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down: "Gifts are rendered valid by the tender, acceptance, and seisin. The prophet has said 'a gift is not valid without seisin.' So also if the thing given be pawned to, or usurped by, a stranger." We think this statement of the law of gifts is not consistent with any other conclusion than that delivery and seisin are of the essence of a gift, and that, therefore, no right of any description passes without them, as must be the case when the donor is not himself in possession. We think, therefore, that notwithstanding any thing to be found in *Kali Das Mullick* v. *Kanyha Lal Pundit*, the case of *Mohinudin* v. *Manchershah* was rightly decided and should be followed. We must, therefore, reverse the decree of the Court below, and dismiss the plaint, with costs on plaintiffs throughout.

Decree reversed.

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[160] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Nanabhai Haridas.

PADAJIRAV (*Original Plaintiff*), *Appellant v.* RAMRAV (*Original Defendant*), *Respondent.** [9th August, 1888.]

Hindu law—Adoption—Adoption by younger widow without consent of elder widow invalid although child selected by both widows—Rights of adoption of elder widow—Right of selection—Doctrine of factum valet *in cases of adoption, when applicable—Limitation—Adverse possession—Adverse possession of defendant supplemented by previous adverse possession of widow by whom defendant was adopted—Limitation Act XV of* 1887, *art.* 144 *and interpretation clause*, s. 3.

An adoption by a younger widow, without the consent of the eldest widow, of a boy who has previously been selected by all the widows for adoption, cannot be supported against the wish of the eldest widow.

A younger widow cannot adopt without the consent of the elder.

Where a younger widow had adopted without the consent of the elder widow it was contended that the right of the elder widow was merely the right to select, and that in any case it was only a preferential right, and that consequently the doctrine of *factum valet* applied.

Held, that the right of the elder widow was not merely a right of selection. Adoption of course implies selection of the child, but there is no complete adoption until the mutual acts of giving and receiving the child are accomplished, and until they take place there is necessarily a *locus pœnitentiæ* for the elder widow of which she may avail herself, although contrary to the wishes of the other widows, by changing her mind and selecting another child. To hold that any one of the junior widows might perform the formal act of adoption of the selected child whenever it pleased her, would be tantamount to enabling her to force the hand of the elder widow, and compel her to complete the adoption which, at the most, was only *in fieri*.

Held, also, that the doctrine of *factum valet* cannot apply to the case of an adoption by a younger widow, for it is plain that until the elder widow waives her preferential right to adopt, her right is exclusive, and that the other widows have no authority to adopt. The rule of *factum valet* applies in cases of adoption only where "there is neither want of authority to give or to accept, nor imperative interdiction of adoption:" see *Gopal* v. *Hanmant* (1).

B. died in 1865 without a son, leaving three widows, *viz.*, Lalitabai, Ahilyabai, and Bachabai of whom Lalitabai was the eldest and Bachabai the youngest.

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* Appeal, No. 113 of 1885.

(1) 3 B. 273 (294).

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The plaintiff was unanimously selected by the three widows for adoption after the death of their husband. The unanimity continued down to May, 1886; but on the 30th June, 1866, Lalitabai declared that if the plaintiff were adopted by Bachabai, [161] she would not consent to it. On the 1st July, 1866, Bachabai adopted the plaintiff without the consent of Lalitabai. On the 12th August 1869, Lalitabai adopted the defendant. On the 10th August, 1881, the plaintiff filed this suit against the defendant, alleging himself to be B's adopted son and as such claiming possession of B.'s property. He did not deny the *factum* of the defendant's alleged adoption on the 12th August, 1869, which constituted (the plaintiff alleged) his cause of action. The defendant contended that he himself was the adopted son of B., having been adopted by Lalitabai, the senior widow. He insisted that the plaintiff's adoption was invalid, having been carried out without the consent of Lalitabai, the senior widow. He further contended that the plaintiff's claim to the property was barred by limitation, it having been in possession of himself (the defendant) and Lalitabai for more than twelve years before this suit was filed.

Held, that the plaintiff wa not the rightfully adopted son of B., and, therefore, was not entitled to the property in dispute. His adoption by Bachabai, the younger widow, without the consent of Lalitabai, the senior widow, was invalid.

Held, also, that the suit was barred by limitation (art. 144 of the Limitation Act XV of 1877), the defendant having been in adverse possession of the property for more than twelve years. The plaintiff's alleged adoption took place in July 1866. The defendant was adopted, and put into possession on the 12th August, 1869. This suit was filed on the 10th August, 1881, *i.e.*, two days before the expiration of twelve years from the date of the defendant's adoption. Down to the date of the defendant's adoption, Lalitabai had been either actually or constructively in exclusive possession of the property, such possession being distinctly adverse both to the plaintiff so far as he claimed to be the adopted son and to Bachabai so far as she might claim to represent him during his minority. The question of limitation then depended on whether the defendant could supplement his own adverse possession since his adoption (which was deficient by two days) by the adverse possession of Lalitabai, and this again depended on whether the defendant could be said to derive his liability to be sued from or through Lalitabai so as to bring himself within the definition of a defendant as provided by s. 3 of the Limitation Act XV of 1877. The Court was of opinion, that the defendant might be said to have derived his liability to be sued from Lalitabai, and that the plaintiff's claim, therefore, became barred in 1878.

[**F.**, 17 A. 167 (171) : 24 A. 195 (198) ; 26 A. 40=23 A.W.N. 163 ; **R.**, 16 B. 91 (109) ; 21 B. 159 (165) ; 21 B. 376 (379) ; 28 B, 461 (462) ; 25 C. 354 (363) ; 39 C. 582= 16 C.W.N. 440 ; 18 M. 277 (280) ; 1 Bom. L.R. 799 (812) ; 16 C.L.J. 304=17 C. W.N. 319=16 Ind. Cas. 817 ; 11 C.P.L.R. 49 (53) ; **D.**, 17 C.W.N. 748=19 Ind. Cas. 367.]

APPEAL from a decision of Rav Bahadur G. A. Mankar, First Class Subordinate Judge of Satara.

One Bhavanjirav Raje died on the 1st September, 1865, without male issue, leaving him surviving three widows—Lalitabai, Ahilyabai and Bachabai, of whom Lalitabai was the eldest and Bachabai, the youngest.

On 1st July, 1866, Bachabai purporting to carry out the instructions of Bhavanjirav, adopted the plaintiff, without the consent of Lalitabai.

[162] On the 12th August, 1869, Lalitabai adopted the defendant.

On the 10th August, 1881, the plaintiff claiming as the adopted son of Bhavanjirav filed this suit to recover from the defendant possession of his adoptive father's immoveable property, and to have it declared that he was entitled to receive the various *nemnuks* (allowances) and *babs* (fees or perquisites). He alleged that he was brought up in Bhavanjirav's family with a view to his being adopted, and that Bachabai had accordingly adopted him on the 1st July, 1866, and that as the adopted son and heir of Bhavanjirav he was entitled to succeed to all his property.

The defendant contended (*inter alia*) that the plaintiff's adoption was invalid, inasmuch as Bachabai had adopted him without Lalitabai's consent, that he himself (the defendant) having been adopted by the

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senior widow Lalitabai was the only heir of Bhavanjirav, and that the suit was barred, as the property in dispute had been in the possession of Lalitabai and himself for more than twelve years before suit.

The Subordinate Judge rejected the plaintiff's suit.

The plaintiff appealed to the High Court.

K. T. Telang (*Ghanasham Nilkanth Nadkarni*, with him), for the appellant.—The plaintiff was brought up in the family as the person to be adopted. All the three widows approved of him. By their conduct they showed that no other boy was to be adopted. It was only when the younger widow adopted, that objection was taken to the plaintiff. The senior widow became jealous, and adopted the defendant. The adoption of the plaintiff should, under the circumstances, be presumed to have been with the consent of the senior widow. It was merely the act of adoption which was done by the younger widow. We do not deny that the elder widow has the right to adopt—West and Bühler, 3rd ed., 977, but here all three widows were unanimous in selecting the plaintiff for adoption, and no change of intention was shown by the senior widow, nor any objection taken by her until after the adoption of the plaintiff had taken place. Adoption, under the Hindu law, is adoption to the husband, and **[163]** it does not matter what widow performs the act of adoption. Where the widows agree as to the child to be adopted there is no superior right in the senior widow: see Steele's Hindu Law, 48. The precedence given to the senior is merely a religious ceremony, but not a law. Moreover, the parties here are *Shudras*, and no ceremony is essential: see Stokes' Hindu Law Books, 316. The *Shudras* have no *putni* and no eremony. Here are three widows equally entitled to the property of their husband. They agreed that a certain boy should be adopted. He was accordingly adopted. We contend that they are all estopped from disputing that adoption. The eldest widow apparently acquiesces, remains inactive for three years, and then adopts another child. We submit that under these circumstances the principle of *factum valet* should be applied in this case—*Gopal* v. *Hanmant* (1). If the prior adoption is good, the subsequent adoption of the defendant is invalid. As regards limitation, it is to be counted from the date of the defendant's adoption on the 12th August, 1869, and the plaintiff's suit, which was filed on the 10th August 1881, is not barred. The defendant cannot claim under his adoptive mother. Prior to the defendant's adoption, possession of the property was held by a third party, and cannot be adverse to the plaintiff.

Branson (*Mahadev Chimnaji Apte* with him), for the respondent:—The lower Court was right in holding the claim of the plaintiff barred, for, prior to the defendant's adoption the property had been in the possession of Lalitabai. She had opposed the adoption of the plaintiff. The defendant claims through Lalitabai as well as her husband. Adverse possession need not be by the same individual: see *Gossain Dass* v. *Issur Chunder Nath* (2). The right of the plaintiff to succeed to the property depends on the validity of the adoption, and the plaintiff, therefore, cannot suceed without obtaining a declaration that his adoption is valid: see *Jagadamba v. Dakhina Mohun* (3). Article 119 of Act XV of 1877 should govern the present suit. The right to sue has gone. The plaintiff cannot impeach our adoption. As to adoption, it is **[164]** the right of the elder widow to

(1) 3 B. 273. (2) 3 C. 224. (3) 13 I.A. 84 = 13 C. 308.

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adopt, and if the younger adopts it must be with the consent of the elder: see West and Bühler, 3rd ed., 965 : see Cole. Dig., 124, pl. 48.

JUDGMENT.

SARGENT, C. J.—The litigation in this suit arises out of the rival claims of the parties to be the adopted son of one Bhavanjirav Raje Deshmukh, who died on the 1st September, 1865, the plaintiff claiming to have been adopted on the 1st July, 1866, by his youngest widow Bachabai acting under her husband's order and with the consent of Lalitabai, his senior widow, and the defendant claiming to have been adopted on 12th August, 1869, by his senior widow Lalitabai. The First Class Subordinate Judge found that the plaintiff's suit was barred by the Statute of Limitations and also by the fact of the plaintiff's having instituted a suit, No. 231 of 1878, without claiming any property therein as he has done in the present suit, and, lastly, that the plaintiff was not the true and rightful adopted son of the deceased Bhavanji Raje, and as such entitled to the property in dispute. The second ground upon which the Subordinate Judge based his conclusion was admitted to be not sustainable by counsel for the respondent.

As to the plea of the Statute of Limitations, the present suit was brought two days before the expiration of twelve years from the 12th August, 1869, the date of defendant's alleged adoption, the *factum* of which is not denied, and constituted, as the plaintiff says, his cause of action. The Subordinate Judge applied art. 144 of the Statute of 1877, and holding that the adverse possession of defendant since his adoption might be tacked on to that of Lalitabai prior to that event decided that defendant had thus been in adverse possession for more than twelve years before the suit.

Now, it is plain, we think, that neither plaintiff nor Bachabai on his behalf has ever been since his adoption in actual or constructive possession of the property. Although Bachabai may have been constructively so prior to plaintiff's adoption on the ground that Madhojirav was originally put into possession on the strength of *yadi* 38 on behalf of the three widows, it is plain from Lalitabai's letter (Ex. 111), Madhojirav's letter **[165]** (Ex. 189), and the plaintiff's own admission, that since plaintiff's adoption Lalitabai has been either actually, or constructively through Madhojirav, not only in exclusive possession of the property, but also that so far as plaintiff claimed to be the adopted son, or Bachabai herself might claim to represent him during his minority, such possession was distinctly adverse to both of them up to the time when defendant was adopted and put into possession. The question whether the defendant can supplement his own adverse possession since his adoption by the adverse possession of Lalitabai must depend upon whether he can be said to derive his liability to be sued from or through Lalitabai so as to bring himself within the definition of a defendant, as provided by the interpretation clause (s. 3) of the Limitation Act XV of 1877. We are inclined to think that the defendant might, under the circumstances under which he obtained possession, be held to do so.

Before leaving this part of the case we think it will be useful to notice the view pressed upon us in argument by defendant's counsel, that art. 119 of the Act of 1877 was the article applicable to the case, and that taken in connection with the ruling in *Jagadamba Chowdhrani* v. *Dakhina*

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Mohun (1), the plaintiff's suit, although one to recover the land, was barred six years after plaintiff came of age. That case, however, was decided under art. 129 of the Act of 1871, and was held by the Allahabad High Court, and we think rightly, to have no application to ss. 118 and 119 of the Act of 1877, which are confined in terms to suits for a declaration—*Ganga Sahai* v. *Lekhraj Singh* (2).

Passing, however, to the merits of the case we entertain no doubt that the plaintiff cannot succeed. The plaintiff was unanimously selected by the three widows for adoption after the death of their husband. This appears from the letter of the 5th May 1866, and the correspondence down to 11th May, 1866, shows that this unanimity continued at any rate down to that date. Between the 11th May and 30th June, 1866, there is no evidence one way or the other: but on the latter date the elder widow **[166]** wrote (Ex. 36) to the Collector complaining that the plaintiff had been spirited away by Bachabai, and saying that if adopted by her she would not consent to it. On the 1st of July, Madhojirav also writes to the Collector (Ex. 190) to the same effect and begging him to prevent plaintiff's adoption by Bachabai. There can be no doubt, therefore, that plaintiff's adoption was effected without the consent of Lalitabai, the elder widow. Nor is there any evidence that she in any way subsequently ratified the adoption.

The question, therefore, which arises on this state of facts is whether the adoption by a younger widow, without the consent of the eldest widow, of a boy who had previously been selected by all the widows for adoption, can be supported against the wish of the elder widow. It was scarcely disputed by the appellant that the eldest widow has the superior right. The answers of the Shastris set out in West and Bühler, p. 977, are to the effect that the right of adoption belongs to the elder widow; and in *Rakhmabai* v. *Radhabai* (3) it was accordingly held that the elder widow could adopt without the consent of the younger. In Steele on Hindu Customs, p. 48, it is stated that "if there be two widows, they ought to adopt by mutual consent; otherwise the elder should have the preference in point of right." The practical and logical conclusion from these propositions is that the younger widow cannot adopt without the consent of the elder.

It has, however, been contended that the right of the widow to adopt is merely the right to select; and that in any case it is only a perferential right, and that consequently the doctrine of *factum valet* applies. The superior right of the elder widow is doubtless based upon her being the *patni* wife, and as such entitled to take part with her husband in all religious ceremonies, and the mere circumstance that by the decisions of the English Courts religious ceremonies although usually observed are not essential to the validity of an adoption cannot affect the above reason for recognizing her superior right. Nor is there anything in the language of the replies given by the Shastris or **[167]** in the reasoning of the judgment in *Rakhmabai v. Radhabai* which can justify the restriction of the elder widow's right to mere selection. Adoption of course implies selection of the child, but there is no complete adoption until the mutual acts of giving and receiving the child are accomplished; and until they take place there is necessarily a *locus penitentiæ* for the elder widow of which she may avail herself, although contrary to the wishes of the other widows by changing her mind and selecting another child. To

(1) 13 I.A. 84=13 C. 308. (2) 9 A. 253. (3) 5 B.H.C.R. A. C. J. 181.(192).

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hold that any one of the junior widows might perform the formal act of adoption of the selected child whenever it pleased her, would be tantamount to enabling her to force the hand of the elder widow, and compel her to complete the adoption which, at the most, was only *in fieri*.

It was said, however, that the elder widow's right is only a preferential and not an exclusive right, and, therefore, that the doctrine of *factum valet* applies. But it is plain that until the elder widow waives her preferential right to adopt, her right is exclusive, and that the other widows have no authority to adopt. In *Lakshmappa* v. *Ramava* (1) which was referred to with approval in *Gopal* v. *Hanmant* (2) it was said in discussing the application of the rule of *factum valet* to cases of adoption, "that its proper 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 the present case, therefore, as the widow Bachabai had no authority to adopt without Lalitabai's consent, which was clearly wanting, the principle of *factum valet* relied on by the appellant cannot assist the validity of his adoption. The decree of the Court below must, therefore, be confirmed with costs.

Decree confirmed.

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13 B. 168.

[168] CRIMINAL REVISION.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* TULSIRAM.* [3rd May, 1888.]

Penal Code (Act XLV of 1860), ss. 99 and 186—Voluntarily obstructing a public servant in discharge of his duties—Mamlatdar's decree—Execution by a surveyor under Collector's orders—Public functions—Right of private defence.

In a suit filed in a Mamlatdar's Court under Bombay Act III of 1876 the plaintiff obtained a decree against the accused for possession of a certain piece of land. When the Mamlatdar proceeded to execute the decree, he found that there was no land corresponding to the boundaries set forth in the plaint, and that the parties were joint owners and in joint occupation of the land in dispute.

Finding himself unable to execute the decree, the Mamlatdar referred the matter to the Collector for advice. The Collector, on looking into the papers of the case, ordered a surveyor to execute the decree by dividing the land in dispute and putting the decree-holder in possession of his share.

The surveyor, in attempting to execute the decree, was obstructed by the accused, who was thereupon tried and convicted of the offence of voluntarily obstructing a public servant in the discharge of his public functions, under s. 186 of the Indian Penal Code (Act XLV of 1860).

Held, reversing the conviction, that as the Collector had no legal authority to issue the order to the surveyor in execution of the Mamlatdar's decree, the surveyor acting under that order was not dicharging a public function, and the act of the accused was not an offence against s. 186 of the Indian Penal Code.

Held, further, that the Collector's order was so entirely *ultra vires* as to leave no room for the operation of either the first or the second clause of s. 99 of the Indian Penal Code.

[F., 22 C. 286 (290); 2 Cr.L.J. 64=10 P.R. 1905 Cr.=68 P.L.R. 1905; R., 24 C. 320 (323); 21 M. 78 (79)=1 Weir 123; 10 Bom.L.R. 761 (763)=8 Cr.L.J. 269; 14 Cr.L.J. 512=20 Ind. Cas. 992=325 P.L.R. 1913=38 P.W.R. 1913; D., 21 M. 296 (298)=1 Weir 136.]

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* Criminal Review, No. 10 of 1888.

(1) 12 B.H.C.R.A.C.J. 364.

(2) 3 B. 273 (293 and 294).