APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

KASHIBAI KOM BHAGVANT AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* TATIA BIN LAKSHMAN (ORIGINAL PLAINTIFF), RESPONDENT.*

1883 *February* 12.

Hindu law—Adoption of an eldest son.

The prohibition to the adoption of an eldest son—unlike that to the adoption of an only son—is admonitory merely, and does not create any legal restriction.

Texts from original Smriti writers, with the opinions of their commentators and the decisions of the High Courts, bearing on the subject, referred to and discussed.

THIS was a second appeal from the decision of W. H. Newnham, Judge of the District Court of Poona, affirming the decree of G. A. Manakar, Second Class Subordinate Judge of Khed.

The plaintiff Tatia brought this suit for possession of certain land, on the ground that he was the adopted son of one Lakshman, deceased. He alleged in the plaint that on the 16th April, 1862, he was adopted by Durgai, widow of the said Lakshman; that since then he had been in possession of the land in dispute; that on the 16th February, 1875, his natural father Tukaram (defendant No. 3) wrongfully mortgaged the land to Kashibai (defendant No. 1); that subsequently on the 16th May, 1880, he (plaintiff) was ousted from the land by Bhagvant (defendant No. 2), the husband of Kashibai, on the strength of a rent-note executed to him (Bhagvant) by Tukaram.

The suit was defended by Kashibai and her husband Bhagvant (defendants 1 and 2). They answered (*inter alia*) that the plaintiff's adoption was invalid, because he was the eldest son of his natural father; that the land in dispute belonged to Tukaram (defendant No. 3), who had mortgaged it to Kashibai for Rs. 500; that they, therefore, had a right to hold the land till their claim was satisfied.

The Subordinate Judge held that the plaintiff's adoption was valid, and that he (plaintiff) was not bound by the mortgage executed by his natural father. He, accordingly, awarded the land to the plaintiff. On the question of adoption the Subordinate Judge made the following remarks :—

* Second Appeal, No. 387 of 1881.

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"The fact of the plaintiff being the eldest son of defendant No. 3 does not, I believe, invalidate his adoption according to Hindu law. For the giving of an eldest son is prohibited, but not the taking (see Mitak. chap. I, sec. xi, 21 ; 12 Bom. H. C. Rep., 39 ; Sir T. Strange's Hindu Law, p. 85, 4th ed.). Whether we accept Colebrooke's rendering or the Mayukha's comments on the Mitakshara on this point, we come to the same conclusion that the prohibition does not vitiate an adoption when made, as it is simply directory and not mandatory. The principle of *factum valet* can then be safely applied to the present suit according to the ruling of the Bombay High Court in the case referred to above. At the present day the prohibition of the adoption of an eldest son is simply exhortatory, and may, therefore, be disregarded with impunity as regards this life, if not that to come, by a father who possesses full authority to give away his son in adoption. The Calcutta High Court has also declared such an adoption as the one in question to be valid (I. L. R., 2 Calc., 365). The plaintiff's adoption then being established by the evidence in this case, and not being invalid according to Hindu law, must be upheld."

The defendants appealed, but the District Judge upheld the decree of the Subordinate Judge.

The defendants thereon appealed to the High Court.

The principal question argued in the High Court was whether the plaintiff's adoption was invalid on the ground that he was the eldest son. The arguments of the pleaders on both sides and the authorities cited by them are dealt with in the judgment of the Court.

G. R. Kirloskar appeared for the appellants.

Y. V. Athley appeared for the respondent.

SARGENT, C. J.—The decision in this case turns upon the question of the validity of the adoption of an eldest son. This as well as the cognate question of the validity of the adoption of an only son may probably be considered as settled in the High Courts of the other Presidencies. In Madras the vilidity of the adoption of an eldest son was established in the case of *Chinna*

Gaundan v. *Kumara Gaundan* (1), the decision being based principally on the opinion expressed by Sir T. Strange "that with regard to both the prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only, and that an adoption of either, however blameable in the giver, would nevertheless, to every legal purpose, be good according to the maxim *factum valet quod fieri non debuit.*" In Calcutta the adoption of an eldest son was held valid by Mr. Justice Markby and Mr. Justice Mitter in *Janokee Debea* v. *Gopaul Acharjea* (2), and that of an only son was held to be invalid by Sir Richard Garth, Chief Justice, and Mr. Justice Markby in *Manick Chandar Dutt* v. *Bhuggobutty Dossee* (3). In this High Court the question as to the validity of the adoption of an only son was considered by the late Chief Justice, Sir M. Westropp, at great length in an exhaustive judgment in *Lakshmapa* v. *Ramava* (4), from which it may be gathered that although he declined, as not being necessary for the decision of the case, to give a positive opinion on the question whether a gift in adoption of an only son by his father is in this Presidency void, the inclination of his opinion was strongly against its validity. As to the adoption of an eldest son, the question does not appear to have received judicial consideration since the cases before the Sadar Adalat referred to in the judgment of Sir M. Westropp at pp. 380-385, and in which the answers of the shastris and the decisions based on them were, as might be expected on a question of this nature, very conflicting. We have not been referred to any text of a Smriti writer prohibiting in express terms the adoption of an eldest son except an alleged text of Vasishta : "The eldest son should not be given in adoption", referred to by Haridatta in commenting on the text of Apastambha : "The gift (or acceptance of a child) and the right to sell (or buy) a child are not recognized" (5). This text, it appears, is also mentioned by Anantadeva, Kasinath Upodhyaya, and Balambhatta, but without referring it to any particular author. (See the Vyavahara Mayukha and the Yajnavalkya Smriti by Rav Saheb Mandlik, p. 496). It is not found in three printed

(1) 1 Mad. H. C. Rep., 54.
(2) I. L. R., 2 Calc., 365.
(3) I. L. R., 3 Calc., 443.
(4) 12 Bom. H. C. Rep., 364.
(5) Translation of Apastambha, p. 131, by George Bühler, in his 'Sacred Books of the East'.

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editions of Vasishta and one manuscript, and as the authors of the Mitakshara, Mayukha and the Dattaka Mimamsa do not refer to it, although referring to the text of Vasishta which prohibits the adoption of an only son, grave doubts must necessarily rest on its genuineness. On the other hand, the other Smriti writers Bhandayana and Caunaka, as shown by the texts set out in Sir M. Westropp's judgment (1), whilst prohibiting in strong terms the adoption of an only son, are silent as to that of an eldest. Passing to the commentators of the highest authority in this Presidency, we find the following texts in the Mitakshara, chap. I, sec. xi, pl. 11 : "So an only son must not be given (or accepted) ; for Vasishta ordains 'Let no man give or accept an only son'" ; "nor though a numerous progeny exist, should an eldest son be given : for he chiefly fulfils the office of a son, as is shown by the following text : 'By the eldest son as soon as born, a man becomes the father of a male issue.'" The same word "*anadhikar*", literally "want of authority", is used in the original in both sections, and the difference in the translation may be regarded as marking the comparative importance which Mr. Colebrooke attached to the prohibitions in the case of an only and eldest son. In the Mayukha, chap. IV, sec. v, pl. 4 and 5, the author would seem to doubt the soundness of Vijnanesvara's conclusion from the text of Manu, that the adoption of an eldest son was prohibited, but in any case he treats the prohibition as regarding the giver only. Again, both the Dattaka Chandrika and Dattaka Mimamsa are silent as to the adoption of an eldest son, whilst prohibiting in express terms that of an only son. Lastly, if we consider the reason for the prohibition in the two cases, it is plain that whilst the one is based upon the religious duty of continuing the lineage for the obsequies of ancestors, the other cannot be regarded as more than the expression of a sentimental preference for the eldest son (and that, too, only in case he happens to be the first born) as being the first to make man "the father of a male issue," for it was not attempted to be denied that the funeral ceremonies could be as effectually performed by the other sons in the event of the eldest being given in adoption. It was contended, however, and apparently with seriousness, that as "the

(1) 12 Bom. H. C. Rep., p. 377.

spiritual efficacy of the eldest son was exhausted," the adoption could be of no spiritual benefit to the adopting father. We are unable to understand what may be meant by the expression "spiritual efficacy". The importance of having a son is, as stated by Vasishta, "that he may raise up progeny for the obsequies." Whether, therefore, we regard the texts in the Hindu books of authority in this Presidency, or the reason of such qualified prohibitions as are to be found in them, there would appear to be no sufficient ground for treating the prohibition of the adoption of an eldest son as more than admonitory or as creating any legal restriction. The decree of the Court below must, therefore, be confirmed, with costs.

Decree conferred.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

1883
February 20.

JAMNABAI, WIDOW OF NAHALCHAND (ORIGINAL DEFENDANT), *v.* RAYCHAND NAHALCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption—Eldest son—Presentation by the uncle—Maintenance for widow.

A Hindu widow, who adopts a son after the death of her natural born son, divests herself of her estate. *Vellanki Venkata Krishna* v. *Venkata Rama Lakshmi* (1) followed.

Where the father of a boy gave his formal consent to the adoption of his son, but was prevented by sickness from attending the adoption ceremony, and delegated to his brother the duty of making the presentation, it was held that the adoption was nevertheless valid.

Adoption of the eldest son upheld. *Kashibai* v. *Tatia* (2) followed.

The High Court being impressed with the propriety of not allowing the adopted son to recover the whole property from the widow—his adoptive mother—until proper provision had been made for her maintenance, added a declaration to the decree made in his favour, that he do take the property awarded to him subject to the obligation to provide a sufficient maintenance for the widow, and directed that the Court executing the decree should determine what was a proper and sufficient maintenance for the widow, and should secure the same, either by directing an investment of a sufficient part of the estate in trust for that purpose, or by such other means as it might deem sufficient.

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* Regular Appeal, No. 72 of 1881.

(1) I. L. R., 1 Mad., 174. (2) *Ante*, p. 221.