1873.
November 18.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 73 of 1873.

'BASHETIA'PPA' BIN BASLINGA'PPA' AND ANOTHER .....*Appellants.*

SHIVLINGA'PPA' BIN BALLA'PPA' (OR BIN VYJA'PPA' GANGER).....*Respondent.*

Hindu law—Adoption—Giving in adoption by a brother—Natural father's consent—Son self-given.

Amongst Hindus in the Presidency of Bombay, a valid gift in adoption can be made only by the natural father or mother of the son given or by them both conjointly. They cannot jointly or severally delegate that authority to another person so as to validate a gift by him, made after they are both deceased.

Therefore, a gift in adoption by the brother of the adoptee after the decease of his father and mother, though made with the previous assent of his father, was held to be invalid.

Amongst Hindus in the same Presidency, an adoption of a son self given, although he may at the time of the gift be an adult, is in the present age (the *Kali Yug*) invalid.

THIS was a special appeal from the decision of W. Sandwith, Acting District Judge of Belgaum, affirming the decision of Dayárám Mayárám, First Class Subordinate Judge of the same place.

The appeal was argued before WESTROPP, C.J., and NANABHAI HARIDAS, J., on the 5th August 1873.

Shántárám Náráyán for the appellant.

Janárdan Sakhárám for the respondent.

The facts and the arguments urged and authorities cited by each side fully appear from the judgment:—

Cur. adv. vult.

18th November, 1873, WESTROPP, C. J.:—The facts, as found by the District Judge, are, so far as material for the purposes of this Special Appeal, the following:—

Vyjáppá Ganger, being entitled to an estate or interest (into the nature and extent of which it is unnecessary for us now to inquire) in a house at Belgaum, died without leaving any son, but leaving a widow, Shivlingavá, him surviving. She, subsequently to her husband's decease, demised, in September, 1869, that house to the first defendant, Bashetiáppá, for one year. Afterwards Shivlingavá went through the form of taking the plaintiff, Shivlingáppá, (who had shortly before attained the full age of 16 years), in adoption as son to her deceased husband, Vyjáppá. At that time, the natural father and natural mother of the plaintiff were dead. His elder brother, A'ppá, went through the form of giving the plaintiff in adoption to Shivlingavá, the widow of Vyjáppá. The District Judge and the Subordinate Judge have respectively found that Balláppá, the natural father of the plaintiff, expressed his consent that the plaintiff should be adopted as son to Vyjáppá, and have referred to the depositions contained in Exhibits 27 and 31 as the evidence of that circumstance. The deponent in Exhibit 27 is A'ppá (or A'ppáya), the elder brother of the plaintiff, who says, "I gave to Shivlingavá the plaintiff, Shivlingáppá, in adoption. My father had agreed to give (him) in adoption. At the time of adoption, my father and mother were not alive. They were dead then. Four or five years ago, our father had given consent for the adoption. I do not know who were present when the consent was given." The witness does not say that he himself was present when the consent was given, or under what circumstances, or at whose request, it was given. It is difficult to understand how an experienced Judge could have been satisfied with such evidence of a consent, alleged to have been given four or five years previously to the adoption. As to Exhibit No. 31, it contains no legal evidence whatever of the consent of the plaintiff's father. The depo-

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nent Satmaláppá says: "The adoption took place in A'ppáya house. Shivlingavá having gone to A'ppáya's house asked him—'As said by your father, will you give Shivlingáppá or not.' A'ppáya assented to this. He gave the boy in adoption. Shivlingavá took the boy in adoption." So far as regards the agreement of the father to give the plaintiff in adoption, this evidence is merely double hearsay, and we are astonished that the Judge should have referred to it as admissible at all to prove the consent of the father. However, there being some evidence in Exhibit No. 27, we unfortunately are bound to regard the finding that the father of the plaintiff did, at some time before his death, express his willingness to give the plaintiff in adoption as conclusive on that fact. But the father of the plaintiff died some four or five years before the adoption is said to have taken place, and the evidence of the consent (such as it is), though it may amount to evidence of an assertion by Balláppá of his willingness at one time that the plaintiff should be adopted as son to Vyjáppá, does not amount to a direct authorisation by Balláppá of the giving by hiselder son A'ppá of the plaintiff in adoption, nor is it alleged that there was any delegation by Balláppá of that office or duty to A'ppá, and there is not any evidence as to whether or not Balláppá, up to the period of his death, continued willing to give the plaintiff in adoption to Vyjáppá or his widow.

On the expiration of the year, for which Shivlingavá had demised the house to Bashetiáppá, and subsequently to the alleged adoption of the plaintiff by her, he (the plaintiff) brought the present suit to recover the house from the defendants, both of whom denied the validity of the adoption, and consequently that the plaintiff had any title to sue. They also alleged that he was a minor—an allegation negatived by the findings of both of the Courts below—and they put forward another defence which was unsuccessful in those Courts, and into which, in the view which we take of this case, it is unnecessary for us to travel.

Both of the Courts below having decreed in favour of the plaintiff's claim to recover the house, the defendants have appealed to this Court.

The question argued before this Court was: Whether the adoption was valid?

For the plaintiff it was contended:—1*st*. That his natural father having, five years before the alleged gift, expressed his willingness to give, the gift by the plaintiff's brother was valid. 2*ndly*. That the plaintiff, being an adult at the time of the adoption, and there not being any evidence that he objected to the gift of him by his brother, the plaintiff must be regarded as having given himself in adoption, and that the Hindu law recognises such a gift.

No instance has been mentioned to us, in which, in this Presidency, the Sadr Adalut, or the Supreme or High Court, has recognised as valid an adoption, coming under either of those heads.

For the present, passing over the case of a gift in adoption by the adoptee himself, we should observe that the books of authority do not show that any one can *give* a person in adoption except his father or mother, or both conjointly. Manu says: "He is called a son given, whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress; confirming the gift with water": Chap. IX., pl. 168. The author of the Mitákshará, Ch. I., Sec. XI., pl. 9, says:—"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 to whom he is given, becomes his given son (dattaka). So Manu declares" —and then the author proceeds to quote the text already cited from Manu. Bálambhatta, commenting on that passage from the Mitákshará, adds that the mother may give in adoption when the father, though present, is incapable, or without his assent if he be dead, but does not mention any

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person other than the father or mother as capable of giving. Paráçara, styled by Colebrooke in his preface to Jagannatha's Digest p. XVII. as "the highest authority for the fourth age," describes the *dattaka* (or son given) thus: "He whom his father or mother gives, that boy becomes an adopted son," Paraçara Smriti IV. 24. Nilakantha in the Vyaváhara Mayukha (Chap. IV., Sec. V., pl. 1), after reciting the already quoted text of Manu, continues thus: "According to Madana: 'the disjunctive '*or*' means, that if the mother be not present, the father alone may give him away; and if the father be dead, the mother the same: but if both be alive, then even both.' From his using the word in distress, (it seems that) if not in distress, he must not be given." The text of Manu is echoed by Nanda Pandita in the Dattaka Mímánsá, Sec. I, pl. 7, and referred to and argued upon in Sec. IV. pl. 11 to pl. 21. In pl. 13 he says: "The husband, singly even and independent of his wife, is competent to give a son." In those passages, or in Sec. V., pl. 13 and 14 and 31, of the same author or elsewhere in his work, we do not find any giver in adoption contemplated except the father or mother or both. Nor in the Dattaka Chandrika, which is of high authority in the Southern part of this Presidency, does Devanda Bhatta, when treating of giving in adoption (Sec. I, pl. 29 to 32), suggest that any one except the parents or one of them can give in adoption.

Thus we perceive that these authors (and Sir T. Strange, 1 H. L., p. 81, concurs with them) provide for the case of the death or absence of the father alone, or for a gift by him altogether independently of his wife, (and therefore whether she be dead or absent,) but make no provision for a gift in adoption after the deaths of both the husband and the wife, and are altogether silent as to the possibility of a delegation of the power of gift of them or of either of them to any other person, kinsman or stranger.

In *Veerapermall Pillay* v. *Narrain Pillay* (*a*) Sir T

(*a*) 1 Madras Notes of Ca. 91, 127 *et seq.*

Strange, as Recorder of Madras, upheld an adoption, where the adoptee, his natural father being dead, was given in adoption by an elder brother, who signed the deed of adoption, which was made in the name of the family. The natural mother was living at the time of the adoption, but did not attend at the ceremony. Under those circumstances, Sir T. Strange considered himself bound to presume the consent of the mother. The reason, which he quotes from the opinion of the Shástris of Poona (*b*) that "the elder brother is the father revived," is not satisfactory, and has not been supported by any text of Hindu law to the effect that the elder son is so far a representative of his father as to be permitted to give a younger brother in adoption. And there has not been any text of Hindu law cited, nor have we been able to find any, which supports the argument that the father or mother may authorize any other person to give their son in adoption in the lifetime of both or of either of them. Still less is there any authority in Hindu law for saying that they or either of them may authorize a third person to do so after they are dead. Sir F. Macnaghten, in his Considerations on Hindu law (*c*), vigorously combated the ruling of Sir T. Strange in the case just mentioned. That case was decided in 1801 upon "comparatively imperfect materials," as Sir T. Strange himself candidly admits in his subsequently composed and justly celebrated treatise on Hindu law (*vide* Vol. 1, p. 102, Ed. of 1830); and the ruling, above mentioned as made by him, is inconsistent with subsequent cases, ex. gr., *Moothoosawmy Naidoo* v. *Lutchmydavummah* mentioned by Mr. Norton in his leading cases on Hindu law, Part 1, p. 66, *Mussumut Tara Munee Dibia* v. *Dev Narayun Rai* (*d*), *Subbáluvammál* v. *Ammákutti Ammál* (*e*), and *Balvantráv* v. *Bayábái* (*f*).

(*b*) Ibid. 131, 132. (*c*) p. 210.

(*d*) 3 S. D. A. Rep. 387, and See 1 Ibid 169; and 1 W. Macnaghten H. L. 66.

(*e*) 2 Mad. H. C. Rep. 129. (*f*) 6 Bom. H. C. Rep. O. C. J. 83.

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We have come to the conclusion that the Hindu law, as current in this Presidency, does not permit a man after the decease of his father and mother, either with or without the authority of both or of either of them, to give his brother in adoption. Accordingly the first branch of the argument for the plaintiff fails.

Were it competent (which it is not) for us to sanction a giving in adoption by a brother, although such a gift is wholly unrecognized by the works on Hindu law of highest authority in this Presidency, we think it would be far from desirable to extend the law of adoption in that direction. Such an extension would leave it in the power of an elder brother to thin the ranks of his fellow parceners by bestowing his younger brethren in adoption in a manner highly detrimental to the interests of the latter.

As to the second branch of the argument for the plaintiff, the first remark to be made is that there is no direct evidence to the effect that he did give himself in adoption to Shivlingavá. Vijnyáneshvara, at Ch. 1, Sec. XI, pl. 18 of the Mitákshára, describes the self-given son thus: "The son self-given is one, who being bereft of father and mother, or abandoned by them, presents himself saying 'let me become thy son'"—and Mr. Colebrooke, in his note upon that text cites this text from Apararka:—"He who, unsolicited, gives himself saying 'let me become thy son,' is called a son self-given (svayandatta)," and this further text from Manu: "He who has lost his parents, or been abandoned by them without cause, and offers himself to a man as his son, is called a son self-given" (*g*). There is no evidence that the plaintiff was unsolicited by Sivlingavá, or that he offered himself to her or said to her "let me become thy son." The evidence is in fact of a different complexion. Assuming, however, that a strict conformity with these details was not necessary, and that the plaintiff, being an adult at the time

(*g*) Manu, Ch. IX., pl. 178.

of the adoption, must, in the absence of any evidence that he objected to the gift of himself by his brother, be regarded as having, in effect, given himself in adoption to Shivlingavá we proceed to consider whether at the present time such a gift in adoption is valid.

The twelve kinds of sons, enumerated by Manu (*h*) and in the Mitákshará (*i*), were formerly capable of succession for the double purpose of obsequies and of inheritance (*j*). Among these the first is the issue male of the body lawfully begotten, the seventh is the son given (dattaka), the eighth is the son bought (krita), the ninth is the son made (kritrima), and the tenth is the son self-given. It is unnecessary here to specify the others (*k*).

Nilakantha, after enumerating the twelve sons (*l*), describing the first, the legitimate son (aurasa), procreated on the lawful wedded wife, as the principal (*m*), and the others as secondary, and after referring specially to some of the latter, says (*n*): "Here we must mark, that with the exception of the given son, [all the other ten] secondary sons are set aside in the Kali or present age, for we read, in the prohibitions of it: 'the acceptance likewise of affiliations, other than those of a legitimate and adopted son.'"

The same doctrine is laid down in the general note to the translation of Manu, pp. 428 to 431, and especially pl. 8 and 9 in the last mentioned page, where the passage from the Aditya Purána, to which we shall presently again refer, is thus rendered: "8. The filiation of any but a son legally begotten or given in adoption *by his parents*; the desertion

(*h*) Ch. IX., pl. 158, *et seq.*

(*i*) Ch. I, Sec.. XI., pl. 1 *et seq.*

(*j*) Miták: Ch. I, Sec. XI., pl. 31, 33; Ch. II. Sec. i., pl. 1.

(*k*) Vide Dattaka Mímánsá, Sec. 1, pl. 33, *et seq*; and 2 Stra. H. L. 194 *et seq.*

(*l*) Vyavahára Mayukha, Ch. IV., Sec. IV., pl. 41.

(*m*) Ibid pl. 42.

(*n*) Ibid pl. 46. As to the son given, see 2 Stra. H. L. 213, Ed. of 1830.

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of a lawful wife for any offence less than actual adultery. 9. These *parts of ancient law* were abrogated by wise legislators, as the cases arose at the beginning of the Kali age with an intent of securing mankind from evil." And in Jaganatha's Digest, Vol. III., Bk. V, Sec. 8, pl. CCLXXX. we again find the same text thus: "*Aditya Purana*. The filiation of any but a son legally begotten, or given in adoption *by his parents, is a part of ancient law abrogated in the Kali age.*" And see to the like effect Ibid Sec. 15, pl. CCC., Vol. 3, p. 288, and Steele, 1st Ed: pp 49, 183.

And Nanda Pandita, after quoting as follows from Vrihaspati: "Sons of many descriptions who were made by ancient saints cannot now be adopted by men: by reason of their deficiency of power, &c.," continues thus *(p)*: "On account of this text of Vrihaspati, and because in this passage 'There is no adoption, as sons, of those other than the son given and the legitimate son.' Other sons are forbidden by Caunaka; in the Kali or present age, amongst the sons however (who have been mentioned) the son given and the legitimate son only are admitted." 65. "The term 'given' is inclusive also of the son made (Kritrima) on account of a text of Paráçara, on the occasion of treating on the law of the Kali age, which expresses, 'the son of the body' (Aurasa), the son of the wife, also, the son given, the son made &c.'" 66. "Nor is it to be argued from this that, in the Kali age, there may be the son of the wife (technically so called): for, such is forbidden, by the mere prohibition against the appointment in that age [of a wife to raise issue to her husband by another]." 67. "Should it be contended that then an option would proceed from the wife's son being ordained: and forbidden (by different authorities): it is wrong: for many objections would be the consequence." 68. "Again if it be asked, in what light then the mention of the son of the wife in this passage (must be regarded)? We reply, as an epithet of Aurasa (the son of the body). Ac-

(*p*) Dattaka Mimánsá, Sec. I, pl. 64.

cordingly Manu says: 'Him whom a man has begotten on his own wedded wife, let him know to be the first in rank, as the son of his body (Aurasa).'"

Devanda Bhatta, after referring to the principal and secondary sons, the latter of whom he describes as substitutes, says *(q)*: "Of these however, in the present age, all are not recognized. For a text recites;—'sons of many descriptions who were made by ancient saints cannot now be adopted by men,—by reason of their deficiency of power'; and against those other than the son given, being substitutes, there is a prohibition in a passage of law wherein after having been premised,—'the adoption, as sons of those other than the legitimate son and son given,' it is subjoined —'These rules sages pronounce to be avoided in the Kali age.'" The first text there quoted by Devanda Bhatta is that of Vrihaspati already mentioned as cited by Nanda Pandita. The second text ('passage of law,') relied on by Devanda Bhatta, and apparently also by Nanda Pandita, is attributed to the Aditya Purána, and Mr. Sutherland says is, in its complete state, thus: "The adoption, as sons of those other than the legitimate son, and son given; the procreation of issue by a brother-in-law; the assuming the state of an anchoret; these rules sages pronounce to be avoided in the Kali age." Devanda Bhatta, in his other work, the Smriti Chandriká (Chap. x., pl. 5 to pl. 12, Kristnaswamy Iyer's translation, pp. 142, 144) speaks to the same effect as in the Dattaka Chandriká. In the Dharmasindhu (pp 122, 123, first half, third division) it is said: "In the Kali age, the son lawfully begotten and the son given are the two sons known. The other ten kinds of sons, the bought and the rest, are to be avoided in the Kali age. In the Kaustubha, however, it is said: a third also, the self given (son) is permitted, and only nine are prohibited in the Kali age." In the Nirnayasindhu (pp. 62, 63, first half, third division) it is, *inter alia*, stated that: "Recognition, as sons, of others than those given or lawfully begotten (is forbidden)."

(*q*) Dattáka Chandriká Sec. 1, pl. 9.

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Mr. Sutherland, at the commencement of his Synopsis, observes: "It should be premised, that in the present age, amongst the various subsidiary sons recognized in codes of law, according to the authority of writers, confirmed by practice, only those technically denominated the son given (Dattaka or Dattrima) and son made are capable of being affiliated. The author of the Dattaka Chandrika indeed admits the son given alone.—In effect however, without any great latitude, a son self-given, and a son rejected, might *perhaps* be included under the general denomination of the 'son made,' the Kritrima or Krita putra (vulgarly called 'Karta puter'): and it should not be omitted that in treatises of law, the term Dattaka or son given is sometimes used to denote an adopted son generally."

This conjecture of Mr. Sutherland has not been adopted, so far as we can discover, by the Sadr Adalut, Supreme or High Court in this Presidency. For this there seems to be good reason. The author of the Vyavahára Mayukha clearly excludes from adoption in the present age all of the secondary sons except the son given, *i.e.*, the seventh of the twelve sons whom he enumerates. He distinguishes him in the plainest way from the eighth (the son bought), the ninth (the son made), and the tenth (the son self-given), and the other secondary or subsidiary sons (*r*), and it would seem to be a direct contravention of his doctrine and of his grammar to maintain that he, whose authority is so great in this Presidency, sanctions the adoption either of the son bought, the son made, or the son self-given. He has evidently, in making "the exception of the given son," used the term given son (dattaka or dattrima) in its most strict technical signification (*s*).

Nanda Pandita also, as we have seen, excepts the son given, but he goes beyond Nilakantha in including within that term the son made (Kritrima). By expressly so includ-

(*r*) Vyav. Mayukha, Ch. IV., S. IV., pl. 41, 46.

(*s*) Ibid, pl. 46.

ing the son made, he must be regarded as excluding the son bought and the son self-given, for *expressum facit cessare tacitum*, or *expressio unius*, &c. It is unnecessary for us now to say whether we should be disposed to follow Nanda Pandita so far as to recognize the adoption of the son made, notwithstanding the opposite doctrine of Nilakantha. It is enough to say that we do not know of any instance in this Presidency, in which an adoption of the son made (Kritrima) has been declared by the Courts to be valid. In some other parts of India, such an adoption has, even in this age, been sanctioned (Vide 2 Stra. H. L. 203, 204, 208, 209 ; *Mussamut Shibo Koeree* v. *Joogun Sing (t)* ; *The Collector of Tirhoot* v. *Huropershad (u)* ; and *Luchmun Lall* v. *Mohun Lall (v)*.

We regard Devanda Bhatta as holding the same views as those of Nilakantha, who excludes all of the secondary sons except the son given, in the strict technical meaning of that phrase, viz., the son whom his father or mother gives, or both of them give in adoption, and not implying the inclusion of the son bought, the son made or the son self-given—all of whom Devanda Bhatta, as well as Nilakantha, has specified amongst the secondary sons, and distinguished from the son given.

Sir Thomas Strange (1 H. L. 75), having mentioned the twelve sorts of sons, proceeds thus : "And now these two, the son by birth, emphatically so called (Aurasa), and (Dattaka) the son by adoption, meaning always the son *given*, are, generally speaking, the only subsisting ones, allowed to be capable of answering the purpose of sons ; the rest, and all concerning them, being parts of ancient law, understood to have been abrogated, as the cases arose at the beginning of the present, the Kali age. It is so stated in the 'General Note' at the end of the translation of Manu, and elsewhere repeated ; though it has been disputed ; and it is true that, in some of the Northern provinces, forms of

(*t*) 8 Calc. W. Rep. Civ. Rul. 155.
(*u*) 7 Ibid. 500. (*v*) 16 Ibid. 179.

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adoption, other than that of the Dattaka, at this day prevail." And Sir T. Strange, in his 2nd Vol. p 188, gives the opinion of the thirteen Pandits at the Court of the Rajah of Tanjore that the prohibition in the Kali Yuga of any sons, except the son of the body and the given son, is not limited to the twice born classes, but is also applicable to Sudras.

Messrs. West and Bühler (*w*) remark "that, with the exception of the son given, (all other) secondary sons are set aside in the Kali (or present age)."

It has, moreover, been held in this Court that an orphan cannot be adopted according to the Hindu Law administered in this Presidency: *Balvantráv Bháskar* v. *Bayábái (x)*. There has been a similar decision in Madras: *Subbálvammál* v. *Ammakutti Ammál (y)*. Both of these cases have already been mentioned with reference to the first branch of the argument on behalf of the plaintiff.

For these reasons, we think that the plaintiff has failed in the second branch of the argument on his behalf, and that, even though he be regarded as a son self-given, his adoption by Shivlingavá cannot be sustained.

The plaintiff not having succeeded on either branch of the argument, we must declare the alleged adoption of him by Shivlingavá as son to her deceased husband, Vyjápá Ganger, to have been invalid, and unwarranted by Hindu Law.

We, accordingly, reverse the decrees of the Subordinate Judge and of the District Judge respectively, and we dismiss the plaintiff's suit, but, under the circumstances of the case, without costs.

Decree reversed and suit dismissed.

(*w*) Vol. 1, p. 45. (*x*) 6 Bom. H. C. Rep. 83. O. C. J.

(*y*) 2 Mad. H. C. Rep. 129.

NOTE:—This judgment was perused and concurred in by Mr. Justice Nanabhai Haridas before he left the Bench, but it was not delivered until afterwards, the pleaders on both sides agreeing to accept it as the judgment of the Court,—ED.