

The decision in *Rachapa v. Amingavda* (1), where the question was as to a compromise before 1827, is to the same effect. If, therefore, Ex. A is now to be held not binding, it must be on the terms of the instrument itself.

It is to be observed that Ex. A is not merely the creation of a permanent office, for the services of which a certain share in the *vatan* is allotted as remuneration, but that it proceeds on the special service to be rendered to the family by the recovery of the *vatan* itself. In other words, the performance of the service as *mutalik* is not the entire consideration or motive for the grant, nor does it expressly provide for the grant ceasing when the services should be no longer required. This distinguishes it from the grant in *Krishnaji v. Vithalrav* (2) and brings it within the principle upon which the Privy Council decided in favour of the continuance of the grant in *Forbes v. Meer Mahamad Tuquee* (3) where there was no longer any occasion for the service to be performed, *viz.*, the keeping up a body of men to repel the incursions of elephants. We are, therefore, of opinion that the rights of the defendants under Ex. A are still in force notwithstanding that the services incidental to the *vatan* have ceased.

[90] As to Ex. B, it purports to exclude the grantor's successors in the *vatan* from the entire management of the *vatan* and to vest it in the permanent *mutalik*, and, whilst leaving them as the absolute owners of the two-thirds, to deprive them of all control over its management. This was virtually to attach an incident to their estate which was inconsistent with its nature, and which he was not competent to do. As to plaintiff's cross objections, they were not insisted on.

We must, therefore, reverse the decree of the Court below and dismiss the plaintiff's claim so far as it seeks to establish a proprietary right to more than two-thirds of the *vatan* and the lands, &c., mentioned in the plaint and to the sum of Rs. 2,368-6-1 in respect to the income of the one-third of the *vatan* received by the defendants, and declare that the parties are entitled to the joint management of the *vatan* as tenants-in-common in respect of their undivided shares. Parties to pay their own costs throughout.

14 B. 90.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt, Chief Justice; and Mr. Justice Candy.

TARANAIKIN (Original Plaintiff), Appellant v. NANA LAKSHMAN
(Original Defendant), Respondent.* [1st July, 1889.]

Temple endowment—Dancing girls attached to a temple inheritance—Succession to the office of a dancing girl connected with such temple—Public policy—Custom.

The existence in India of dancing girls in connection with Hindu temples is according to the ancient established usage, and the Court would not be justified in refusing to recognize existing endowments in connexion with such an institution.

Accordingly where the plaintiff sued, as the adopted daughter of a dancing girl attached to a temple, to redeem and have her right to manage the *inam* lands

* Second Appeal No. 624 of 1887.

(1) 5 B. 283.

(2) 12 B. 80 (84).

(3) 13 M. L. A. 438 (464).

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assigned as the remuneration for the temple office recognized, but her claim was rejected, on the ground that the adoption could not be recognized by the Civil Court.

Held, that the plaintiff's suit should be allowed. The lands in question were not claimed as being the property of the last incumbent, but as a part of the endowment of the temple of which she had been the manager. The alleged adoption only had effect as nominating the plaintiff to be successor in the management [91] and if it was the custom of the temple that the actual incumbent of the office of dancing girl in the temple should nominate her successor, the Courts of law could not refuse to recognize it, such custom being recognized in the country.

[*Diss.*, 25 C. 254 = 2 C.W.N. 97; R., 19 B. 428 (459); 19 M. 127.]

THIS was a second appeal from a decision of A. H. Unwin, Acting District Judge of Satara.

The lands in dispute had been assigned as an endowment to the deity of Venknath of Kale and attached to the office of dancing girl of the temple of that deity. Raja Naikin was the last holder of that office, and on her death was succeeded by the plaintiff.

The plaintiff, therefore, claimed, as the adopted daughter and heir of Raja Naikin, to redeem the said lands, alleging that they had been mortgaged by Raja to the defendant, and that the mortgage-debt had been satisfied out of the profits of the lands.

The defendant denied that the plaintiff was either the daughter or the heir of Raja, or that the lands had been mortgaged, and pleaded adverse possession.

The Subordinate Judge who tried the suit was of opinion that the right of heirship set up by the plaintiff to Raja Naikin could not be recognized by the Civil Court. He, therefore, rejected the suit. On appeal that decision was confirmed by the lower appellate Court.

The plaintiff preferred a second appeal to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant;—The lower Courts were wrong in rejecting plaintiff's suit as not maintainable. The case of *Mathura Naikin v. Esu Naikin* (1) decides merely that an adopted daughter of a *naikin* cannot sue for partition. I rely on *Venku v. Mahalinga* (2), which is an authority for recognizing adoption by a dancing girl: The custom and usage of this country recognize the connection of dancing girls, with temples. The plaintiff is an actual servant of the temple and the successor of Raja Naikin to the office of the temple dancing girl. The plaintiff, therefore, in her capacity of the successor to the office may be held entitled to redeem.

Ghanasham Nilkanth Nadkarni, for the respondent:—The plaintiff claims as the adopted daughter, and such adoption cannot be [92] recognized—*Mathura Naikin v. Esu Naikin* (1). In second appeal the plaintiff for the first time claims as successor to the office. Even if the alleged custom was proved, such a custom is immoral. Refers to Mayne's Hindu Law (4th ed.), pls. 52 and 183. The plaintiff is not entitled to redeem, whether she bases her title on adoption or heirship to Raja Naikin.

JUDGMENT.

SARGENT, C.J.—The District Judge has found that the Subordinate Judge was right in refusing to recognize the right to manage the *inam*

(1) 4 B. 545.

(2) 11 M. 393.

land in question attached to the office of dancing girl in the temple of the deity Venknath at Kale as being the adopted daughter of Raja, the previous incumbent. This he has done on the authority of *Mathura Naikin v. Esu Naikin* (1), in which the Court refused to recognize a custom amongst *naikins* to adopt.

The learned Judge at the conclusion of his able and exhaustive judgment on the legal effect of usage and custom says (at p. 571): "The Courts formulating the decision of society must refuse to allow to the *naikins* a legislative power which as individuals they cannot possess." The legislative power had reference to the making of rules with a view to their organization as a distinct class.

The decision has been disapproved of by the Madras High Court in *Venku v. Mahalinga* (2). But without expressing any opinion on it we may remark that here the lands in question were not claimed as being the property of Raja Naikin, but as part of the endowment of the temple of which she had been the manager as the dancing girl attached to the temple, and which Saka Naikin had mortgaged as such. The alleged adoption, therefore, could only have effect by way of nomination of the plaintiff as successor in the management; and if it was the custom of the temple that the actual incumbent of the office of dancing girl in the temple should appoint her successor, a Court of law cannot refuse to recognize that nomination, unless it is prepared to say that the Courts of this country should not recognize the existence of dancing girls in connection with Hindu temples, or any endowment for their support.

[93] In *Mathura Naikin v. Esu Naikin* (1) West, J., speaking of temple dancers says it is a question "whether, in such circumstances, the endowments enjoyed by such guilds of women ought to be recognized and protected by the law without a reform of their essential constitution." However in *Kamalam v. Sadagopa Sami* (3) such endowments were recognized.

Now the existence of dancing girls in connection with temples is according to the ancient established usage of the country, and this Court would, in our opinion, be taking far too much upon itself to say that it is so opposed to the "legal consciousness" of the community at the present day as to justify the Court in refusing to recognize existing endowments in connection with such an institution. As the Court has dealt with the case entirely on the assumption that it was an ordinary case of adoption, we must reverse the decree and send the case back for retrial, having regard to the above remarks. Fresh issues should be framed to raise the necessary question. Costs to abide the result.

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(1) 4 B. 545 (565).

(2) 11 M. 393.

(3) 1 M. 357.