[APPELLATE CIVIL JURISDICTION.]

1873.
April 2.

Regular Appeal No. 57 of 1870.

THE COLLECTOR OF SURAT .....*Appellant.*

DHIRSINGJI VAGHBA'JI .....*Respondent.*

Adoption—Gift and acceptance—Giving in adoption by paternal grand-father—Decree—Evidence.

To constitute a valid adoption, there must be a gift and acceptance.

When the natural father is dead, and the mother is living, she is the only person who can give in adoption. The Hindu law does not authorize the paternal grand-father or any other person to give in adoption in such a case.

THIS was a regular appeal from the decision of W. H. Newnham, Acting District Judge of Surat.

Dhirsingji brought this suit to establish his right to a *Tordá Girás hak*, and alleged that he was adopted by Devbái, widow of Vaghbáji. The suit was at first rejected by the Judge on the ground that the claim was illegal and that Government was not bound to pay it. On appeal, the High Court reversed that decision, and remanded the case for retrial on the merits.

The Judge then made a decree in favour of the plaintiff, holding him to be the duly adopted son of Devbái Kom Vaghbáji. The following is an extract from his judgment:—

"Is the plaintiff the duly adopted son of Devbái Kom Vaghbáji? I find that in 1851* it was decided by the Senior Assistant Judge of Broach that he was so. This decision is not shown to have been subsequently reversed; and, although Government was no party to it, I hold that, as regards the mere fact of adoption, (not as to the question whether Government is bound to recognize the adoption, as governing the succession to the *hak*,) this, as a judgment of status, is conclusive. I find farther that the defendant's *vakil* declined to call any evidence to rebut the alleged adoption on the ground

* This date is erroneous. The decree was made in 1852 in a suit commenced in 1851.—ED.

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that the late Judge 'had held the adoption proved' * * * ; but in order to leave no room for objection, I allow the defendant's *vákil* to point out any evidence he has in disproof of the adoption. He shows that, on several occasions afterwards, the plaintiff's name was signed with the addition of that of his natural, and not his adoptive, father; and that he sometimes described himself as the *heir* and not as the son of Devbái; but I find that on other occasions he called himself by the adoptive father's name, and no stress can be laid on this objection. Defendant's *vakil* further urges that, as an only son, he could not be lawfully adopted; but there is the case of *Chinna* v. *Kumára* (*x*), on the very passage of Strange, which he quotes, that such adoption is valid when made. I find for the plaintiff on this issue."

In the memorandum of appeal, these two objections *inter alia* were taken to the decisions of the District Judge:—The Judge was wrong in receiving the Decree No. 30 in evidence against the defendant who was not a party to it. The alleged adoption is invalid according to the Hindu law and the usage of the country.

The appeal was argued before WESTROPP, C.J. and MELVILL J.

Mayhew, Legal Remembrancer, (with him *Dhirajlál Mathurádás*, Government Pleader,) for the appellant, cited Strange's Manual of H. L. 21; 1 Strange H. L. 81; Macnaghten's H. L. 66; Grady's H. L. 36, 46; 1 Norton's Leading Cases, 57; Stoke's H. L. Bks. Pl. 7, 8, 9.

Anstey (with him *Nánábhái Haridás*) for the respondent:—Reputation of adoption should be regarded as strong proof of adoption. There was a decree in 1852 establishing the adoption. The father being dead, the grandfather was competent to give. If the term 'son' include, as it does, a grandson, *e converso* a 'father' includes a grandfather. There is no evidence that the natural mother ever dissented from the gift.

(*x*) 1 Mad. H. C. Rep. 54.

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WESTROPP, C.J. :—It is clear Hindu law that to constitute a valid adoption, there must be a gift and acceptance—1Stra. H. L. 95 ; Manu ch. IX. pl. 168 ; Mitak. ch. I. Sec. 11, pl. 1.

At the time of the alleged adoption the natural father of the plaintiff was dead—his mother was living and his paternal grandfather. The mother was not present at the ceremony, and there is not any evidence of her having assented to the adoption. There is some but not very strong evidence that the plaintiff was given in adoption by his paternal grandfather. A deed of adoption purporting to be executed by Devbái, the adopted mother, has been produced, but can scarcely be said to have been proved. To that deed the plaintiff's paternal grandfather does not appear to have been either a party or even an attesting witness. No evidence, however, has been given to contradict the faint evidence of the paternal grandfather having given the plaintiff in adoption. Assuming then that he did so give him, there remains the question whether such a giving in adoption by the paternal natural grandfather, to which the natural mother has not been shown to have been in anywise a party, can be regarded as a valid gift. The Hindu law clearly points to the mother as the person who can give in adoption when the natural father is dead (*a*). There has not been any authority quoted to us, nor do we know of any, which would authorize the paternal grandfather or any other person to give in adoption after the death of the natural father except the mother ; and so far as the authorities on the subject go, they are against the proposition that the paternal grandfather could give in adoption. It has been held in Madras by Phillips and Holleway, J.J., *Subbáluvammál* v. *Ammákutti (b)*, and also in Bombay by Sir R. Couch, C.J., *Balvantráv* v. *Bayábái (c)*, that an orphan cannot be adopted, and this is because there cannot be any lawful giving of him in adoption in such a case. It does not appear whether or not the paternal grandfather

(*a*) Manu ch. IX. pl. 168; Miták. ch. 1, Sec. 11, pl. 1, 9 ; Vyav. Mayukha ch. 4., Sec. 1., pl. 1. 16 *et seq* ; Datt. Chand. Sec. I., pl. 12, 31.

(*b*) 2 Mad. H. C. Rep. 129. (*c*) 6 Bom. H. C. Rep. A. C. J. 83, 85.

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of the orphan was in either of those cases living or had assented to the adoption. It is sufficient for us to say that inasmuch as the Hindu law plainly indicates the mother as the person authorized to give in adoption where the father is dead, and is silent as to any other person having, under such circumstances, authority to give in adoption so long as she lives, we feel bound to hold that a giving in adoption by the paternal grandfather, when the plaintiff's natural mother is living, cannot be supported. In the present case it is, we think, quite established by the evidence of the plaintiff's own witnesses that his natural mother was not present at the ceremony of adoption, and was not even resident at the place where it was performed, and did not take any part whatever in it.

We do not consider that the decree in the former suit, to which the Collector was not a party, was admissible in evidence in this case: *Kanhya* v. *Radha Churn(d)*. It is unnecessary for us to enter upon the other points in this case. We reverse the decree of the District Judge, and make a decree for the defendant, the Collector of Surat, with costs of the suit and appeal.

In the above case, a petition of review was presented on behalf of the respondent, Dhirsingji by Mr. Shántárám, Náráyan. The case was argued *ex-parte* before WESTROPP, C.J., and MELVILL, J., on the 2nd October 1873, when the following judgment was given by—

WESTROPP, C.J.:—This Court is now asked to review its decree of the 2nd April 1873, on the ground that the point on which that decree was rested—the invalidity of a giving in adoption of the plaintiff by his paternal grandfather while the plaintiff's natural mother was living, there not being any evidence of her being a party to that act—came upon the plaintiff by surprise, and that, if he had been prepared for it, he would have adduced evidence to show her assent to or ratification of the act of the paternal grandfather.

(*d*) 7 Calc. W. Rep. 338. Civ. R.

No such surprise was alleged on the 2nd of April 1873, when the cause was being argued before this Court—and we do not perceive how such an assertion, if made, could have been then sustained. The 2nd issue, settled by Mr. Kemball as District Judge of Surat (see his decree of the 17th June 1867), was:—"Whether the plaintiff was the duly adopted son of Devbái, wife of Vaghbáji." On the trial (on remand of this cause) by Mr. Kemball's successor, Mr. Newnham, on the 2nd of September 1870, the same issue was before him, and he, upon no other evidence than the decree of the Assistant Judge of Broach, made in 1852 in the suit of 1851, came to a finding upon that issue in the affirmative. When this cause came, upon the 26th of June 1872, before the High Court (LLOYD and MELVILL, JJ., presiding), it, on the authority of the Full Bench decision at Calcutta, *Kánhya* v. *Radha Churn* (*supra*), held the decree of 2185 not to bind the Collector, inasmuch as neither he, nor Government, was a party to the suit in which that decree was made—but, thinking it probable that the plaintiff might have been induced not to give in the District Court other proof of adoption than the decree of 1852 in the suit of 1851, on the supposition that it would be sufficient to establish that fact, this Court, then exercising its power under Sec. 356 of the Civil Procedure Code, directed the District Judge to take such evidence on the point of adoption as might be offered by either of the parties, and to forward it to this Court. The District Judge did so. It is manifest that, on behalf of the defendant (the Collector), the witnesses produced by the plaintiff were cross-examined to show that Dhirsingji's natural father was dead at the time of the alleged adoption by Devbái, and that the plaintiff's natural mother was not present at the adoption. (See the evidence of the witnesses Nos. 20, 21, 22, and 23 examined before Mr. Newnham, and the witnesses Nos. 7 and 8 examined under commission from him at Baroda.) If the defendant or his pleader had not intended to dispute the validity of a giving in adoption by the natural grandfather,

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Sardár Bawa (mentioned in the decree of the Assistant Judge of Broach of the 27th September 1852, and of which some evidence was given in the present suit in Exhibits 7 and 8 already mentioned), it would have been quite unnecessary to cross-examine the plaintiff's witnesses as to the presence of his natural mother at the adoption. The plaintiff must have been made aware from the defendant's written statement filed on the 24th August 1866, that the defendant disputed the validity of his adoption, and continued to do so in the appeal to this Court; and, ever since the order of this Court on the 26th June 1872, the plaintiff must have been aware that the decree of 1852 in the suit of 1851 would not suffice to establish his adoption in this suit, and that it would be necessary for him to give full and independent proof of such a giving and receiving in adoption as is required by Hindu Law. The order, then made, was an ample warning to him, and the subsequent cross-examination of his witnesses clearly showed the direction which the objection to the giving in adoption would take. It is, under these circumstances, impossible to hold that he has been, in any respect, surprised by the course which the case took when it came before this Court on the 2nd April 1873 (Westropp C.J., and Melvill, J., presiding), and this Court accordingly sees no ground for granting a review of that decree.