

1st—Whether the five *thikáns*, the subject of this suit, formed part of the family property.

2ndly—Whether the said five *thikáns*, or any of them, or any part thereof, have ever been the subject of a partition, either by suit or otherwise, amongst the parties to this suit.

3rdly—When were the said five *thikáns*, or any of them, or any part thereof, redeemed by Hari or any of the defendants from the mortgagees thereof; and, incidentally to this third issue,

4thly—Whether this suit is barred by the law of limitation.

5thly—Whether in the event of the trying court being of opinion that the plaintiffs are entitled to recover a share or shares in the five *thikáns*, the subject of this suit, the plaintiffs are bound to compensate the defendant Hari to any and what extent in respect of the redemption of the same five *thikáns*, or any of them, or any part thereof, by him. And it is further directed that the trying court shall be at liberty to take such further evidence in this cause on such re-trial as aforesaid as may be necessary. Costs to abide the final result.

Decree reversed and case remanded.

Special Appeal No. 22 of 1871.

June 12.

NA'THA'JI KRISHNA'JI.....Appellant.

HARI JA'GOJI.....Respondent.

Hindú Law—Adoption by Widow—Adoption of Married Man among Shúdrás—Gifts of Ancestral Property previous to Adoption.

According to the Hindú law obtaining in Western India, the adoption of a *Shúdrá* who is married at the time of his adoption is not invalid if the adopted person be a *sagotra* (of the same family) of the person adopting. A son adopted to her husband by a widow is entitled to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption.

THIS was a special appeal from the decision of R. F. Mactier, Judge of the District of Sátará, in Appeal Suit No. 38 of 1870, confirming the decree of the Subordinate Judge of Rahímatpur.

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The plaintiff, Hari, alleged that he was adopted by one Bálái, widow of Jágoji—a member of the Shúdrá caste, who owned a piece of land and a house; and that one Nátháji, who was in wrongful possession of them, would not give up his possession though requested to do so. The plaintiff, therefore, prayed that the court would eject the said Nátháji from the property in question.

Nátháji, *inter alia*, answered that the plaintiff had not been adopted, as alleged, and that the property had been given to him (Nátháji) in gift by the deceased.

The court of first instance held that the plaintiff had been adopted by Bálái, and that he was her heir, and that Bálái had no authority to make a gift of Jágoji's immoveable property, and gave a decree in the plaintiff's favour.

The court of appeal upheld this decree, for the following among other reasons:—

“The adopting mother, Bálái, and the giver in adoption, Rávji, both say the plaintiff, Hari, was received and given in adoption; and the writer and the attesting witness, Nos. 22 and 23, prove having written and attested No. 14, the deed of adoption, which sets forth the facts; the giver is a cousin of the adopting widow's husband, and, as he is in the same *gotra*, this is all legal. As to the adopted son, Hari, being an eldest son, as alleged, this is not proved by the evidence; and as to an objection now made, that Hari is married and has children, I can find only one decision to the effect that the adoption of a married man is illegal; and this is a very old case of the Madras Šadr, dating A.D. 1823,* and the contrary doctrine is laid down at page 75 of Macnaghten, where he says: ‘But when a relation, or *sagotra*, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family;’ he says this on the authority of the Mayúkha, at page 64 of which are the words ‘a married man, who has even a son born, may become an adopted son.’ I prefer the authority of this last to such an old decision as that quoted by Strange, and I have met

* See Strange's Hindú Law, Appx., p. 87.

with several cases in this district, unopposed, in which an adopted son was married and had a family: and I do not consider that a man's being married, with a family, will defeat the original object of his being adopted at all. And if his being married does not defeat this object, I can see no reason against his being so. I have looked over all the authorities on this point, the chief being the Dattaka Mīmāṃsā, and I can find no prohibition of such an adoption: so that, under the rule which I quote in the margin, I must conclude that the adoption of a married man is valid, and that this adoption of the plaintiff was, therefore, strictly according to Hindú law."

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The special appeal was heard by MELVILL and KEMBALL, JJ.

Bahiravnáth Mangesh, for the appellant:—The adoption of a married person is invalid by the Hindú law. After the performance of the Upanayana ceremony there can be no adoption: *P. Venkateshaiya v. M. Venkata Chárlu (a)*; Dattaka Chandriká, Sec. II., para. 25 (b); T. L. Strange's Manual, para. 104, p. 27; Macnaghten's Hindú Law, Ch. VI., p. 75 (ed. of 1829); Cowell's Lectures on Hindú Law (1870), pp. 329-334; and cases collected in Norton's Leading Cases, p. 65. Marriage is, therefore, even amongst Shúdrás, an insuperable bar: Strange, p. 91; Norton's L. C., p. 76. The Dattaka Chandriká and Dattaka Mīmāṃsā are of universal authority, and their doctrines are not to be disputed. It is true that in the Vyavahára Mayúkha (CIX.), Ch. IV., Sec. V., pl. 19 (c), Nilkanṭha has quoted the authority of his father for the position that the adoption of a married man with even a son born is valid; but Nilkanṭha's father was not a Rishi, and his opinion is not authoritative.

The adoption of the plaintiff took place four years after the gift to the defendant, and, as it was made from corrupt motives in the widow, should be set aside: *Rakhmábái v. Rádkhábái (d)*. The doctrine of *factum valet* will not apply in the present case, as there is a direct prohibition to such

(a) 3 Mad. H. C. Rep. 28.

(b) Stokes' H. L. B. 642.

(c) Stokes' H. L. B. 64.

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

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an adoption : Steele's Customs, 176 ; *Balvantráv Bháskár v. Bayábái* (e).

Janárdhan Sakhárám Gádgil, for the respondent :—The sole authority on which Norton, Strange, Macnaghten, and the Madras High Court rely is, as appears from the footnotes, a passage from the Káliká Purán quoted in the Dattaka Chandriká as well as in the Mayúkha, which is of greater authority in Western India. But in the présent case there is really no conflict among the authorities. The Dattaka Chandriká quotes the passage from the Káliká Purán at Sec. II., para. 25, but states that it is unauthentic. In paras. 26–32 the author points out that, even if the passage be authentic, its correct interpretation would not prevent a person upon whom the ceremony of tonsure and other rites of initiation are performed from being adopted; only a particular ceremony called “the sacrifice for male issue,” would in that case have to be performed. In para. 33 it is distinctly said : “And thus the practice of all the ancients, even in respect to the adoption of a son, unlimited to any particular time, is upheld.” The Dattaka Mímánsá's interpretation of the passage is the same as that of the Dattaka Chandriká. Nilkantha, the author of the Mayúkha, says that reliance is not to be placed upon the passage in question, “because it is not to be found in two or three copies of the Káliká Purán” (f). Even if it were authentic, he says it applies to *asagotras* (of different *gotras*) only. On the other hand he quotes the express authority of his father for the position that a married man having children even can be adopted, and maintains the position to be reasonable, and not in opposition to the other authorities. Nilkantha's father, Shankar Bhat, though not a Rishi, is the author of *Dwait Nirnaya*—a work specially intended, as stated in the work itself, for the Dakhan—the express object of which is to reconcile conflicting points of Hindú law.

For decided cases on the point see *Sree Brijbhookunjee*

(e) 6 Bom. H. C. Rep., O.C.J. 82.

(f) Vyavahára Mayúkha, Ch. IV., Sec. V., pl. 20—Stokes' H. L. B., p. 65.

Maharaj v. Sree Gokoolootsaojee Maharaj (g); *Ráje Vyan-kastráv v. Jayávantráv (h)*, in which the doctrine of *factum valet* is distinctly affirmed to be applicable in a case like the present.

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The following judgment of the court was delivered by

MELVILL, J.:—In this case we have to consider whether the adoption of the respondent, Hari, by Bálái was valid, he having been at the time of the adoption a married man; and, if it be held valid, whether it invalidates a gift of ancestral immoveable property previously made by Bálái to the appellant, Nátháji.

It is contended that the adoption is invalid on the strength of a passage in the Dattaka Chandriká (Sec. II., § 29) which lays down that adoption must be performed previously to investiture in the case of persons of a regenerate tribe, and previously to marriage in the case of Shúdrás, to which class the parties to the present suit belong. Sir Thomas Strange (Manual, p. 91) considered that the rule would be more absolute in the case of Shúdrás than in those cases in which investiture is the criterion. "It would seem," he says, "as if there could be no adoption of one who is married; marriage not being capable, like tonsure and investiture, of annulment." So Mr. Norton, in his *Leading Cases on Hindú Law* (p. 76), relying on the same text of the Dattaka Chandriká, says: "An adoption made after the adopted son is married is clearly invalid," and he refers to two decisions of the Madras Šadr Diváni Adálat in 1814 and 1823. There appear to be no later decisions of the Madras or Bengal Courts directly bearing upon the point, but the Madras High Court has held, notwithstanding the doubts expressed by Sir T. Strange, that the doctrine of the Dattaka Chandriká, as regards Bráhmans, is absolute, and that an adoption is necessarily invalid if made after the *Upanayana* has been performed in the natural family: *P. Venkatesarya v. M. Venkata Charlu and others (i)*.

(g) 1 Borr. 181, 196; 2 Borr. 92.

(h) 4 Bom. H. C. Rep., A.C.J. 191.

(i) 3 Mad. H. C. Rep. 28.

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On the other hand, the author of the Vyavahára Mayúkha seems to have been inclined to take an opposite view of the effect of marriage as an impediment to adoption: "and my father has said that 'a married man, who has even had a son born, may become an adopted son.' This also is reasonable, for it is not in opposition [to other maxims]." Macnaghten (p. 75) says: "According to the Mayúkha, an authority of the greatest eminence among the Mahrattas, the restriction as to age relates only to cases where no relationship subsists: but when a relation, or Sagotra, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family." And other authorities on this side of India are, so far as they go, of the same tendency. In a case of great importance, *Sree Brijbhookunjee Maharaj v. Sree Gookoolootsajee Maharaj*, reported in 1 Borr. 181 (ed. 1825), the opinion of the Pandits was that "when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability, and is beloved by the person who adopts him," and the court upheld the adoption. The opinion of the Shástris in that case was recognised as an authority (though on another point) by this court in *Rakhmábái v. Rádhábái (j)*. In *Ráje Vyankatráv Anandráv Nimbálkar v. Jayávantráv bin Malhárráv Rána-dive (k)* an adoption was objected to, among other reasons on the ground that the person adopted was, at the time of his adoption, a father, and possibly a grandfather. But the court refused to set aside the adoption, holding, on the principle of *factum valet*, that such an adoption, if once made, must stand. Independently of the Hindú law, we think that there is sufficient authority for holding that such adoptions are in the Dakhan recognised by the custom of the country. Mr. Steele (Law and Custom of Hindu Castes in the Dekkan), p. 44, says, speaking of the law: "The Poona Sastrees do not recognise the necessity that adoption should precede Moonj and marriage," though subsequently, speaking of existing customs, he says the adoptee "should be

(j) 5 Bom. II. C. Rep., A.C.J. 181. (k) 4 Bom. II. C. Rep., A.C.J. 191.

adopted previously to the performance of his Moonj or marriage, at least if not a near relation" (p. 182). In the judgment now appealed against, the District Judge says: "I have met with several cases in this district, unopposed, in which an adopted son was married and had a family;" and he might have added that in the present case the idea of disputing the adoption on this ground did not even occur to the appellant until the hearing of the appeal.

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Upon a review of all the authorities, we think that we are justified in holding that in Western India the adoption of a *sagotra* or relation (as the respondent Hari was) is not invalid because the person adopted was married at the time of the adoption.

The adoption being held valid, the adopted son has, we think, the right to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption. In the case already referred to (*l*) it was held that an adoption by a widow has a retrospective effect, and, relating back to the death of the deceased husband, entitles the adopted son to succeed to his estate. In *Ranee Kishenmune v. Rajah Oodwunt Singh* (*n*) it was held that, according to the Hindú law, a boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale by her, to his prejudice, of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity. In *Banundoss Mookerjee v. Mussamut Tarinee* (*n*) (in which the decision of the Bengal Sadr Diváni Adálat was adopted without qualification by the Privy Council), the Judges, referring to that case, said: "In that case the son, when adopted, became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances

(*l*) *Ráje Vyankatráv Anandráv Nimbálkar v. Jayávantráv bin Malkáráv Ránadive*.

(*m*) 3 Beng. S. D. A. Rep. 228. (*n*) 7 Moo. Ind. App 109.

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of strict necessity." In the Maráthá Country it is not necessary that a widow should have the permission of her husband to an adoption, provided that the act is done by her in the proper and *boná fide* performance of a religious duty, and neither capriciously nor from a corrupt motive: *Rakhmábái v. Rádhábái (suprà)*. In the present case, the person adopted* seems to be the person who would have inherited the estate after Bálái's death; so that, even if there had been no adoption, the gift to Nátháji would have been invalid, as against him, after Bálái's death. Nátháji has, in the courts below, contested the adoption on the ground either that Hari was an eldest son, or that he was married, and not on the ground that the adoption was made capriciously or from a corrupt motive. Under these circumstances we see no reason why the doctrine laid down in *Ranee Kishenmune v. Rajah Oodwunt Singh* should not be applied, and the gift by the widow treated as invalid against the adopted son. We, accordingly, confirm the decrees of the courts below.

KEMBALL, J., concurred.

Decree confirmed with costs.