APPELLATE CIVIL.

(3)

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

1878
April 2.

RADHABAI, WIDOW OF KRISHNAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* GANESH TATYA GHOLAP (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Will—Attestation—Signature.

A will by a Hindu is not invalid because the text of it was not written by the testator himself, and because his signature is not attested.

The rules of Hindu law relating to documentary evidence are not to be applied strictly in the case of wills.

THIS was an appeal from the appellate decree of G. Druitt, Assistant Judge of Puna, confirming the decree of the Subordinate Judge, First Class, of Puna.

The plaintiff alleged that he was the purchaser of an upper story of a house belonging to one Hari Ok, that the defendant No. 1 unlawfully obstructed him in getting possession of the same, and he prayed for the removal of the obstruction, and for a declaration of his title.

The defendant No. 1 answered that he held possession on behalf of Radhabai, widow of Krishnaji, who was, therefore, joined in the suit as a co-defendant. Radhabai asserted that the house belonging to her husband, who had executed a will in her favour. She also stated that the first defendant held possession on her behalf.

The Subordinate Judge found the will not proved, and awarded the claim; the Assistant Judge confirmed his decree on the ground that the text of the will was not written by the testator himself, and that the testator's signature was not attested as required by the Hindu law.

Mahadev Chimnaji Apte for the appellant.

Ghanasham Nilkanth Nadkarni for the respondent.

WESTROPP, C.J.—The Assistant Judge has rejected the will (exhibit No. 27) because it was not written by the testator himself, and because his signature is not attested. The Vyavahara Mayukha (c. II, s. 1, para. 5) does, no doubt, lay down certain rules, dividing documentary evidence into two sorts, "the first in the handwritting of the party himself, which need not have subscribing witness; and the second in that of another person which ought to be attested," and it is added: "the validity of

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both depend on the usage of the country." We do not think that we are bound to apply this rule strictly, at all events, to documents, such as wills, which, were not recognized by Hindu law, and were, therefore, not within the contemplation of the author. No decision of any Court has been shown to us, declaring the will of a Hindu to be invalid unless attested; while it was held by this Court, sitting in appeal from the decision of the late Supreme Court in *Mancherji Pestanji* v. *Narayan Lakshmanji and others*, (1) that the will of a Hindu in writing, signed by him, but not attested by witness, is to be admitted to probate. The decision proceeded mainly on the absence of authority to the contrary, and on the proved usage in regard to wills executed in Bombay.

We, therefore, think that this case must be remanded to the District Court, in order that it may be decided whether the will (exhibit No. 27) is proved, and, if so, what are the rights of the parties under it.

We observe that the defendant Radhabai's vakil, in the lower Appellate Court, applied to be allowed to produce and prove the deed of adoption of Hari Krishna Ok by the defendant Radhabai. We are not informed on what grounds this application was made; and, of course, it whould not have been, and should not now be granted, unless for some such sufficient reason as is stated in s. 355 of Act VIII of 1859. But, supposing that such reason existed, we must remark that the grounds stated by the Assistant Judge for rejecting the application are not satisfactory. If the Assistant Judge had referred to the cases of *Venayak Narayan Jog* v. *Govindrav Chintaman Jog* (2) and *Chitko Ragunath* v. *Janaki* (3) he would have seen that there is, at all events, authority for holding that the rights of a minor, given in adoption, may be defined and restricted by agreement between the natural and adoptive parents. If the Court below should ultimately decide to admit the deed of adoption in evidence, it will be necessary for it to reconsider what is the effect of that deed upon the rights of the parties.

The decree of the Assistant Judge is reversed, and the case remanded for a new decision. Costs to follow the final result.

(1) 1 Bom. H. C. Rep. 77. (2) 6 Bom. H. C. Rep. 224, A. C. J.
(3) 11 Bom. H. C. Rep. 199.