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the size of the "Runic" and that the terms of this agreement were only consented to for a steamer of the size of the "Idar" and no larger. This really is conclusive of the case. To offer the "Runic" to the defendants, as the plaintiffs did, when she arrived, and tell them they could treat her as being smaller than she really was, was really to add insult to injury: rather should they have been frank, have dropped concealment when they discovered, as they did soon after the execution of the charter-party, that they had made a misrepresentation as to the size of the vessel, have gone to the defendants, explained their mistake, and obtained, if possible, a new and valid contract in the place of this voidable one.

I find the first four issues in the affirmative. The fifth issue I find in the negative. The suit is dismissed with costs.

Attorneys for the plaintiffs:—Messrs. *Little, Smith, Frere and Nicholson.*

Attorneys for the defendants:—Messrs. *Hore, Conroy and Brown.*

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APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Scott, and Mr. Justice Jardine.

WAMAN RAGHUPATI BOVA AND OTHERS (*Original Defendants*), *Appellants v.* KRISHNAJI KASHIRAJ BOVA (*Original Plaintiff*), *Respondent.** [10th October, 1889.]

Hindu Law—Adoption of an only son—Invalidity of such adoption—Practice.

The adoption of an only son is, by the general Hindu law, invalid.

[**Overr.**, 24 B. 367 (382); **N.F.**, 14 A. 67 (**F.B.**)=12 A.W.N. 161; 21 A. 460=22 M. 398 (**P.C.**)=3 C.W.N. 427=26 I.A. 113=9 M.L.J. 67; **F.**, 19 B. 628; **R.**, 17 A. 294 (297); 1 Bom.L.R. 144 (151); 16 Bom.L.R. 263 (278)=23 Ind. Cas. 912.]

[250] THE plaintiff claimed, as the adopted son of one Kashiraj, to be entitled to an eight-anna share in the *sansthan* of Shri Venkatesh and to have a right to perform the *puja*, &c., &c. He prayed that the defendants might be ordered to deliver over to him the possession of the *sansthan*, or, in default, to pay him Rs. 400.

The defendants denied his claim, alleging that he was the only son of his father, and that his adoption by Kashiraj was, therefore, invalid.

The Court of first instance found that the plaintiff was an only son, that his adoption was, therefore, invalid, and dismissed his suit.

On appeal by the plaintiff, the District Judge upheld the plaintiff's adoption, applying the doctrine of *factum valet*. He, therefore, reversed the lower Court's decision, and remanded the case for re-trial.

The defendants preferred a second appeal to the High Court.

The appeal came on before the Division Bench consisting of Mr. Justice Jardine and Mr. Justice Candy, who made a reference to a Full Bench.

The reference was as follows:—

"JARDINE, J.—The learned District Judge found that the adoption of an only son was not invalid at Hindu law, merely on the ground that

* Reference in Appeal No. 31 of 1888.

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the son given was an only son. He applied the doctrine of *factum valet*. Among other reasons he remarks that no decision of this Court had been cited in which the giving of an only son by a father had been held invalid, and that he could find none, whereas there are reported decisions upholding the validity. He treated the texts in the Hindu law books, which forbid such adoptions, as merely directory and not mandatory.

"The same questions have been argued before us. At the commencement Mr. Telang, as counsel for the appellants, informed us that the same points had been argued in appeal No. 1 of 1879, under Act XXVII of 1860, and urged that the decision of the Full Bench in that appeal, delivered on the 8th September, 1879, determined that adoptions, like that in the case before us, were [251] invalid at Hindu law. On examining the record and the note books of the learned Judges, we find that an opinion to that effect was apparently expressed in the course of the hearing, but the recorded reason for the decision was based on a narrower ground, namely, the custom of Lingayets. We have, however, been shown a decision of a Division Court—Birdwood and Parsons, JJ.—in second appeal No. 184 of 1885, given on the 4th July, 1888. The Court assumed, without recording any written judgment, that the Full Bench had determined the question as one of Hindu law against the validity. The reported decisions of this Court have been cited. They are collected in para. 136 of Mayne's Hindu Law (4th ed.). The following distinctly affirm the validity:—*Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav Malharrav Ranadive* (1), *Mhalsabai* v. *Vithoba Khandappa Gulve* (2). So do also the cases—*Huebut Rao Mankur* v. *Govindrao Bulwunt Rao Mankur* (3); *Abaji Dinkur* v. *Gungadhur Wasdeo Gosavee* (4). In *Rangubai* v. *Bhagirthibai* (5) the objection to validity was taken and abandoned.

"There are other cases where the matter was discussed and opinions of great weight were expressed against the validity—*Bhaksar* v. *Mahadev* (6); *Lakshmappa* v. *Ramava* (7); *Somasekhara Raja* v. *Subhadramaji* (8). But these cases were disposed of on other grounds (*e.g.*, see *Lakshmappa* v. *Ramava* (7). *Kashibai* v. *Tatia* (9) follows the above opinion, which, however, it treats as *obiter dictum*, although it is adopted in deciding the question affirmatively of the validity of the adoption of an eldest son.

"There does not appear to be any decision of this Court on Hindu Law directly invalidating an adoption of an only son, earlier than that in second appeal No. 184 of 1885. That decision and the opinions expressed in the cases I have mentioned are contrary to the earlier decisions: and, therefore, a reference to a Full Bench is necessary in order to settle the law.

[252] "The High Court of Bengal has held such adoptions invalid—*Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (10). But, as pointed out by the District Judge, the High Courts at Madras and Allahabad have upheld them—*Chinna Gaundan* v. *Kumara Gaundan* (11); *Hanuman Tiwari* v. *Chirai* (12); *Narayanasami* v. *Kuppusami* (13).

(1) 4 B. H. C. R. A. C. J. 191.
(2) 7 B.H.C.R. Appx. 26.
(3) 2 Borr. 83.
(4) 3 Morr. S. D. A. R. 420.
(5) 2 B. 377.
(6) 6 B H. C. R. O. C. J. 4.
(7) 12 B.H. C. R. 364, 391.
(8) 6 B. 524.
(9) 7 B. 221.
(10) 1 B. L. R. A.C.J. 221.
(11) 1 M. H. C. R. 54.
(12) 2 A. 164.
(13) 11 M. 43.

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"The Judicial Committee have not yet determined the point. It is glanced at in *Nilmadhub Doss* v. *Bishumbar Doss* (1), a Bengal case, and in *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra* (2) the doctrine of *factum valet* in regard to adoptions is upheld. That this principle applies to adoption, is stated by Sir T. Strange, Colebrooke, Ellis and Steele (3).

"The acknowledged writers on Hindu law differ, as do the High Courts. In favour of such adoptions have been cited Sir T. Strange and Mr. Ellis; and against them Mr. Sutherland and Colebrooke, as also West and Buhler, pp. 909, 912, 1040 (3rd ed.), where the references are given.

"Dr. Jolly's History of the Hindu Law has since been published—Tagore Law Lectures, 1885. At p. 166 he sums up as follows:—'It is simply a misfortune that so much authority should have been attributed by the Courts all over India to such a treatise as Nandapandita's Mimansa, which abounds more in fanciful distinctions than perhaps any other work on adoption, and it is high time that the numerous other treatises on adoption should be thoroughly examined and given their due weight. At p. 309 the learned writer quotes the Dattaka Nirnaya to the effect that the prohibition of adoption of an only son is an esoteric doctrine. See, also, Rao Saheb Mandlik's learned argument at pp. 496 to 514 of his Hindu Law and the texts there collected and translated. The observations of Mr. Mayne at para. 10 *et seq*, of his Hindu Law have been cited to us as showing that the custom of adoption is far more extensive than Brahmanism or the Hindu religion or the Aryan race, and is based [253] on secular considerations of convenience. In para. 95 Mr. Mayne again suggests 'that the spiritual theory is not the sole object of an adoption even upon Brahmanical principles.' Mr. Khare has quoted texts to show that adoption is not a religious but a worldly ceremony, and that there are six ways of attaining heaven, so that the provision of a son is not a religious necessity—Manu, Chap. 5, v. 159. These arguments seem intended to lead up to the same conclusion, as Sir H. S. Maine arrived at on another matter of Hindu law, *viz.*, that the priestly lawyers found a secular custom and invented a religious reason (Early Law and Custom 89) (*Cf.* Ancient Law, 192). It is also urged that the prohibitory texts, *e.g.*, Vyavahara Mayukha, c. 4, s. 5, pp. 16, 36; Mitakshara, c. 1, s. 11, p. 11, are only rules of conduct and not rules of civil law. See *Khettur Monee Dossee* v. *Kasheenath Doss* (4) and Maine's Early Law and Custom, 36, for discussions regarding the test to be applied; also *Srimati Uma Deyi* v. *Gokoolanund Dass Mahapatra* (5). In *Lakshmappa* v. *Ramava* (6) Westropp, C.J., lays stress on the fact that Colebrooke in his translation of the Mitakshara, c. 1, s. 11, p. 11, used the words 'must not' as regards the adoption of an only son, and 'should not' as regards that of an eldest son. Mr. Mandlik, however, at p. 502 of his work states that in both *placita* the Sanskrit word *na deya* is the same, and that the difference of the rendering is unwarrantable. As has happened in other questions of Hindu law, the decisions have been much influenced by the words employed in rendering the Sanskrit originals: the whole Sanskrit law of adoption is evolved, says Mr. Mayne (para. 96), from two texts and a metaphor: and, as in

(1) 13 M. I. A. 85 (100). (2) 5 I. A. 40.
(3) Strange's H. L. 87; 2 *Ibid.* 126; Steele, 53, See Mandlik's H. L. 503; and *per* Gibbs, J. 4 B. H. C. R.A.C.J. 195,
(4) 10 W. R. F. B. Cases, 89. (5) 5 I.A. 40 (50). (6) 12 B. H. C. R. 364 (378).

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the case of an eldest son, much care is required to determine whether the 'precepts are merely admonitory or mandatory.' The question whether the doctrine of *factum valet* applies, is also one to be determined, and some other questions regarding the validity of this particular adoption have to be decided.

"In the present state of the authorities, I am of opinion that, sitting as a Division Bench we ought not to overrule the earlier [254] decisions, nor the later decision, supported as it is by opinions of great weight, but that we should refer to a Full Bench the question whether the adoption in this case can be sustained as valid."

"CANDY, J.—For the reasons just stated, I concur in holding that the question should be referred to the Full Bench, whether the adoption of an only son is valid. I had recently occasion to examine the authorities on this point (appeal No. 127 of 1886 of the District Court, Poona), and the necessity of having an authoritative decision on the point in this Presidency was manifest."

The case now came on for argument before a Full Bench.

Telang (*Shamrav Vithal* with him), for the appellants:—The adoption of the plaintiff was invalid—*Lakshmappa* v. *Ramava* (1); appeal No. 1 of 1879 decided on the 8th September, 1879, (not reported). Under the Hindu law the adoption of an only son is not permitted—*Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (2).

The text of Vashistha is prohibitory and has been understood to be so by the authors of the Dattaka Mimansa and Dattaka Chandrika, which are the leading authorities in the Bombay Presidency on questions of adoption. The Benares school treats the prohibition as a legal prohibition, and that school is followed in this Presidency. These texts have been interpreted as prohibitory by the Full Bench decision in appeal No. 1 of 1879.

Jardine (*M. C. Apte* and *Daji Abaji Khare* with him), for the respondent.—The preponderance of authority is in favour of the validity of the adoption of an only son. The principle of *factum valet* may be properly applied in such a case—*Huebut Rao* v. *Govindrao* (3); *Abaji* v. *Gangadhar* (4). It is a sin to give an only son, but not to receive one. From 1822 to 1875 the course of decisions has been uniform and in favour of the adoption of an only son—*Lakshmappa* v. *Ramava* (5); Mandlik's [255] Hindu Law, pp. 496—514. The injunctions are merely recommendatory, and not prohibitory. There is no written judgment in the Full Bench decision in appeal No. 1 of 1879, and it cannot be relied on as finally deciding the question at issue. The Madras and Allahabad decisions are in favour of such adoption. In *Narayanasami* v. *Kuppusami* (6) the Bombay cases have been referred to and disapproved, and this is a recent authority in favour of such adoption. Jagannath says that a son actually given in adoption becomes a completely adopted son though he be an only son—Cole. Dig., 387. Dr. Jolly quotes Dattaka Nirnaya at p. 309 of his translation, and says that the prohibition of an only son is an esoteric doctrine. On the proper construction of the Mitakshara the prohibition seems to be merely directory.

Telang in reply:—The parents have no power to give their only son in adoption: Stokes' Hindu Law Books, p. 572. The father of an only

(1) 12 B.H. C. R. 364 (376). (2) 1 B. L. R. A. C. J. 221. (3) 2 Borr. 83.
(4) 3 Morr. S.D.A. Rep. 420. (5) 12 B. H. C. R. 364. (6) 11 M. 43.

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son owes a duty to his ancestors, and ought not to part with his only son. Although there was no written decision in the Full Bench case, appeal No. 1 of 1879, that authority is binding. The Registrar's note states that the adoption in question in that case was held invalid "for reasons to be given." The question of the validity of the adoption of an only son was determined by that decision.

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C. J.—The question as to the validity by Hindu law of an adoption of an only son, which has been referred for the decision of this Full Bench, has already been the subject of judicial decision in the other High Courts. The Calcutta High Court of appeal, consisting of two very high authorities on such a question, *viz.*, Mr. Justice L. Jackson and Mr. Justice Mitter, in *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (1), and again when consisting of Sir Richard Garth and Mr. Justice Markby in *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (2), decided against its validity; whilst both in the Allahabad and Madras High Courts the decisions (*dissentiente* Turner, J.) have been in [256] favour of its validity—*Hanuman Tiwari* v. *Chirai* (3) and *Narayanasami* v. *Kuppusami* (4).

In this Court the question was discussed by the late Chief Justice Sir Michael Westropp in a very exhaustive judgment in *Laskhmappa* v. *Ramava* (5) where the parties were Sudras. The Court, consisting of the Chief Justice and Mr. Justice Nanabhai Haridas, whilst clearly indicating that the right conclusion from the Hindu law books of authority in this Presidency was unfavourable to the validity of such an adoption, did not, however, give a final opinion on the question, as the only son in that case had been given by a widow without the express authority of the husband, and the Court held that the giving an only son is such a grievous sin that in any case the Court would not be justified in implying such an authority from the husband, who (as they clearly held was the case) was by his own law and religion forbidden to make such a gift. However, prior to the above decision in *Lakshmappa* v. *Ramava*(5), the question as to the validity of an adoption of an only son had already engaged the attention of the Sadar Adalat. In the Special Appeals Nos. 1419 and 1958, decided by the Sadar Adalat in 1839 and 1843, the adoption of an eldest son was held to be invalid. But in *Abaji Dinkur* v. *Gungadhur Wasudeo Gosavee* (6) and *Vishram Baboorow* v. *Narainrow Kasee* (7) those cases were not followed, apparently on the ground, as stated in the judgment in the last case, that "such an adoption could not be called in question, as no point of Hindu law was more firmly decided than that an adoption once made in proper form cannot be set aside, though both the giver and receiver in adoption may have committed sin in allowing it." The answers of the Shastris and the decision of Sadar Adalat in *Huebut Rav* v. *Govindrao*(8) are, as admitted by Westropp, C.J., also favourable to the validity of the adoption of an only son. Again, in *Mhalsabai* v. *Vithoba*(9), which was a case under Act XXVII of 1860 for a certificate of administration, it would appear to have been

(1) 1 B.L.R. A.C.J. 221.
(2) 3 C. 443.
(3) 2 A. 164. (4) 11 M. 43.
(5) 12 B.H.C.R. 364 (376).
(6) 3 Morris S.D.A. R. 420.
(7) 4 Morris S.D.A. R. 26, (30).
(8) 2 Borr. 83.
(9) 7 B.H.C.R., Appx. 26.

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assumed that a man might give his [257] only son in adoption, and the only question really discussed was as to the authority of the widow to give a son without the express consent of the husband. In 1862 by a Court consisting of Sausse, C.J., and Herbert and Forbes, JJ., on an application under Act XXVII of 1860, it was assumed that the adoption of an only son, if valid in other respects, could not be set aside; and the decision in *Raje Vyankatrav* v. *Jayavantrav* (1) is to the same effect. However, in *Bhaskar Trimbak Acharya* v. *Mahadev Ramji* (2) Sir Joseph Arnould treated such an adoption as invalid on the authority of the Calcutta decision in *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (3).

The authorities show doubtless that up to the time when *Lakshmappa* v. *Ramava* (4) was decided, with the exception of the opinion expressed by Sir Joseph Arnould in the last mentioned case, the adoption of an only son had been regarded by the late Sadar Adalat and by this Court as valid, on the ground that however wicked it might be, yet if performed with the proper ceremonies, it could not be set aside. But an examination of the judgments in those cases can, we think, leave no doubt that it was not until the question was fully discussed by Westropp, C. J., in all its bearings in his judgment in *Lakshmappa* v. *Ramava* that it can be said to have received the consideration worthy of its importance. In 1879 the question again came before a Full Bench, consisting of Westropp, C. J., and M. Melvill, F. D. Melvill, and Kemball, JJ., on an application under Act XXVII of 1860 in the case of the estate of a deceased Lingayet, on which an order was made in the following terms:—"The Court being of opinion that an adoption of an only son by a Lingayet is invalid, reverses the decision of the Court below;" at the same time, as appears from the note books of M. Melvill and Kemball, JJ., leave was given to apply to establish a custom amongst Lingayets of making such adoptions. This was subsequently attempted to be done, but failed. No judgment was written on this occasion, although it appears from the Registrar's note that one was intended to be written "for a [258] decision that under Hindu law a gift in adoption of an only son is invalid, and that such is not the case where *factum valet* applies." It is stated by Mr. Telang, who was counsel on the occasion, that the question as to the validity of the adoption of an only son by Hindu law was fully argued during two days; there can, therefore, we think, be no doubt that a Full Bench of this Court, adopting the view taken by Sir M. Westropp and Mr. Justice Nanabhai in *Lakshmappa* v. *Ramava*—which, strictly speaking, could only be regarded as an *obiter dictum*—did decide, after solemn argument, that the adoption of an only son by general Hindu law was invalid. The fact of there being no written judgment may well be explained by the circumstance of the judgment in *Lakshmappa* v. *Ramava* being published in the reports in 1879, which was probably thought to render another judgment unnecessary.

Now, according to the long-established practice of this and we believe, of the other High Courts, a decision of a Full Bench is regarded as conclusive, unless a decision of the Privy Council (and there is none on this question—see *Sri Ami Devi Garu* v. *Shri Vikrama Devu Garu* (5)) has been subsequently passed militating against it, or unless perhaps in a

(1) 4 B.H.C.R. A.C.J. 191.
(2) 6 B.H.C.R 1 O.C.J. 1 (4).
(3) 1 B.L.R. A.C.J. 221.
(4) 12 B.H.C.R. 364 (376).
(5) 15 I. A. 176.

case of this description the Court could clearly be shown to have formed its conclusion upon a mistaken impression as to the text of the Hindu law books upon which it relied. In the present case it is said that Westropp, C. J., relied on the difference in the rendering by Mr. Colebrooke of the passage in the Mitakshara, "So an only son must not be given." For Vashistha ordains "Let no man give or accept an only son," and of the passage relating to an eldest son where it is said "Nor though a numerous progeny exist should an eldest son be given." And this difference in the rendering of the same expression which, as it was pointed out is used in the Sanskrit in both passages it was contended was not justifiable. But the term "rendering" which Sir M. Westropp uses would rather seem to show that he was aware that the language of the vernacular was the same in both texts, and only attached importance to the difference in the rendering as indicating the [259] opinion of so high an authority as Mr. Colebrooke that there was a stronger reason for prohibiting the gift of an only son than an eldest son. The opposite views on the subject, which turn almost entirely on the question whether the injunctions in the text of Vashistha and Savnaka against the giving and receiving an only son in adoption are to be treated as mandatory or only as directory and recommendatory, cannot probably be better stated than they are in the judgment of Mr. Justice Dwarkanath Mitter in *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (1), and by Rao Saheb Vishvanath Mandlik in his valuable notes to the translation of the Vyavahara Mayukha. With respect to the latter, we will only remark that it is not attempted to be denied by the Rao Saheb that the text of the Vashistha is understood as prohibitory in the legal sense by the authors of the Dattaka Mimansa and Dattaka Chandrika, who are regarded in this Court as the leading authorities on the subject of adoption, and that he confines himself to disputing their title to such high authority. But although this course may be fairly open to a critic of the decisions of the Court, it is, in our opinion, very important, with a view to uniformity of decisions, that this Court should, in the absence of a very cogent reason to the contrary, not depart from the standard it has uniformly applied in appreciating the value of the different text-writers. Under these circumstances, it is sufficient, in our opinion, to say that the question has been determined by a Full Bench after full discussion against the validity of such an adoption, and that for the last ten years such an adoption has been regarded by the legal profession as being, in the view of this High Court, in contravention of Hindu law, and that no reason which could properly be entertained, with due regard to the long-established authority of Full Bench decisions, has been assigned which could justify our interference with that decision. We must, therefore, answer the question referred in the negative.

(1) 1 B.L.R. A.C.J. 221.