APPELLATE CIVIL JURISDICTION.

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice West.

1877. June 7.

BHALA NAHANA (PLAINTIFF, APPELLANT) *v.* PARBHU HARI (DEFENDANT, RESPONDENT).

Talabda Koli caste—Adoption—Hindu Law—Contract to settle—Specific performance—Alienation of immoveable property by Hindu widow—Limitation.

It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists amongst the higher castes of Hindus, has no influence upon the Talabda Koli caste, that its members may not lawfully adopt.

Where a member of the Talabda Koli caste of Hindus, by an express promise to settle his property upon the boy, induced the parents of the defendant to give him their son in adoption, but died without having executed such settlement,

Held that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract, survived; and the property in the hands of his widow was bound by that contract.

Therefore, when the widow of the adoptive father, nearly thirty years after his death, gave effect to his undertaking by executing a deed of gift of his property in her hands in favour of the adopted son,

Held that such alienation was valid as against the next heir by blood of the adoptive father, and he could not, on the death of the widow, avail himself of the plea of limitation which she had waived.

The nature of a Hindu widow's estate in immoveable property considered.

THIS was an appeal from the decision of H. Birdwood, District Judge of Surat, affirming with costs the decree of the 2nd Class Subordinate Judge at Ankleswar, whereby he dismissed the plaintiff's suit with costs.

The parties to this suit were Talabda Kolis.

The plaintiff as brother's son, and next heir, according to Hindu Law, of one Gosai Rámji, sued, in 1875, to recover from the defendant, who was a sister's son of Gosai Rámji, possession of a house and land in the village of Obha. Gosai Rámji, who was the divided brother of the plaintiff's father, died intestate and without issue about thirty years before the institution of this suit, leaving him surviving his widow, Bhani, who died on 29th September 1873, which was the date alleged by the plaintiff as that of the accrual of his cause of action, and the plaintiff contended that he thereupon became entitled to succeed to the property left by Gosai Rámji.

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The defendant alleged that he had been adopted, according to the custom of the Talabda Koli caste, by Gosai Rámji, and also relied on a deed of gift executed in his favour by Bhani shortly before her death. He also pleaded limitation.

The evidence showed that Gosái Rámji and Bháni requested the defendant's parents to give the boy to them, as they were childless; that the defendant's father replied "Take him, since you are childless"; that Gosái Rámji promised that the whole of his property should belong to the boy, and also agreed to execute a deed of gift in his favour; and that, but for such promise and agreement on the part of Gosai Rámji, the parents of the defendant would not have consented to give him their son. It was also proved that ever since this compact, which was made in his infancy, the defendant had lived with Gosai Rámji, and been treated by him in all respects as his son; that Gosai Rámji had defrayed the expenses of the marriage of the defendant; and that, when the defendant's father died, the defendant's brother succeeded alone to the whole of his property.

The defendant admitted that he had never assumed Gosai Rámji's name, or performed the funeral ceremonies either of Gosai Rámji or Bhani, and that he still continued to observe the periods of mourning for the deaths of his own blood relations. This, however, was accounted for by the fact that adoption, in the sense in which the word is generally used in the Hindu Law, is unknown to the Talabda Kolis, amongst whom boys are taken as sons, not for any spiritual purpose, but for temporal only; and are, consequently ineligible for the performance of the funeral obsequies of their adoptive parents, and are forbidden to call the adopter "father."

The 2nd Class Subordinate Judge found the plea of limitation in favour of the plaintiff. He also held that the mere taking of the boy, in the manner and for the purposes above stated, did not constitute such an adoption as would, according to the Hindu Law, entitle the defendant to inherit the property of Gosai Rámji. He also held that there was not sufficient evidence to warrant him in finding that Gosai Rámji had expressly authorized his wife to make such a disposition of his property in favour of the defendant

as she afterwards did by the deed of gift. But he held that, inasmuch as Gosai Rámji had induced the defendant's parents to give him their son, and thereby materially affect the boy's *status*, by his promise to execute a deed of gift in favour of the defendant, and had died without having executed that deed, but without having shown any wish to retract his promise, the alienation by the widow was a proper one according to Hindu Law, and must be supported as a disposition made for the purpose of giving effect to the wishes of her husband, who, as a divided Hindu, had a right to deal with his property as he pleased. The District Judge, in appeal, affirmed this decision on the same grounds, and the plaintiff thereupon preferred this special appeal.

Nagindás Tulsidás for the appellant.

Goculdás Parekh for the respondent.

The judgment of the Court was delivered by

WESTROPP, C.J. :—It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists amongst Hindus of castes higher or other than the Talabda Koli caste, has no influence upon it, that its members may not lawfully adopt. The celebrity or perpetuation of the name and family of the adopter is recognized as a motive for adoption. Datt. Mim., sec. 1., pl. 9.; Datt. Chand., sec. 1., pl. 3. For instance, adoption, though not frequent in the Jaina community of Hindus, is practised and recognized, notwithstanding that they disbelieve in the efficacy of and discard the *sraddha* or *paksha* ceremonies; their sole motive for adoption being the perpetuation of the name and family of the adopter: *Bhagvandás Tejmal* v. *Rajmal*.[1]

In the Subordinate Judge's Court the reasons for adoption in the Talabda Koli caste are found to be temporal, viz., the rendition by the adopted sons of domestic services, the commemoration, by those sons, of the adoptive fathers, by giving feasts on the anniversaries of their deaths to the caste, and that the adopted sons should become heirs of the adoptive fathers. In the present case there unquestionably has been a giving and receiving in adoption

(1) 10 Bom. H. C. Rep. 241; see pp. 261, 263.

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and it is found, as a fact, that the gift of the boy by his parents was made upon the express promise by Gosai Rámji, the adoptive father, to settle his property upon the boy. It has, indeed, been also found, as a fact, that an adoptive father may, according to the custom of the caste, for such reasons as would justify a natural father in disinheriting his son, repudiate the adopted son. It is, however, sufficient for us to say that not only is there a complete absence of allegation or evidence that any such grounds existed here, but Gosai Rámji, up to the time of his death, kept the boy in his house, treated him as his son, and never expressed any intention or desire to repudiate him, or to violate the promise on the faith of which the natural parents gave their boy in adoption. If any such grounds had existed, and the adoptive father had upon them repudiated the boy, it might be a question what would be the effect of such a repudiation upon the contract to settle, or upon the boy's right to resume his place in the family in which he was born, either as regards heirship or otherwise. It is unnecessary here to consider such questions. There not being any evidence of grounds which would have warranted repudiation, or any repudiation in fact, we must hold that Gosai Rámji was, at the time of his death, bound to perform his contract, on the faith of which the boy's natural parents permitted him to alter his *status* in life, and to forego his claim to inheritance from them. In *Hammersley* v. *Baron De Biel*(1) Lord Cottenham said:—"A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation." And in the same case in the House of Lords, where his decision below was affirmed, he said:—"But the principle of law, at least, of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he

(1) 12 Cl. and F. 45, 61, note.

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is not disappointed, and will give effect to the proposal."(1) See to the same effect *Coverdale* v. *Eastwood*,(2) and the cases collected in 1 White and Tudor, 3rd Ed. 705, 4th Ed. 782. Gosai Rámji having died, without making the promised settlement, the equity to compel his heir and legal personal representative specifically to perform his contract, survived him. The property, when it came into his widow's hands, was bound by that contract. It has been relied upon on behalf of the plaintiff that the contract remained unperformed for some thirty years after the death of Gosai Rámji. That circumstance, however, is immaterial, inasmuch as his widow, who fully, so long as she lived and continued a widow, represented the inheritance (if the adopted son were not himself the heir,) did not think proper to avail herself of any plea of lapse of time, but did, by the deed of settlement (Exhibit No. 9), carry her husband's contract into complete execution. Strictly speaking, however, the property of Gosai Ramji, on his death, vested in interest in the adopted son as his heir, who was then entitled to immediate possession, and the acts of the widow were merely for the purpose and had the effect of vesting that property in him in actual possession. She never, apparently, wavered in her purpose; for she had previously caused the *Gamatia* lands to be transferred to the name of the adoptive son, and had endeavoured to induce the Collector to transfer her deceased husband's share in the *Bhagdari* land also to the adoptive son's name. She was not in anywise bound to avail herself of the plea of limitation, *Tilakchand* v. *Jitamal*,(3) if such a plea were open to her. She honourably adhered to her husband's contract, and it is not competent for the person who, if Gosai Rámji had not adopted a son, would, on the death of the widow, have been Gosai Rámji's heir to set up such a plea, which has been, as we think, most properly waived by the widow. In saying that she was not bound to avail herself of that plea, we are not unmindful of a *dictum* in *Melgirápá* v. *Shivápá*,(4) that payment of a time-barred debt of a deceased husband was not a sufficient purpose to support an alienation by his widow against his male heir. That *dictum*, however, does not appear to have been indispensable—the suit there having

(1) 12 Cl. and F. 78, 79.
(2) L. R. 15, Eq. 121.
(3) 10 Bom. H. C. Rep., pp. 213 to 215.
(4) 6 Bom. H. C. Rep. 270, A. C. J.

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been simply to recover possession, to which relief the Court held the plaintiff (the alleged male heir) not to be entitled, the alienation being good, at least, so long as the widow lived and continued in a state of viduity.(1) The case of *Grish Chunder Lahoory* v. *Koomaree Debea*, cited by Norton (2 L. C. 642) from 1 Calc. W. R. Misc. 23, only shows the liability of the widow to pay the debts of her husband, and does not in anywise support the proposition for which he quotes it, viz., that the payment of her husband's debt after it has been barred by limitation is not such a necessity as will support an alienation by her. In *Gopalnarain* v. *Mudoomutty*,(2) Couch, C.J., is reported as having said in the High Court at Calcutta that "the manager of a joint Hindu family has no power to revive a debt by acknowledgment, except as against himself." That remark was made with reference to Section 4 of Act XIV. of 1859, and may, perhaps, be regarded as the Court's view of the construction of that enactment, and akin to the ruling that an acknowledgment signed by an agent is not sufficient to bring a case within that section.(3) It is another and different proposition to maintain that, if the manager of a Hindu family (*ex. gr.* a son or grandson of the deceased) pay a debt of his father or grandfather barred by the law of limitation, such manager would not be entitled to credit as against his coparceners for the amount or that a widow paying such a debt of her husband could not support her act against his divided male heirs. Whether we should concur in the above-quoted remark of Couch, C.J., it is unnecessary now to consider. The difference between a promise to pay and an acknowledgment should not be forgotten.(4) We do not feel pressed by the distinction, taken in *Gopalnarain* v. *Mudoomutty*,(5) between an English executor and a Hindu manager or executor. Of the English executor Lord Lyndhurst says: "The debtor may at any time pay the debt; and even his executor may pay it in spite of the statute, and in that way satisfy, in his

(1) 1 Calc. W. R. 47, 69; 2 Mad. H. C. R. 393; 2 Bom. H. C. Rep. 313, 2nd Ed.

(2) 14 Beng. L. R. 21, 49.

(3) *Budoobhoosun Bose* v. *Enaet Moonshee*, 8 Calc. W. R. 1 Civ. R.

(4) Indian Contract Act IX. of 1872, Sec. 25, Cl. 3; *Raghoji* v. *Abdul Karim* (Sp. App. 303 of 1876) printed judgments of 1877, p. 74; *Chatur* v. *Talsi* (Sm. C. Court Ref. 73 of 1877) printed judgments of 1877, p. 237; *Nagindás* v. *Trikumdás* (Civ. Ref. 117 of 1877) printed judgments of 1877, p. 239; *Tilakchand* v. *Jitamal*, 10 Bom. H. C. R. 213, 214, 215.

(5) 14 Beng. L. R. 21, 49.

representative capacity, the conscience of his testator."[1] See to the same effect *Norton* v. *Frecker*,[2] per Lord Hardwicke; *Stahlschmidt* v. *Lett*;[3] *Hill* v. *Walker*,[4] where Wood, V.C., expressly states that a *dictum* to the contrary in *McCulloch* v. *Dawes*[5] is not law; and *Lowis* v. *Rumney*.[6] The religious law of the Hindu widow, which is even more urgent than the moral obligation of the English executor, enjoins upon her the duty of paying the debts of her husband if he be not a member of an undivided family. The Rishi Narada says:—"The debts contracted by the husband shall be discharged by the widow, if sonless, or if her husband has enjoined her to do so on his death-bed, or if she inherits the estate; for whosoever takes the estate must pay the debts with which it is incumbered."[7] The answer of the Shastri, in 1 West and Bühler 68, is to the same effect. And East, C.J., in *Gopeymohun Thakoor* v. *Sebun Cower*[8] remarked that "it is her duty to pay off the mortgage debt, as well as all other debts of her husband, provided there are assets, either real or personal." If the adopted son be not himself regarded as the heir of his adoptive father, but merely as a person upon whom the latter had contracted to settle his property, then the alleged adoptive father, having died sonless, divided from his kinsmen, and without having performed his contract, his moveable and immoveable estate completely vested in the widow by way of inheritance,[9] although with a restriction on her power of alienation of immoveable property,[10] except for certain proper or necessary purposes specified by Hindu jurists. Amongst these, as we have seen, the payment of her husband's debts and performance of his contracts are included. She so completely represents the inherit-

(1) *Williamson* v. *Naylor*, 3 Y. and C., Exch. 211, note.

(2) 1 Atk. 525, 526.

(3) 1 Sm. and Giff. 415.

(4) 4 Kay and Johns 166, 168, 169.

(5) 9 Dowl. and Ry. 43.

(6) L. R. 4, Eq. 451.

(7) Dr. Jolly's Trans., p. 17, pl. 18. That the same religious duty is incumbent on the son and grandson, see 11 Bom. H. C. Rep., pp. 83 to 85.

(8) 2 Morley Dig. 105, 111.

(9) *Vide* per Peel, C. J., in *Hurrydoss Dutt* v. *Rungunmoney Dossee*; 2 Taylor and Bell 280, 281, and per Colvile, C.J., in *Sreemutty Jadoomoney* v. *Sarodaprosono Mookerjee*; 1 Boulnois R. 129; *Doe d. Muddoosoodun Doss* v. *Mohenderlal Khan*, per Sir C. Jackson, J.; 2 Boulnois R. 42; and *Doe d. Goluckmoney Doss* v. *Diggumber Dey*; 2 Boulnois R., per Peel, C.J., p. 193.

(10) She may be restrained from waste. 1 Taylor and Bell 370; 2 Taylor and Bell 279; 2 Boulnois 201, per Peel, C. J.

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ance, that in a suit (in which she is a defendant) to foreclose a mortgage made by him, his next male heir is not a necessary party, although he has sometimes been made so *ex majori cautelâ*.(1) In *Doe d. Goluckmoney Dabee* v. *Diggumber Dey*,(2) Peel, C. J., observed: "It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law that adverse possession, which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life, as known to the English Law; on the contrary, if such were her estate, her heir would have twenty years after her death for making his entry, which would be a most mischievous rule to establish." The completeness of her title to the inheritance is further illustrated by the same learned Judge's observations and those of Colvile, J., in *Mohar Ranee Essadah Bái* v. *The East India Company*,(3) and the other cases mentioned in *Lalchand Ramdyal* v. *Gumtibái*,(4) and there quoted at pp. 155 to 157 of the report in 8 Bom. H. C. Rep., O. C. J. In *Ramchandra Tantra Dás* v. *Dharmo Náráyen Chuckerbutty* (5) it was held by a Full Bench in Calcutta that the interest of an heir, expectant on the death of a widow in possession, is so mere a contingency, that it cannot be regarded as property, and, therefore, was not liable to attachment and sale under Section 205 of Act VIII. of 1859.

It follows, from what has been said, that we think the widow had full power to perform the contract of her husband with the parents of the adopted boy.

For these reasons we affirm the decree of the District Court with costs.

Decree affirmed.

(1) 2 Morley's Dig. 111, per East, C. J.; and also in *Cossinaut Bysack* v. *Hurrysoondry Dossee*, Ibid. 210, 215, as to which case, on appeal to the Privy Council, see 2 Boulnois R. 197, 198, per Peel, C. J., and 1 Boulnois R. 129, per Colvile, J.; and the Shiva Gunga case, per Turner, L. J.; 9 Moore, Ind. App. 604.

(2) 2 Boulnois R. 198; and *Nobinchunder* v. *Issurchunder*, 9 Calc. W. R. 505, Civ. R.

(3) 1 Taylor and Bell 290.

(4) 8 Bom. H. C. R. 155 to 157, O. C. J.

(5) 7 Beng. L. R. 341.