) *Ibid.* 193.

writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband" (*r*). And further on it is said: "Again, it appears to their Lordships that inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supercession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites" (*s*). This necessity for the consent (express or implied) of the husband is because the act of filiation is on his behalf: Sutherland's Synopsis, Head I.; 1 Stra. H. L. 78, 79, 80; 2 *Ibid.* 88, 91, 94, 98, 111, 116.

Recapitulating the Hindú authorities held in highest repute here as to adoption by a *wife*, we find Manu and the Mitákshará silent as to adoption by any woman; Vasishṭha allowing adoption by a woman with the consent of her husband; Devanda Bhaṭṭa, reciting the text of Vasishṭha, and if our opinion be right, leaving that text uncontroverted and unexplained so far as it relates to a taking in adoption by a woman; Nandá Pandita reciting the same text, and admitting that a wife may, with the assent of her husband, adopt, but denying that a widow can adopt at all, because she cannot, as he says, obtain the consent of her husband; and Nilakaṇṭha, whose authority, amongst those who have actually written on the point, stands highest here, also reciting the text of Vasishṭha, and requiring the order or command of the husband to the wife, but dispensing with it in the case of the widow, and substituting for it the consent of kinsmen.

(*r*) 10 Calc. W. Rep., P. C. 21. (*s*) *Ibid.* 24.

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Thus, upon the highest authorities in repute here, so far as they have spoken, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime.

Other authorities of value in this Presidency have been cited to the same effect: Viramitrodaya, fol. 188: "While the husband is living, he to whom the husband does not consent, cannot be made a son by the wife;" also the Vyavahára Kaustubha, fol. 44, line 6 (Bombay ed., Shake 1783); the Dattaka Darpan (or Mirror of Adoption), quoted in 2 Borradaile's Reports, 2nd ed., 492, thus: "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 (Nyati), must be obtained;" and 1 Strange's H. L. 79, and 1 Borradaile Rep. 211 (2nd ed.). The wife and widow are mixed up in a somewhat confused way at p. 54, plac. 45, in Steele, 1st ed. (pp. 47, 48, 2nd ed.), but this is merely an inaccurate quotation from the Mayúkha. At page 188, plac. 48, 1st ed. (page 187, 2nd ed.) of Steele, is this passage: "A wife, in case of her husband's continued absence, when no hope remains of child-bearing, may adopt by his written order; or, after the period has expired when she puts on the appearance of widowhood, she may adopt as his widow." It is admitted in this case that Ramábái never put on mourning, or permitted others to treat her as a widow. The course which she and Náráyaṇ Bábáji have pursued compels us to regard the adoption attempted here as the act of a woman whose husband was then living. That act was unauthorised by him.

We have, therefore, without doubt arrived at the conclusion that Náráyaṇ Bábáji, the first defendant and appellant, is not the adopted son of Purshotam Chimṇáji. We have already said that Ramábái could not bind the property of her husband by deed or will in his lifetime; hence the attempt, on behalf of Náráyaṇ Bábáji, to lean on exhibit No. 7 as a will, must fail, as also the attempt of the plaintiffs to rely on exhibit No. 109, alleged to have been executed by her previously to the adoption. It is an instrument which, if it

be treated as a deed, is open to the objection that it is unregistered, and which, whether it be deemed a will or a deed, she, as a wife, had not any power to make with reference to the property of her husband. If that property be immoveable, she, even as a widow, would not have had power to alienate it for any period extending beyond her lifetime, except for the special and limited purposes sanctioned by Hindú law.

All claims on the part of Náráyaṇ Bábáji, the alleged adopted son, and all claims by the plaintiff under exhibit No. 109, having been disposed of, the case remains to be considered on the question of inheritance as between Sundrábái and the plaintiffs. Were this ordinary moveable or immoveable property, Ramábái being considered to have predeceased Purshotam Chimṇáji, and he not having any son, Sundrábái, his daughter, would succeed to that property as his heir, if he were separate in estate from his kinsmen. It, however, is alleged that the property, the subject of this suit, is of such a nature that females cannot inherit it. Upon that question the Acting Joint Judge has not come to any finding, and it will be necessary to remand the cause for the decision of that point. In considering it, the court below should recollect that the property in dispute here is of two species: 1st, offerings to goddesses; 2nd, *varshásans*; and though the alleged custom may be applicable to one, it may not be so as to the other. It will be for the court below to ascertain and say whether the alleged custom is applicable to either, and, if so, to which. That court should further recollect that the general rule of Hindú law is that if a man die separate in estate from his kinsmen, and without leaving male issue or a widow surviving him, his daughters inherit his moveable and immoveable property. If any person shall aver a custom to the contrary with respect to any particular kind of property, the burden of proof of such custom lies upon him, and ample and satisfactory evidence is necessary before the court ought to admit as established any variation from the general rules of law regulating the devolution of property amongst Hindús. Were the court not to look with a jealous eye at attempts to establish local or caste customs in dero-

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gation of the general canons of descent amongst Hindús, the exceptions would soon become as frequent as the rule; and *misera est servitus ubi jus vagum est.* However, if the evidence of an uninterrupted general custom be satisfactory and above suspicion, the court is bound to give effect to the custom.

Before deciding the question of custom as to the exclusion of females from inheriting property such as that in suit here, it will be necessary for the court below to ascertain whether or not that property (which consists of one-sixteenth of the offerings to the goddess Rukmini in her temple at Pandharpur, and one-sixteenth of the offerings to the goddess Rádhiki and two *varshásans*) were held by Chimṇáji, or by his adopted son, Purshotam, in severalty, or jointly with the plaintiffs. The Acting Joint Judge said: "I see no reason why the ordinary rule should not be followed in the present case, namely, that the party pleading separation and division of the property should prove their plea. It makes no difference whether the whole, or only a very small portion, of the family property remains to be divided; the presumption still remains that the property in question is joint family property, and it is for the defendants in the present case to prove that the property now sued for is not joint." We are unable to adopt these observations of the learned Judge. It is true that the Hindú law presumes joint tenancy to be the primary state of a Hindú family, and hence it follows that the burden of proving that partition has taken place, as a general rule, lies upon him who asserts it: 1 Strange, H. L. 225; 2 Knapp, P. C. C. 60; 3 Moo. Ind. App. 229, 240; 6 *Ibid.* 53; 9 *Ibid.* 539; 10 *Ibid.* 403; 11 *Ibid.* 369; 6 Calc. W. Rep., 58; 5 Bom. H. C. Rep., A. C. J. 71. But there are exceptional cases in which the burden of proving jointure of estate is cast upon the party who alleges that the estate is joint. For instance, where a plaintiff has admitted, or where it appears *aliunde*, that property in dispute between him and the defendants, members of his family, was not acquired by the use of patrimonial funds, and the defendants have not acknowledged that such property was acquired by any joint exertion of the plain-

tiff, the mere circumstance of commensality (union in food) existing between the parties at the time of the acquisition does not relieve the plaintiff of the burden of proving his averment, that he had a joint share and interest in the acquisition: *Kishoree Lall* v. *Chummun Lall* (*t*), *Mt. Soobedhur Dossee* v. *Boloram Dewan* (*u*): and see *Kaleepershaud Roy* v. *Degumber Roy* (*v*). Another instance, where the burden of proof lies upon the party asserting that the property in dispute is undivided, is where he admits, or it clearly appears *aliunde*, that a prior division of family property has taken place: *Ram Gobind Koond* v. *Moulvie Syed Hossein Ali* (*w*); *Somangouda* v. *Bharmangouda* (*x*); 1 Stra. H. L. 230, 232, 233; Grady H. L. 317, 389; *Maharajah Hetnarain Sing* v. *Modnarain Sing* (*y*); West & Bühler, Bk. II., Introd., p. xv. The present case is of that latter kind. It is unnecessary for us here to enter into the consideration of the circumstances which, according to Hindú law, amount to a partition. There may perhaps, as apparently suggested by Messrs. West and Bühler in the part of their work just referred to, be some difficulty in reconciling with each other the reported decisions on that question, and, as each new case arises, cautious discrimination may be requisite in order to arrive at a satisfactory conclusion. But in the present case it has, we think, been clearly admitted, on behalf of the original plaintiffs, that there has been at least a partial division of the family property. The Ṣadr Amín found that such was the fact, and no objection upon that point was taken by the plaintiffs to his decree. The Acting Joint Judge was warranted in holding, as he did, that before himself it was admitted that such a partial division had taken place, and no memorandum of objection to that holding by him has been filed by the respondent (plaintiff) in this court. When, under such circumstances as these, a member of a family is found in exclusive possession of a portion of the family property,

(*t*) Calc. S. D. A. Rep. 1852, p. 111.

(*u*) Calc. W. Rep., Special No. F. B. R. 1862 to 1864, p. 57.

(*v*) 2 Macn. S. D. A. Rep. 237, A.D. 1817.

(*w*) 7 Calc. W. Rep., Civ. R. 90. (*x*) 1 Bom. H. C. Rep. 43.

(*y*) 7 Moo. Ind. App. 311, 321; S. C. 3 Calc. W. Rep., P. C. 51.

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as Purshotam and (during his absence and on his account) Ramábái were here, the burden of showing that the portion in dispute was not allotted to that member of the family as his separate share, or as a part of it, falls upon those who contend that such portion was not taken into consideration at the partition which did take place, and that the same portion still remains common to all of the parceners. The reason for this is that Hindú law lays down as a general rule that "once is the partition of an inheritance made:" Manu, Ch. IX., pl. 47; and the court will not presume that this rule has been violated, and will itself strictly observe it by refusing to make a partial division of undivided property: *Nánábhái Vallabhdás* v. *Náthábhái Haribhái* (z), West & Bühler, Bk. II., Introd. xvii. All of the parceners should be made parties to a suit for partition: 12 Calc. W. Rep., Civ. R. 256. Privately, no doubt, partial divisions are not unfrequently made, and whether it be by fraud of one or more of the parceners, or by ignorance of the existence of a part of the family property, or by special arrangement, that a part of it remains undivided, the court will, on due proof that there is an undivided residue, entertain a suit for the completion of the partition by making a division of that residue: Manu, Ch. IX., pl. 218; Mayúkha, Ch. IV., Sec. VII., pl. 24, 26, 36; Dáyá Bhága, Ch. XIII.; Miták. Ch. I., Sec. IX.; Dáyá Krama Sangraha, Ch. VIII.; Vivada Chintamani (Prossonno Coomar Tagore's translation), pp. 241, 270; Steele, Tit. Partition, pp. 66, 223, 1st ed.; pp. 60, 223, 2nd ed.; Smriti Chandriká (Kristnawmy Tyer's translation, 2nd ed.), Ch. XVI., pp. 232, 235; and see *Ibid.*, Ch. XVI., pl. 3, 14, 18, 19, 20, pp. 238, 241, 242; Elberling, pl. 209; West & Bühler, Bk. II., Introd, pp. xvii., xviii., and Ch. III., Sec. 2, p. 39; Sec. 4, p. 51; 1 Strange H. L. 230, 231, 232, 233.

For these reasons we think that the learned Judge was in error in throwing upon the appellant (defendant) Sundrábái the burden of proving that there had been a partition between Purshotam or his adoptive father, Chimnáji, on the one side, and the original plaintiffs on the other, under

(z) 7 Bom. H. C. Rep., A.C.J. 46.

which the property in dispute had been allotted to Chimṇáji or to Purshotam. We hold that the burden of showing that the property in dispute was not allotted to Chimṇáji or to Purshotam at the partition of the family property, which is admitted to have taken place, must be put upon the present plaintiff (respondent).

As we must remand the suit on this and the other question already mentioned, as to whether Sundrábái as a female is excluded from inheritance, and for a fresh decision on the merits, we are of opinion that, although to a certain extent we concur with the learned Judge, and also to a certain extent with the Ṣadr Amín, who has taken a great deal of trouble and shown much learning in this cause, especially on the question of adoption, the better course for this court to adopt will be to reverse the decrees of the courts below. The court which hears the cause on the new trial should of course be at liberty to take such new evidence, oral and documentary, as justice may require, should also make a fresh decree upon the two questions referred to it only, and as to the costs of the suit and of this appeal, and in so awarding costs should have regard to the fact that the defendant Náráyaṇ Bábáji has failed to establish any defence in this suit. Our decree disposes of the question of adoption, and of all claims sought to be founded on the exhibits No. 7 and No. 109.

We think that it was a very inconvenient course to instruct only one Pleader for the defendants Náráyaṇ Bábáji and Sundrábái. Their interests were clearly conflicting, and ought to have been separately represented. Henceforward, however, Náráyaṇ Bábáji's interest in the suit, save so far as regards costs, is at an end.

The decree was made in the following terms:—

"Reverse the decrees of the Acting Joint Judge and of the Ṣadr Amín. Declare that the adoption of the defendant Náráyaṇ Bábáji is invalid, and of no force or effect in law, and that he does not take any estate or interest whatever in the property the subject-matter of this suit, either under

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the exhibit No. 7 dated the 15th Márgshirsha Shudhya, Shake 1787 (2nd December A.D. 1865), or any other exhibit filed in this cause. Declare that the Acting Joint Judge was in error in placing upon the defendant Sundrábái the burden of proving that, as regards the said property in dispute, Purshotam Chimnáji was separated from the original plaintiffs. Remand the cause for a new trial on the two following questions, namely, 1st, whether, as regards the said property in dispute, the said Purshotam Chimnáji was divided from the original plaintiffs, and let the burden of proof that he was not so divided be cast upon the present plaintiff; and 2nd, whether, according to the custom of the country, the defendant Sundrábái, as a female, is excluded from inheriting the said property in dispute, or any part thereof. And in trying the said questions let the court below have regard to the judgment, a copy of which is sent herewith. And let the decree be made in accordance with the finding on the said questions, and dispose of the costs of the suit and of this appeal. And in awarding costs let the court below have regard to the fact that the defendant Náráyan Bábáji has totally failed to establish any defence in this suit."