APPELLATE CIVIL.

(64)

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

1879
March 14.

GOPAL NARHAR SAFRAY, A MINOR (ORIGINAL PLAINTIFF), APPELLANT, *v.* HANMANT GANESH SAFRAY AND GANESH RAMCHANDRA SAFRAY (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption of a daughter's or sister's son—Lingayats—Factum valet.

It is a general rule and fundamental principle amongst Brahmans, Kshatryas and Vaishyas, that they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or son of any other woman whom they could not marry by reason of propinquity. The burden of proving a special custom to the contrary amongst any members of these three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom.

Limits within which the maxim *quod fieri non debuit, factum valet* applies, pointed out.

Lingayats are members of the Sudra, and not of the Vaishya class.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, reversing the decree of the Second Class Subordinate Judge of Karad.

Gopal, a minor, brought this suit by his mother and guardian, Rakhmabai, and prayed for a declaration that he was the adopted son of Narhar Ganesh safray, and that, as such, he was entitled to the estate of the said Narhar Ganesh. The defendants Hanmant Ganesh and Ganesh Ramchandra, who were respectively the brother and nephew of the said Narhar Ganesh, answered that plaintiff had not been adopted, and that, even supposing he had been, his adoption was illegal, as he (the plaintiff) was the son of Narhar's daughter, Ambabai. The material facts, either admitted in the pleadings or found on the evidence by the lower Courts, were that the plaintiff was the son of Narhar's daughter, Ambabai, by her husband Vasudev ; and that the ceremony of his adoption had taken place in the life-time and with the consent of Narhar Ganesh, according to the necessory forms prescribed by the Hindu law. The Subordinate Judge passed a decree for the plaintiff, on the ground that an adoption, once made in due form, was not to be set a aside. In appeal the District Judge reversed that decree, holding that the adoption was illegal, as Ambabai, plaintiff's nature mother, was Narhar's daughter.

* Special Appeal No, 259 of 1874.

1879

GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

The learned pleader, who appeared for the plaintiff Gopál (appellant), stated, in answer to a question from the Court, that there was on the record no evidence to show that the adoption was in accordance with any custom prevailing among Brahmans of the caste to which the parties belonged, or in the place where the suit arose.

The respondent's pleader stated to the Court that the District Judge was wrong in finding, on the authority, as he said, of the deposition of witness No. 31 (plaintiff's paternal grandfather), that plaintiff had been given in adoption by the witness as his natural guardian in the absence of Vásudev, then deceased. The learned pleader referred to the deposition, and showed that the witness (No. 31) had made no such statement as had been attributed to him.

Shántaram Narayan for the appellant.—The law prevailing on this side of Indin on the subject of adoption is laid down in the Vyav. Mayukha, ch. iv, sec. 5 : Dattaka Mimansa and Dattaka Chandrika. I admit that these books disapprove the adoption of a daughter's or sister's son by a person of the three regenerate classes, although they allow, nay strongly recommend, such adoption among the Sudras. But I submit that they, more especially the Vyav. Mayukha, do not absolutely prohibit such adoption among the three superior tribes. The rule is directory, not prohibitory. (In support of his view the learned pleader commented on Vyav. Mayukha, ch. iv, sec. 5, pl. 9, 10, 11, 36, and then proceeded.) Steele, who is a great authority on the law and customs of Hindus in the Deccan, says at page 44 (ed. 1868) while enumerating the list of persons (eligible for adoption): "6th. A boy of different *gotr*, but of the same caste (*purgotr*). Such are the sister's son and daughter's son, who are adoptible in default of the preceding, P. C. (Koustoobh and Nirunesindhoo.)" Again at page 183 the same author says: "A daughter's son is sometimes adopted with the consent of relations, D." Sir Thomas Strange, (1) after stating that the daughter's son and the sister's son are eligible for adoption among Sudras, relaxes the general rule in favour of the three superior classes when no other child is procurable. In support of this view the auther refers

(1) 1 Stra. H. L. 83, 84.

to the opinion of Mr. Ellis.(1) On this point the learned pleader also cited Strange's Manual of Hindu Law, p. 87, 88, 89; and Grady on Hindu Law, p. 38.) The Privy Council in *Ramalinga Pillai* v. *Sadasiva Pillai*(2) upheld the adoption of a sister's son by a Vaishy. An adoption of a Brahman of his sister's son was held valied in *Ramchandra Chatterjea* v. *Sambhu Chandur Chatterjea.*(3) By the law and usage of Mithila, the adoption of a sister's son, even by persons of high caste, was held valid in *Choudree Prumessur Dutt* v. *Hunooman Dutt Ray.*(4) The Bombay High Court held the adoption of a sister's son, by a Hindu of the Vaishya caste, valied: *Ganpatrau* v. *Vithoba.*(5) The late Sadar Adalat in *Huebut Rao* v. *Golindrao* (6) upheld the adoption of a sister's son holding that the sin of a forbidden adoption lay with the giver, not the receiver. Even supposing such adoption to be illegal and sinful among the three higher classes, an adoption once made in due from, and with the necessary ceremonies, cannot be set aside on the principle of *factum valet.*

Dinkar Gangadhar for the respondent.—The most universal rule of Hindu law on the subject of adoption among the three regenerate tribes is that one with whose mother the adopter could not legally have married, must not be adopted.(7) Accordingly, a Hindu belonging to any one of the three superior castes is strictly prohibited from adopting his daughter's or sister's son. In support of his argument the learned pleader relied upon Datt. Mimansa, sec. 5, pl. 17, 18; Datt. Chandrika, sec. 5, pl. 17. *Narasammal* v. *Balaramacharlu.*(8)

The following is the judgment of the Court delivered by

WESTROPP, C. J. By this suit the infant plaintiff, by his guardian and alleged adoptive mother Rakhmabai, sought for a declaration of his title, as adopted son of her husband Narkar Ganesh Safray, against his male relatives, the defendants.

(1) 2 Stra. H. L. 100, 101.
(2) 9 Moo. Ind. App. 506; S. C. I. Calc. W. R. P. C. 25.
(3) Morley's Dig. (1850) Tit. Adoption, 58; S. C. Macn. Cons. H. L. 167.
(4) Morley's Dig. (1850) Tit. Adoption 61, S. C, 6, S. D. A. Rep. 192.
(5) 4 Bom. H.C. Rep. 130, A.C.J.
(6) 2 Borr. R. 83 (1863).
(7) Stra. H. L. 83; Synopsis, Head II; see Stocks H. L. Bks., P. 664.
(8) 1 Mad H, C. Rep. 420.

1879

GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

It was agreed by the respective pleaders of the parties before the District Judge, Mr. Mactier, that Gopal, the infant plaintiff, was the son of Ambabai by her hasband Vasudev, and that Ambabai was the daughter of Narhar Ganesh Safray. The District Judge has found, as fact, that the ceremony of the adoption of Gopal was performed in the usual form, and that, whatever may have been the original allegation as to the adoption having been by Rakhmabai, the adoption actually was made in the life-time of Narhar, her husband, and with his assent; and that there was some evidence to show that by some persons it was considered not improper, in the district where the adoption took place, that a daughter's son might be adopted. It was, however, admitted by the appellant Gopal's pleader, Mr. Shantaram Narayan, that there was not any evidence in this case that amongst Brahmans of the caste to which the parties belong, or in the locality whence the case comes, any such custom of adopting a daughter's son prevailed. The District Judge further said that the witness Ramkrishna, the grandfather of Gopal and father of Vasudev, gave Gopal in adoption, he (Ramkrishna) being the lawful guardian of Gopal, whose father Vasudev was then dead. But it was admitted by Mr. Dinkar, who argued the case on behalf of the respondents, that this was a mistake, of the District Judge, and that, in fact, Ramkrishna did not make any such statement. Accordingly, the objection made on behalf of the defendants in the Court below, that Gopal was given an adoption by Ramkrishna, a person who had no authority to give him, fell to the ground. However, there still remained the objection that Gopal was not the son of a woman whom Narhar could have lawfully married, inasmuch as a marriage with his own daughter Ambabai would have been incestuous and invalid. The Subordinate Judge of Karad, on the ground that an adoption once made cannot be set aside, held the adoption valid. The defendants appealed, and the District Judge disposed of the Subordinate Judge's *ratio decidendi* by remarking that it could not be applied to an adoption that was so completely invalid as that attempted to be set up by the plaintiff, and that "there would be no use in making a law, and then saying that 'if it be broken there was no remedy,'" which were observations certainly not without weight. The District Judge being of opinion that Narhar

could not adopt his daughter's son, reversed with costs the decree of the Subordinte Judge, which had been made in favour of the plaintiff.

The plaintiff has specially appealed to this Court.

By his memorandum of special appeal he contends:

1. That by Hindu law his adoption was valid.

2. That the District Judge ommitted to determine whether, by the custom of the caste and the country, the adoption was valid.

3. That he ought to have laid down an issue on that question, and to have thus given to the appellant an opportunity of adducing evidence in support of the custom.

We proceed first to discuss the general question of the validity, amongst Brahmans, of the adoption, by one of that class, of a daughter's son.

In the Dattaka Mimansa, which Mr. Colebrooke, says "is, no doubt, the best treatise on Hindu adoption," and which, though not quite invariably followed, is generally of high authority in this Presidency, (1) the author Nanda Pandita, in sec. ii, pl. 74, refers to a text of Caunaka in which it is said: "But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes a sister's son is nowhere [mentioned as] a son." Further, remarking on the same text the commentator at pl. 91 of the same section proceeds thus:

"This part of the text [but a daughter's son, &c.] propounds an exception as to those of the three first tribes with respect to the daughter's son inferred from the mention of propinquity in general."

"92. Since (the particle 'but' having an exclusive import) a restriction 'by Sudras only' is conveyed, those of the three first tribes are excluded. On this point the author subjoins a reason: 'For the three superior tribes, &c. &c.'"

"93. Since the filial relation of a sister's son to one of the three first tribes is not exhibited in any autority whatever, the passage is relative only to Sudras. This is the meaning of the whole."

(1) West & Buhler, Introd. II; 7 Bom. H. C. Rep. 165, 167. *Ibid.* App. p. vii,

1879
GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

"94. The expression 'a sister's son' is of indefinite import in the [part subjoined as a] reason; for [otherwise] it would follow that it were therein an unmeaning term: or, were it of definite import, one portion [of the preceding sentence, viz., 'a daughter's son'] would be void of sense."

"95. The daughter's son and that of the sister refer to the Sudra tribe: for in no other authority do they relate to those of the three first tribes.....Hence it is not accurate that these two refer to those of the three first tribes."

Containing the argument thence down to pl. 107, he says in that *Placitum*: "Cakala has clearly laid down the above points. 'Let one of a regenerate tribe, destitute of male issue, on that account adopt as a son, the offspring of a *sapinda* relation particularly: or also, next to him, one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son, and the son of the mother's sister.'" Nanda Pandita sums up thus in the last *placitum* of section II: "108. By this is clearly established that the expression 'sister's son' [in the last sentence of Caunaka's text, pl. 74,] is illustrative of the daughter's son and mother's sister's son, and thus is proper for prohibited connexion is common to all three. To enlarge would be useless."

In Sec. V, Nanda Pandita, commenting on the text of Caunaka which enjoins the adoption of one "bearing the reflection of a son" [pl. 15], proceeds in pl. 16 thus:

"['The reflection of a son.'] The resemblance of a son, and that is the capability to have sprung from [the adopter] himself, through an appointment [to raise issue on another's wife], and so forth as (is the case) of a son, of a brother, a near or distant kinsman, and so forth. Nor is such appointment of once unconnected impossible: for the invitation of such [to raise issue] may take place under this text. 'For the sake of seed let some Brahman be invited by wealth,' &c."

"17, Accordingly, the brother, paternal and maternal uncles, the daughter's son and that of the sister are excluded: for they bear not resemblance to a son."

In *placita* 18, 19 and 20 he continues the argument in favour of the exclusion from adoption by any of the three superior tribes of the daughter's or sister's son, and lays down the general principle which works that exclusion, viz., that the person to be adopted must be, in those tribes, one whose mother the adopter might have married without incest.

Devanda Bhatta in the Dattaka Chandrika, sec. 1, pl. 11, quotes the passage from Cakala, relied upon by Nanda Pindita, for the prohibition of adoption by any man of a regenerate tribe of "a daughter's son and a sister's son and the son of the mother's sister ;" and in pl. 17 he says :

"'Except a daughter's son and a sister's son.' This prohibition against the daughter's son and sister's son refers to those other than Sudras. Accordingly, Caunaka : 'Of Kshatriyas in their own class positively, and [on default of a *sapinda* kinsman] even in the general family, following the same spiritual guide [*guru*]. Of Vaishyas, from amongst those of the Vaishya class : of Sudras, from amongst those of the Sudra class : of all and the tribes likewise in [their own] classes only and not otherwise. But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes a sister's son is nowhere mentioned as a son.'" In sec. ii, pl. 8, he gives the same meaning to Caunaka's phrase "reflection of a son" which Nanda Pandita subsequently adopted.

Mr. Sutherland in his Synopsis, summing up the foregoing authorities (Head II, pl. 1) says : "The first and fundamental principle if that the person, proposed, to be adopted, be one who, by a legal marriage with his mother, might have been the legitimate son of the adopter. By the operation of this rule a sister's son and offispring of other female, whom the odopter could not have espoused, and one of a different class, are excluded from adoption. In the present age, marriage with one, unequal in class, to prohibited. Nanda Pandita declares that a woman may not affiliate a brother's son :(1) if his opinion be correct, it might consistently be argued, that where a woman is proceeding to adopt with

(1) Datt, Mim., sec. ii, pl. 33, 34.

1879

GOPAL NARAR SAFRA v. MANMANT GANESH SAFRAY AND ANOTHER.

the sanction of her husband or kindered, she must not select generally one with whose father she could not have legally married."

Nilkantha(1) quotes the text of Caunaka, already given, enjoining in adoption equality of class, and allowing affiliation by Sudras of "a daughter's son and a sister's son." Mr. Shantaram argued that Nilakantha, while strongly urging, nay insisting, on the affiliation of a daughter's son or a sister's son by a Sudra, (2) does not prohibit such an affiliation by a member of any of the three regenerate tribes. But this argument is inconsistent with Nilakantha's mention of the adoption of such persons by Sudras as an exception, and, therefore, inconsistent also with the rule *exceptio-unius exclusio alterius*, as well as with his observations in pl. 10 to the effect that adoption of a daughter's son or sister's son is for Sudras alone. And although he in the next *placitum* treats such an adoption as "the most proper for Sudras," and in pl. 36 says: "Of Sudras (adopting) the daughter's son or the sister's son is to be taken and no other," we see no reason for supposing that he intended to relax the interdiction of such adoptions by Brahmans, Kshatriyás and Vaishyás partly expressed and partly implied by Chaunaka, and expressly imposed by Cakala, Devanda Bhatta, and Nanda Pandita. And in this there is not any inconsistency when we remember that the Hindu law regarded the Sudras as slaves(3) and their marriages as little better than licensed concubinage.(4)

In support of the adoption, Mr. Shántárám Náráyan relied on two passages in Steele. In one of these, referring to the Poona College as its authority (and which, again, referred to the Kaustubha and Nirnaya Sindhu as their authority), it is said that, in default of certain specified preferable relations, the sister's son or daughter's son may be adopted.(5) In the other it is said that a daughter's son is sometimes adopted with the consent of relations.(6) The letter D (probably standing for Dhárwár) append-

(1) Vyav. Mayukha, ch. iv, s. v, pl. 9; and see ch. iv, s. i, pl. 14.

(2) Vyav. Mayukha, ch. iv, pl. 11 and 36.

(3) Cole Dig., Bk. III, ch. I, s. 2, pl. 36; Datt. Mim. s. ii, pl. 81.

(4) *Vide* M. S. note of West, J., *infra*, and the *vyavastha* in 2 Borr. (1st ed.) 667; (2nd ed.) 725.

(5) Steele (1st ed.,) p. 51; and at p. 44 of 2nd ed. (1868.)

(6) *Ibid.* (1st ed.) p. 184; and at p. 183 of 2nd ed. (1868.)

ed to this passage shows that it was founded on a reply received from the South Maratha Country.(1) It will be observed that in neither of these passages is it stated to what class of Hindu the *dictum* is applicable. To the first of these passages Mr. Steele has attached a note, in which he refers to the opinion of one of the shastris in *Huebut Rav* v. *Govind Rav*(2) as excluding the son of a daughter or sister, except in the case of Sudras. In fact, three of the shastris (Sakharam Shastri Nagarkar, Chintaman Shastri Dixit Apte and Ramchandra Shastri Karadkar) distinctly in their opinions denied, in reply to the seventh question submitted to them, that the son of a daughter or sister could be abopted. One of them (Sakharam Shastri Nagarkar) added that this was so, except in the case of Sudras alone.(3) The shastris, other than those above mentioned, there consulted, were silent on the right to adopt a daughter's or sister's son. Mr. Shantaram Narayan, after carefully consulting the Kaustubha and the Nirnaya Sindhu, on which the first passage in Steele professes to be founded, very candidly admitted that the Kaustubha went no further than the Vyavahara Mayukha, which treats the daughter's and sister's sons as eligible for adoption by Sudras only, and that the Nirnaya Sindhu shed no light whatever on the question; and the Dharma Sindhu, which he also examined concurs precisely with the Kaustubha. We are much indebted to Mr. Shantaram Narayan for the information which he has thus been so good as to furnish to the Court.

With a view to probable future publication, our brother West has collected *vyavasthas* of the shastris of this Presidency on adoption—a subject upon which the already-published valuable treatise on Hindu law of himself and his learned and able *collaborateur* Dr. Bühler (which has yet to be completed) only casually touches. To these *vyavsthas* our brother West has kindly permitted us to have access. In the M. S. of these *vgavasthas* the portion of No. 1633 applicable here is as follows:—"To a question whether a daughter's only son could be adopted by her father, in pursuance of an agreement with her

(1) Steele (1st ed.) Preface, p. xiv, and at p. xvi, of Preface to 2nd ed. (1868).
(2) 2 Borr. p. 29 (1st ed.); and at p. 33 of 2nd ed. (1863).
(3) 2 Borr. Rep. (2nd ed.), pp. 105, 107.

1879

GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

husband at the time of marriage, the shastri says only : 'The adpotion of a daughter's son is forbidden.'" And, again, in No. 1638 the shastri says : "A Brahman cannot adopt his daughter's son." And in No. 1613 the shastri lays it down that "if a Prabhu cannot obtain a son of his own *gotra*, he may take one from another *gotra*, except the son of his sister or daughter." The sister or daughter, it will be remembered, leave on marriage the *gotra* of their father, and enter the *gotra* of their husband.(1) The Prabhus claim to belong to the Kshatriya class.(2) The shastri in M. S. 1636 says that "a Sudra only may adopt a sister's or daugnter's son." And in M. S. 1624 the *vyav-ustha* is : "A Vania, being a Sudra, may ado pt his sister's son." In M. S. No. 1672 the shastri said that "a brother's or sister's son may be adopted by a sister or brother amongst Sudras only." And in M. S. No. 1641 the shastri, quoting Vyav. Mayukha, f. 106, line 6, (the passage already above given relating to Sudras, says "a Lingayat may adopt his daughter's son." It may be here observed that the statement in the marginal note to *Ramalinga Pillai* v. *Sadasiva Pillai*, (3) and at page 511 of the report that the person held in that case to have been adopted belonged to the Vaishya class, is erroneous. Mr. Mayne in his able treatise on Hindu law (4) states that the parties were really Sudras which fact is also mentioned in the judgment of the High Court of Madras in *Jivani Bhai* v. *Jivu Bhai*.(5) In *Ramalinga Pillai* v. *Sadasiva Pillai*(6) the judgment of the Privy Council went solely upon admissions of the appellant's father as to the fact and valid ity of the adoption, and which admissions, so far as the validity of the adoption was concerned, rested, no doubt, on his knowledge that the adopter and adoptee, being Sudras, fell within the exception to the general rule against the adoption of a sister's son. It should be observed that Lord Chelmsford, in giving the judgment of the Privy Council, said that upon the objection that the adoption was illegal, as the respondent was the adopter's

(1) Steele (1st ed.) 33, (2nd ed.) 26; Max. Muller Sans. Lit 387; *Lallubhai Bapubhai* v. *Mankuvarbai*, Ind. L. R. 2 Bom. 388. see, p. 420; 1 West and Bühler (1st ed.) 233, answer to Q. 3; 2nd ed., pp. 237, 238, 118, 180, 434, 438

(2) Steele (1st ed.) 95, 100.

(3) 9 Moore's Ind. App. 506,

(4) Page 110, note *(u)*.

(5) 2 Mad. H. C. R. 462, 467.

(6) 9 Moore's Ind. App. 506.

sister's son, "very little was said;" and he did not dicuss that point. That case, therefore, is no authority for the proposition that amongst Vaishyas a sister's son may be adopted, although it appears to have been cited in *Ganpatrav* v. *Vithoba*(1) as showing that such an adoption would be good amongst Vaishyas. The head-note to that Bombay case is incorrect. There is nothing in the very meagre report of the judgment of the Court, there pronounced by Couch, C. J., to the effect that Lingayats, as the parties there were, are Vaishyas. The third clause in the head-note to *Mhalsabai* v. *Vithoba Khandappa Gulvè*(2) is also wrong. The Court did not give any opinion in that case on the law relating to Vaishyas, or that the Lingayats were Vaishyas. The counsel for the appellant, at the twelfth hour, was instructed to state that Lingayats are Vaishyas; but no evidence to that effect was then or had been previously given, and the case had in the lower Court been dealt with on the understanding that the parties were Sudras.(3) The questions, which the High Court put to the shastri, prove, beyond doubt, that by the Court also the parties were regarded as Sudras only.(4) During the present century some of the more wealthy and educated members of the Lingayat caste have, as it advanced in prosperity, manifested a desire to elevate it, and, by endeavouring to get rid of practices which are badges of the Sudra tribe, to raise the caste from that class into the next, viz., Vaishyas. But it is an impossible task for a Hindu to rise from the class, whether it be Kshatriya, Vaishya, or Sudra, in which he was born, to any class above it. It would seem that some of the Lingayats, in their effort to accomplish that impossibility, persuaded Mr. Steele to described them as "considered rather superior to Sudras," and to have furnished to him, as the slender foundation for that statement, a mythical tradition to the effect that Lingayats are the result of the adulterous intercourse of an outcaste of the Vaishya tribe with a Vaishya married woman. However, in the same year (1827) in which Mr. Steele's book was published, a case occurred in Civil Courts which showed that the majority of the Lingayat caste then adhered to a practice indicative of their Sudra origin.

(1) 4 Bom. H. C. Rep. 130, A. C. J.
(2) 7 Bom. H. C. Rep., Appx. p. xxvi
(3) *Ibid.* App. p. xxviii, note†
(4) *Ibid.* Appx. p. xxix.

1879

GOALNA RHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

We refer to an appeal from a *panchait* to the Court at Sholapur (*Kashibai* v. *Nagapa bin Gurshidset*). The facts seem to have been these: Gurshidset was married to Kashibai, but had no issue by her. He, however, had a son, Nagapa, by a female slave of his own caste, which female had always been an inmate of his house. Kashibai, after Gurshidset's death, affected to adopt one Appa Chatya (her brother-in-law) as a son to Gurshidset and herself, but Appa Chatya was the only son of his natural father. Subsequently, *post litem motam* between Gagapa and Kashibai, she adopted another boy (also the only son of his natural father) as son to herself and Gurshidset. This latter boy belonged to a different *gotra* from Gurshidset. The action appears to have been brought by Kashibai against Nagapa. So far as we can gather the facts, the *panchait* substantially held that Kashibai was entitled to a widow's estate in the *vatan* property of Gurshidset, and that, on the termination of that estate, the defendant Nagapa (the illegitimate son) and the first adopted son Appa Chatya would be entitled to it as heirs of Gurshidset in certain shares. And the *panchait* refused to give any damages to Kashibai against Nagapa. Nagapa appealed against the award of the *panchait* to the Court at Sholapur (Mr. Blane), which convened the caste, and found a large majority of its members in favour of the claim of Nagapa, as son of the female slave of Gurshidset, to be received into the caste, and, we thence infer, entitled to the whole estate as against Appa Chatya; but whether or not on the termination of Kashibai's widow's estate, or immediately, we have not been able to discover. The Court shastri gave an opinion that, as between Nagapa and Appa Chatya, the former was exclusively heir of Gurshidset, but it would rather seem that he thought that the widow Kashibai would be previously entitled to a widow's estate. The minority of the caste, which voted against Nagapa's right to be deemed an heir, included a *deshmukh*, a *guru* and several other respectable persons. The Court at Sholapur said: "The assembled Vanias (Lingyats of the Vania community) having yesterday attended, their votes were taken as to the reception of a natural son into the caste or otherwise, and whether there were only objections to receive the appellant individually. The numbers on either side

appear to be 113 and 108 for the reception in either case, and 66 and 76 against it. If mere numbers were admitted, this would be conclusive of the custom of the caste being in favour of the reception; but the *deshmukh* and *guru* with several most respectable persons appear in the minority. They, however, modify there negative by stating that, although a natural son can never become in all respects the same as a legitimate one, yet that he can be received among them to dine, &c. If even the opinion of the shastri and the votes of the majority be set aside, no cause is shown why the appellant (Nagapa) should not be considered capable of succeeding to the inheritance which is the cause of suit; and the *panchait's* decision, by awarding to him a portion, admits this capability. The Court is, therefore, of opinion that he must be considered entitled to succeed in the regular course, and as sole heir on the death of respondent (Kashibai). The decision of the *panchait* is, therefore, confirmed in so far as rejecting the damages which were the original cause of suit; but the additional part of the decree stating that the appellant shall share the inheritance with Appa Chatya, is reversed." Against that decree the respondent and plaintiff Kashibai appealed to the Zilla Court at Poona, asserting (*inter alia*) that a female slave's son cannot be regarded as an heir. The Zilla Court held Appa Chatya's adotpion invalid on the ground that he was an only son, and that the other adoption made by Kashibai was also invalid for two reasons: 1st that it was made *pendente lite*. 2ndly, that the boy adopted wa an only son. The Zilla Court further held that, in the absence of a legitimate son, Nagapa, as son of Gurshidset by his femal slave, was, in accordance with the custom of the caste, entitled on the termination of Kashibai's widow's estate, to be regarded, as heir of Gurshidshet, and, accordingly, on the 28th February 1828 affirmed with costs the decree of Mr. Blane of the 10th February 1827.

So recently as the 18th November 1878 a case from Akalkot, involving similar questions, has been decided by the Governor in Council of Bombay as a Court of Appeal from the Political Superintendent of Akalkot, which province is not subject to the appellate jurisdiction of this Court. The facts were shortly these: Shidshet Deshmukh, a Lingayat Vania, died leaving two

1879

GOPAL NARAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

widows, Basamabai and Nagamabai, and a concubine Sankrova. He left no son by either of his wives, but he left an illegitimate son (Khanderav) by Sankrova. On the death of the Deshmukh (Shidshet), Khanderav, the illegitimate son, applied to the Political Superintendent, Major Baumgartner, for a certificate of heirship. The widow Basamabai consented to this application. The widow Nagamabai opposed it on two grounds: 1, that Sankrova, though living with Shidshet, was the wife of another person (which allegation was found for Khanderav in the negative by the Political Superintendent); 2, that Lingayat Vanias belonged to one of the regenerate classes, and were not Sudras, which allegation was found in the affirmative by the Political Superintendent and against Khanderav, and the certificate of his heirship was refused. Khanderav appealed to the Governor in Council. The Collector and Political Agent at Sholapur, by order of Government, caused evidence to be taken by Mr. Crawford on the question as to the right to the illegitimate son of a Lingayat to succeed to the property of his father. Khanderava's witnesses, who deposed before Mr. Crawford in favour of the right of the illegitimate son of a Lingayat to succeed to his father's property, were nearly all religious persons or leading laymen, such as village patels, of the Akalkot State. The witnesses on the other side were merchants and religious persons of the town of Sholapur. Both parties failed to produce satisfactory instances of the usages for which they respectively contended. Khanderav's witnesses, however, named two instances said to have occurred in the Nizam's territory in which illegitimate sons succeeded to their father's estate, but no details were given, and those alleged instances were not verified. Both parties referred to the above-mentioned case of *Kashibai* v. *Nagapa*, decided in the Poona Zilla Court, a copy of which the Collector furnished to Government. He said; "I am sorry that the evidence as to usage is so unsatisfactory; but similar cases are very rare, because second or inferior marriages, known as *pat*, are recognized by the caste as legitimate. It appears that persons of the class to which the petitioner belongs are favourable to his claims, that he is admitted as a member of the caste, and has married within it. In their opinion there is nothing im-

moral in the conduct of his mother, who was brought up in his father's house from childhood and never left it. The answers from Kaládgi and Dhárwár are entirely in favour of the claim of the widow as against an illegitimate son whose right to succeed as heir is denied. They are the opinions of leading men of the caste. The decision of this question is very important for the Lingáyats ; the position of their women will be seriously affected by it for good evil. The practice of allowing a *dasiputra* to have almost the same right as a son born in wedlock, is degrading for the women, and it would appear difficult for such a practice to prevail in one place and not in another without a division of the caste. The educated and leading men disapprove of it, and they are the people who would naturally be consulted in making a law to govern them all. If they are willing to get rid of a demoralizing custom, I do not think that Government should confirm it, even if it were shown to be practised by a part of the community or in a particular locality. If Major Baumgartner's decision is confirmed, it will not directly affect any large number of persons, but the general effect will be good." It will, from these extracts, appear that the Government of Bomaby had the political advantages of a disaffirmance of the illegitimate son's claim fully pressed upon it by the Collector in his report. Justly feeling, however, that its position on the occasion was judicial, and not political or legislative, the Government of Bombay, holding itself bound by the Sholápur and Poona precedent in *Kashibái* v. *Nágapa* so far as it held an illegitimate son to be a member of the caste and entitled as an heir, reversed the decision of Major Baumgartner, the Political Superintendent, and decreed that the certificate of heirship should be granted to Khanderáv, the *dasiputra*, and that the costs should be paid out of the estate of the deceased Deshmukh Shidshet. In disposing of the case, Government in its resolution said : "The main question is, are the Lingáyats, Vaishyás or Sudras? They now call themselves Vaishyás, but there are points among their customs, such as the adoption of a sister's son, which indicate a Sudra origin, and the precedent which is set out above in full (*Kashibai* v. *Nagapa*) is to the effect of the illegitimate son succeeding, which is a Sudra rule. That case, decided at Sholápur and Poona so far back as 1827-28, bears marks of having been very carefully tried, and of much

1879

GOPAL NARHAR SAFRA v. HANMANT GANESH SAFRAY AND ANOTHER.

labour expended in order to find out what the local customs were; and from the fact of it having been decided so long ago, before the time when the Lingáyats began to rise in social position and acquired the desire to assume a higher caste *status* than was probably their due, Government is inclined to think it a valuable guide to follow. Cases of this kind cannot be decided on sentimental grounds; and much as it might be for such reasons desirable to give a decision which might tend to raise Lingáyats in the social scale, Government is bound to decide this case strictly in accordance with the Hindu law, or of a custom contrary to that if it can be clearly proved; but in this case Government do not consider that it has been proved that a customary deviation from the general law has been accepted by the caste generally."

These passages show that in that case the Lingáyats were deemed to be Sudras, whose ordinary law admits an illegitimate son to a half share with legitimate sons; and if there be no legitimate son, and no legitimate daughter, or son of such a daughter, the illegitimate son by a female slave or continuous concubine takes the whole estate. If there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son; and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaing the widow of the deceased proprietor.(1) It is within our knowledge that the Government of Bombay, of which one of our former colleagues in this Court was then a distinguished member, bestowed much consideration on the Akalkot case, and consulted one of our present colleagues previously to arriving at its decision. It will be observed that Government only followed the precedent in *Kashibai* v. *Nagapa*, so far as it held that an illegitimate son of aLingáyat was entitled to inherit or to be received into the Lingáyat caste, but deviated from that decision in so far as it gave a prior estate to the widow. The Lingáyats having, by Government, in the Akalkot case been held

(1) Mitak, ch. i, sec. 12, pl. 1, 2. Vyav. Mayukha, ch. iv, pl. 32. 1 West andBühler (1st ed.), 52, 53, 57, 63; (2nd ed.,) 106, 107, 108, 109, 110, 111. Cole. Dig. Bk. V, ch. iii, pl. clxxiv, clxxv. Viv. Chint., Tagore's Trans., 274, 275. *Rahi* v. *Govind*, Ind. L. R. 1 Bom. 97; *Dhodyela* v. *Malanaik* (S. A. 273 of 1873), Printed Judgments for 1874, p. 43; *Salu* v. *Hari* (S. A. 315 of 1876), Printed Judgments for 1877, p. 34.

to be Sudras, the preference in that case given to the illegitimate son over the widow is in accordance with the answers of the shastri to Q. 8, at p. 107 of West and Bühler (2nd ed.)(1) That, however, is a question with which we are not at present concerned, and upon which we do not intend here to enter; but we have appended to this judgment a valuable M. S. note of our brother West on the case of the Mali, mentioned in Q. 8 at p. 107 of West and Bühler (2nd ed.),(2) which, in connection with the

(1) See also West and Bühler (2nd ed.) p. 109, the remark on Q. 12, and pp. 112, 113; the remarks on Q. 16 and Q. 17.

(2) The MS. note of Mr. Justice West is as follows :—

"The Malis rank below the pure Sudras. (See Steele's L. C. 100, 106, 2nd ed.) The second marriage of widows is not forbidden, even to Sudras, according to Balchandra Shastri (*ibid.* 26, 30, 159, 168, 169), and children by *pat* are legitimate. The widow in this case could claim full recognition. She is, however, still postponed to the illegitimate son through the operation of Yajnyavalkya's text—(Mitak. 2—12—1 and Vijnyaneshvara's comment. Mitak. 2—12—2)—which provide for daughter's sons and daughters, but not for the widow."

"It seems anomalous that the widow should be thus postponed to the illegitimate son and her own daugeter and daughter's son. But, according to the recognized rule of construction set forth in W. & B., p. 517, 2nd ed., the text of Yajnavalkya can be cotrolled only by another not reconcileable with its literal sense. The passages from Vishnu and Manu, quoted Mitak. 2—2—6. show that at one stage of the development of the Hindu law the daughter's son was made equal to a man's own son, while the widow was still unprovided for, or reduced to a lower place. Yajnyavalkya's text belonged to this stage."

"It is to the *patni* only that the sacred texts assign a right of inheritance. The English translation 'wife' fails to indicate the distinction between the wife sharing her husband's sacrifices and the wife of an inferior order—Daya Bhaga 11—1—48. The Sudra, having no sacrifices to celebrated like the twice-born, has no *patni* to share them, The Asura marriage, being a purchase, gave to the wife no higher *status* than that of a *dasi* or concubine—Sm. Chand.150. But thus or some even lower from was the appropriate one for Sudras; the highter forms were not allowable until custom in some measure made them so (8 Bom. H. C. R. 255—6), and the different consequences of marriage according to the different forms) Mitak, 2—11—11(are traceable to a time and a custom in which community of property between the married pair was not recognized—(W. & B., 2nd ed., 429, 431, 434, 439). Under such a system it is not all surprising that the wife's right of inheritance should not be admitted. Nor is it strange that the development of the purely Brahmanical law, by which widows in the higher castes benefited, shouldnot have embraced to the full extent the degraded Sudras. As to the wives in this caste, the expanding law left them as it found them, while it readily adopted an existing custom in favour of illegitimate sons, which appeared reasonable to those who looked on the Sudra marriages as virtually no more than licensed concubinage."

1879
GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

Lingayat case last mentioned, may be useful hereafter. It may be observed, with reference to the case of the Mali, that, generally, the law applicable to Sudras is so likewise to castes below Sudras.

The admission of illegitimate sons amongst Lingayats to dine with and marry in the caste, the prevalence in it of *pat* marriages (Steele, 1st ed., pp. 32, 37; 2nd ed., pp. 26, 30) and the succession of the illegitimate son to property, as above described, are so many badges of the Sudra tribe. No doubt by special custom any one of those usages might exist in a caste or family belonging to one of the regenerate tribes; but it would be quite beyond probability and experience to find them all co-existing in one caste of or family appertaining to one of those three tribes.

The object of this digression as to Lingayats has been to show that any recognition which there may have been of their right to adopt the son of a sister or of a daughter is; inasmuch as they are Sudras, no infringment of the general rule that the regenerate classes cannot make such an adoption.

In *Bai Ganga* v. *Bai Shivkuvar*, (1) heard in 1825, the shastri gave it as his opinion that a Brahman could not adopt his daughter's son, and for this he relied on the Mayukha, c. v, 8 of the original edition of Borradaile's translation, which is evidently a mistake for c. v, 9 : viz. ch. iv, sec. 5, pl. 9, already above

"The express provisions of Yajnyavalkya's text in favour of the daughter's son may not improperly be traced, in reality, to a time when his kind of descent afforded the better assurance of a real connection of blood. But it may be really an adpotion, for the Sudras, of a rule much repeated though not intended for that caste. The advantageous position assigned to the daughter's son is traced by Jimuta Vahana to his identification with the son of the appointed daughter (D. Bhaga 11—2—21) in whose favour only Jimuta Vahana says that the 'Putrika Sutam' is to offer the *pindas*, and apparently excludes the mere '*douhitra*' from this right, which is assigned to him also, however, by Manu, also Sankha and Likhita (Stokes H. L. B, 411). The introduction of the daughter as well as her son may be due to a similar course of thought. The daughter, appointed as a son, being one recognized as a regular heir (Eitak 1—11—3), the daughter not appointed gained a place (Manu 9, 130; Narada 13, 50; W. & B. 559), and in the passages cited, as well as in Brihaspati (D. Bhaga 11—2—8), is mentioned without any mentioned of the wife. The texts were so far admitted as to the Sudras. But those specially favouring the wife is an heir—bearing only on the *palni*—were not, *Vide* West and Buhler (2nd ed.). 119 *et seq.*"

Et vide Ind. L. R. 1 Bom. 102, 106.

(1) S. D. A. Select Cases, 80, 85.

quoted. He adds, indeed, "that when once a person was adopted according to the Vedas, the adoption could not be set aside, and that the person so adopted, if he had no son of his own, could adopt his wife's sister's son, as his written in the Vyav. Mayukha, ch. iv, 7, which does not appear to support the proposition for which it is cited. However, it seems difficult to hold that the adoption of a daughter's son amongst Brahmans would be in accordance with the Vedas. The actual decision in that case turned not upon the law, but the fact of adoption, the Court there holding that the fact was not proved.

In West and Buhler (2nd ed)., p. 148, the shástri, in his reply to Q. 6, given by him in 1857, observed that a man of the Brahman or Kshatrya or Vaishya caste cannot adopt a sister's son. The case of *Ganpatrav* v. *Vithoba*, referred to by the learned authors in their remark upon that answer, we have already commented upon. See also *Narsain* v. *Bhutton Lall.*(1)

The case of *Ramchandra Chatterjea* v. *Sumboochundur Chatterjea*, of which the facts are stated by Sir Francis Macnaghten in his Considerations on Hindu Law, p. 167,(2) and where the Supreme Court at Calcutta A. D. 1810 upheld the adoption of a sister's son, is condemned by that learned Judge, and recorded by him as an instance of the untrustworthiness of the opinions of *pandits* when given *pendente lite* as experts. He says that, although many *pandits* upheld the validity of that adoption, he does not "believe that one, except while a suit was pending, could be found to declare that an adoption of his sister's son by a Brahman is an act to be sustained by the Hindu law." That case was overruled in 1815 by *Doe d. Kora Shunko Thakoor* v. *Bebee Munnee*(3) decided by the same Court.

In Madras the High Court, notwithstanding what is said in Mr. Strange's Manual, pp. 87, 88, 89, has twice held that the adoption of a sister's son is, amongst Brahmans, invalid: *Narasammal* v. *Balaramacharlu*(4) and *Gopalayyan* v. *Raghupa*

[1] Cal. W. R. Sp. Mo. for 1864. p. 194.

[2] Mentioned also in Morley's Dig. [1850], Tit, Adoption, 58.

[3] East's Notes No. XX, and 2 Morley's Dig. (1849), p. 32.

[4] 1 Mad. H. C. Rep. 420, and see the MS. cases mentioned in the note to page 427.

1879

GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

tiayyan.(1) In the latter case, however, the conduct, throughout many years, of the plaintiff and his family was held to estop him from availing himself of that invalidity, and so to have altered the position of the defendant, as that it would be impossible to restore him to his original situation.

The adoption of a sister's son by a Brahman has in the N.-W. Provinces also been held invalid: *Lakminath Rav* v. *Mt. Bhina Bai*.(2)

Sir Thomas Strange(3) gives it as the general rule that the daughter's and the sister's sons cannot be adopted by the regenerate classes, but adds that they are eligible for adoption among Sudras, if not also in the three superior classes, notwithstanding positions to the contrary, no other being procurable. As authority for the latter portion of that passage he refers to an opinion of the learned civilian, Mr. Ellis of Madras ;(4) but the High Court of Madras have distinctly, in the two recent cases just quoted, declined to accept that view, and in *Jivani Bhai* v. *Jivu Bhai* (5) said : "On the point of the validity of the adoption of the son of a person with whom the adopter could not have intermarried, there will be found great conflict of opinion among the *pandits*, but none whatever upon the authorities. They are all perfectly consistent in declaring such adoptions invalid."

In Mithila the adoption of a sister's son by the Kritrima form amongst the higher classes seems to be permitted (*Chowdree Purmessur Dutt Jha* v. *Hunooman Dutt Ray*),(6) but this is a local execution to a general rule.

In Allahabad a Saravgi Jain has been allowed to adopt a sister's son by the custom of his country : *Hasan Ali* v. *Nagamal*;(7) but Jains, if classed amongst Hindus, would be no so higher than Sudras.

In *Nunkoo Singh* v. *Purm Dhin Singh*,(8) the validity of the adoption of a sister's son was rested by Mitter, J., on the fact

[1] 7 M. H. C. R. 250.
[2] N.-W. P. Rep. 441, 468.
[3] 1 Stra. H. L. 83, 84.
[4] 2 Stra. H. L. 100, 101.
[5] 2 Mad. H. C. R. 462, 468.
[6] Morley's Dig. (1850) Tit. Adoption 58 : S. C. 6, S. D. A. Rep. 192.
[7] Ind. L. R. 1 All. 288.
[8] 12 Calc. W. R. 356.

that the parties did not belong to any of the three regenerate classes. And see 1 W. H. Macnaghten's H. L. 67 to the effect that the adoptee "should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son," which rule, the author states, "applies only to the three superior classes, and does not extend to Sudras."

Whether we have regard to the treatises on Hindu law above quoted as of authority in this Presidency, or to the opinions of the Bombay shastris which have been mentioned, or to the Hindu law as generally prevalent throughout India, we think that it is a general rule and, as said by Mr. Sutherland, a "fundamental principle" amongst Brahmans, Kshatriyas and Vaishyas that they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or son of any other woman whom they could not, by reason of propinquity, marry, and that the burden of province a special custom to the contrary amongst any members of these three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom.

But it has been said that the maxim *quod fieri non debuit, factum valet* applies here, and that the adoption, though sinful, must under that maxim be regarded as valid, and cannot be "set aside".

We, however, holding the adoption to be invalid, inasmuch as Brahmans, Kshatriyas and Vaishyas are positively interdicted from, and there incapable of, making such an adoption, are of opinion that the maxim relied on for the appellant is quite inapplicable. There is no necessity for the Court to set aside that which is void *ab initio*, and the term "set aside" cannot properly be employed in such a case. That term is applicable only to that which is voidable, not to that which is null and void. In the case of *Lakshmappa* v. *Ramava*(1) the principle on, and the extent to, which the rule *factum valet* is permitted to operate in cases of adoption, are fully considered, and this Court concurs in what was said by the Division Court in that case upon that subject. It was there said of that rule "that its proper

(1) 12 Bom. H. C. Rep. 361.

1879
GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption. In cases in which the Shastra is merely directory and not mandatory, or only indicates particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the moral precept on recommended preference be disregarded." In that case it was held that incapability, in the alleaged adoption son, to be given in adoption by a widow without the previous assent or direction of her husband—*ex. gr.*, his being an only son at the time of the alleged adoption—would be fatal to the adoption, and could not be aided by the maxim *factum valet.*

Recently in *Lallubhai Bapubhai* v. *Mankuvarbai*(1) Mr. Justice Bayley refused in recognize as valid an adoption in which the mother of the boy gave him without the consent of her husband, who was alleged to be imbecile, which allegation failed in proof, and on the hearing of the appeal, filed upon various grounds in that case, it was admitted on both sides that Mr. Justice Bayley's findings on that point were unimpeachable.

In *Narayan Babaji* v. *Nana Manohar*(2) want of authority in the adoptive mother to accept was held fatal to the adoption.

In 1858 a case(3) was submitted to the shastri of Thana as follows: —

"A Brahman's wife's sister had a son who was already married. The Brahman previous to his death adopted him with due ceremonies. Is this adoption valid? It may be that the Brahman could not adopt his sister-in-law's son; but is the adoption have taken place with due ceremonies, and the adopted son have performed the funeral rites of the adoptive father, will the adoption be legal? It cannot be ascertained whether in the family of the adoptive father there is a fit person whome he could have performed to his sister-in-law's son. Can a boy be given in adoption by any person other than his presents?" The reply was: "There is no objection to the adoption of son of a man's wife's sister, but the adoption (*i. e.* by a Brahman) of a married

(1) Ind. L. R. 2 Bom. 388, 401, 404, 405.

(2) 7 Bom. H. C. Rep. 153, A. C. J. (3) M. S.

person can only be valid when he was born in the *gotra* of the adoptive father, and if the adoption have taken place with due ceremonies. If a married person, born in a different *gotra*, be adopted, his adoption will be illegal, even though it may have taken place with due ceremonies, and though the adopted person should have performed the funeral rites of his adoptive father. The rule of the Shastra is that the person to be adopted should be a kinsman of the adoptive father, and that when a kinsman is to be found, no other person should be preferred. If the Brahman could have found a person in his family, and if he have adopted a person who was already married, and who was born in a different *gotra*, the adoption will be illegal. No other person but the parents can give a man to another in adoption: Datt. Mim., L. 6, p. 1, l. 6; Datt. Kaustubha L. 1, p. 1, l. 3; Vyav. Mayukha, p. 107, l. 6, and p. 109, l. 3." It should be especially noticed that the family in this case were Brahmans and, therefore, it does not fall within the scope of *Lakshmappa* v. *Ramava* (1) decided in this Court in 1875, where the parties were Sudras, so far as that case relates to the adoption of a married *asagotra*. We have mentioned this Thana case here, because it shows how completely the *pandit* ignored the *factum valet* doctrine in a case in which he deemed it to probable that the Brahmanical adoptive father had violated what the *pandit* regarded as a mandatory injunction to Brahmans.

Srimati Uma Devji v. *Gokulanand*(2)—decided last year in the Privy Council, which was the case of the adoption of a remote relative, not a *sapinda* of the adoptive father, in disregard of the preferential claim of the son of a brother of the whole blood (which latter could properly have been adopted only as a *dwyamushyayana* where the Privy Council affirmed a decree of the High Court of Calcutta upholding that adoption—appears to us to be in complete accordance with the view taken by a Division Court here in *Lakshmappa* v. *Ramava*(3) as to the right limits to the operation of the *factum valet* maxim, and not to touch the case of an imperative prohibition.

(1) 12 Bom H. C. Rep. 364. (2) L. R. 5 Ind. App. 40.
(3) 12 Bom. H. C. Rep. 364.

1879

GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY AND ANOTHER.

A recent case in this Court, *Rangubai* v. *Bhagirthibai*, (1) in which the judgment was given by our brother West, is an instance of the failure of an adoption from want of authority on the part of the giver, and the rule of *factum valet* was not applied. It was there held that a wife cannot without the assent, express or implied, of the husband give their son in adoption. He had assented on three conditions, one of which was not fulfilled. This was ruled to be no complete assent, and, therefore, the adoption was held invalid.

For the reasons given we think that the present case of the adoption, by a Brahman, of his daughter's son does not fall within the proper limits for the application of the maxim *quod fieri non debuit, factum valet.* It, like *Lakshmappa* v. *Ramava* as regards the giver, is an instance of *non potuit* rather than of *non debuit.*

The second and third points of special appeal remain to be disposed of. They amount to this, that the District Judge omitted to determine whether, by the custom of the estate and locality whence this case comes, the adoption was valid; and that he ought to have framed an issue for that purpose, and have given to the appellant an opportunity of adducing evidence in support of the custom.

The issue laid down by the Subordinate Judge were—

1. Whether the plaintiff Gopal was adopted by the deceased Narhar according to Hindu law.

2. If he were, whether plaintiff was competent for adoption, and, even if he were not so, whether he ought to be accepted as heir of Narhar.

3. Whether the defendants Hanmant and Ganesh are heirs of Narhar.

The plaintiff did not ask, either in the Subordinate Judge's Court or in that of the District Judge, for any issue as to a special custom of the caste or the country. If there be any such custom, it lay upon him to aver and prove it, contrary as it would be to the general Hindu law affecting the twice-born classes. As already stated, it was mentioned by one or two witnesses that they considered that

(1) Ind. L. R. 2 Bom. 377.

in the district, where the ceremony of adoption was gone through, a daughter's son might be adopted; but it was admitted by Mr. Shántárám Náráyan that there were not any instances deposed to of the existence in that locality, amongst the caste of Brahmans to which the parties belonged, of any custom of adopting a daughter's son. There was an exhibit (No. 18), dated 2nd *Jeth Sud Shak* 1788 (14th June 1866), given in evidence, which showed that Narhar had been excommunicated by the caste for having affected to make such an adoption; but that, although adoption of a daughter's son was very rare, the giver of the document, namely, Vidyáshankar Bharati, claiming to be one of the *shankaracharyas*, thereby recognized the adoption as valid. As the law, however, has not entrusted any dispensing or judicial power to that ecclesiastic, and as he was not agreed to as an arbitrator, the exhibit in question has not any legal force and, by reciting the fact of the excommunication of Narhar, very clearly indicates that there would have been great difficulty in proving such a custom as the plaintiff at the hearing of the special appeal seemed anxious to set up. That attempt was then quite too late. The Privy Council has in the case of *Ramalakshmi* v. *Sivananth a*(1), and this Court has in the case of *Bhagvandas* v. *Rajmal* (2) stated what is the nature of the evidence necessary to establish a special custom in a Hindu family or caste at variance with the general Hind law. We expect satisfactory evidence of instances in which the custom has prevailed before we accept it. No issue as to the alleged custom having been sought, and no evidence of instances in which it took effect having been offered, the plaintiff completely fails on those points of appeal.

We must, therefore, affirm the decree of the District Judge with costs.

Decree affirmed.

The following case is repported, as it indicates Mr. Justice West's concurrence in the decision of the above case of *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* and also in the decision of *Kakshmappa* v. *Ramava* (12 Bom. H. C. Rep., p. 364).

(1) 14 Moo. Ind. App. 570; see pp. 585, 586.

(2) 10 Bom. H. C. Rep. 241; see pp. 260, 261.