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The reference was in the following terms:—

"The complainant is a bailiff of the First Class Subordinate Judge at Nagar. He was employed to attach the property of a judgment-debtor, who was a carpenter and maker of tongas. He proceeded to attach two tonga-tops which were lying on the road in front of the judgment-debtor's shop. Thereupon the accused Abdul Husain said that the said tonga-tops were his, and that he would not let the bailiff take them away unless he entered them as his property. Abdul Husain has on these facts been convicted of the offence of offering resistance to the taking of property by the lawful authority of a public servant, and punished with a fine of Rs. 10 under s. 183 of the Indian Penal Code.

"I venture to submit that the facts disclosed by the evidence do not amount to a resistance, as contemplated by the Indian Penal Code. It does not appear from the evidence whether the tonga-tops were or were not the property of Abdul Husain; even if they were not his property I think that a mere verbal direction to the bailiff not to remove them, cannot be regarded as an illegal regal resistance, and if they were his property, still less proper [565] would it be to regard his conduct as an offence against the Penal Code. The evidence does not show that, in this case, the bailiff was either abused, or intimidated, or that any physical resistance was attempted.

"I have, therefore, the honour to suggest that the conviction and sentence be set aside."

OPINION.

PER CURIAM:—For the reasons stated by the Sessions Judge, the Court reverses the conviction and sentence, and directs the fine to be restored, if paid.

Conviction and sentence reversed.

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APPELLATE CIVIL.

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

PATEL VANDRAVAN JEKISAN AND ANOTHER (*Original Defendants*), *Appellants v.* PATEL MANILAL CHUNILAL (*Original Plaintiff*), *Respondent.** [10th and 17th December, 1890.]

*Adoption—Adoption in Gujarat—Adoption by a widow whose husband died while a minor—Implied authority from minor husband—Adoption from corrupt and improper motives—*Onus *of proof—Kadwa Kunbi caste, adoption among—Custom as to adoption—Evidence—Statement as to custom made by witnesses—Admissibility in evidence—S. 32, cl. 4, of the Indian Evidence Act (I of 1872)—Proof of custom.*

In the Maratha country a Hindu widow may without the permission of her husband and without the consent of her kindred adopt a son to him if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. But the adoption must not have been expressly forbidden by the husband, and must not have the effect of divesting an estate already vested in a third person.

There is no reason for drawing any distinction, as regards the general law, between Gujarat and the Maratha country properly so called. Apart from local

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or caste custom, the general law in Gujarat must be taken to be as stated in *Rakhmabai* v. *Radhabai* (1).

A widow has implied authority from her husband to adopt, even though her husband be a minor.

Where a widow adopts there is a presumption that she has performed the duty from proper motives, and the *onus* lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive.

[566] A Hindu widow in Gujarat having adopted a son to her husband, who died before the completion of his sixteenth year and who was separated from his brother.

Held, that the adoption was valid. The authority of the husband to adopt may be implied, although he was a minor at the time of his death. If adoption by a widow be a meritorious act "beneficial to her husband's soul," assent should be implied in the case of a minor husband, as well as in the case of one who had attained his majority.

A Hindu widow having adopted a son about eight years after her husband's death during her last illness when she was confined to her bed.

Held, that that circumstance alone did not afford any sufficient reason for supposing that she was not actuated by the sense of the duty she owed to her husband.

The fact that the adoption was made on an inauspicious day, showed the anxiety of the widow to adopt, but not the motive.

The lower Court having under s. 32 of the Indian Evidence Act (I of 1872) admitted, in evidence, a statement signed by several witnesses to the effect that a widow of the Kadwa Kunbi caste cannot adopt, according to the custom of the caste, without the express authority of her husband.

Held, that s. 32, cl. 4 of the Indian Evidence Act (I of 1872) was not applicable to the case, as the evidence was required to prove a fact in issue, and not merely a relevant fact. The statement was, therefore, inadmissible to prove the alleged custom.

[R., 22 B. 199 (205); 22 B. 206 (212); 22 B. 558 (F.B.); 23 B. 789; 27 M. 228; 1 Bom.L.R. 144 (150); 8 C.W.N. 266; 5 M.L.T. 169 (173).]

THIS was an appeal from the decision of Rav Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad.

One Maneklal Chunilal, a separated brother of the plaintiff Manilal Chunilal, died in September 1882, while still a minor under sixteen years of age, leaving behind him his widow, Bai Rupali, but no issue. After the death of Maneklal the plaintiff took possession of his property under a will alleged to have been executed in his favour by the deceased.

In the year 1885 Bai Rupali filed a suit against the plaintiff to recover possession of her husband's immoveable property and certain ornaments. Subsequently the plaintiff filed a suit against Bai Rupali for a declaration of his right to succeed to the estate of the deceased in preference to his widow. Both the suits were tried together and decided against the plaintiff Manilal on the ground that the alleged will of Maneklal was not genuine. The said suits were decided on the 21st November 1887, and against the decree passed therein the plaintiff preferred an appeal to the High Court, which was pending when the present appeal was argued.

[567] In July, 1889, Bai Rupali adopted a son, Vandravan, a minor, and executed a deed of adoption; and in the month of August of the same year she made a will in favour of the adopted son.

The plaintiff thereupon filed the present suit against Bai Rupali, who died pending the suit, against Damodardas Ranchoddas and against Bai

(1) 5 B.H.C.R.A.C.J. 181 (191).

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Rupali's adopted son, Vandravan Jekisandas, who being a minor was represented in the suit by his guardian the said Damodardas Ranchoddas.

The plaintiff in this suit sought to set aside the adoption, the deed of adoption and the will made by Bai Rupali. He contended that he (plaintiff) was the heir of his brother Maneklal according to Hindu law and by the usage of the Kadwa Kunbi caste to which the parties belonged. Bai Rupali had no authority to adopt a son; that she made the adoption and the will from a capricious and malicious motive; that the adoption was made pending the appeal relating to the succession to the estate of the deceased, and that the deceased was a minor at the time of his death.

The Subordinate Judge found that the adoption and the will made by Bai Rupali were proved; that she had no authority, according to Hindu law, to make a will or to adopt a son; that there existed a custom of the Kadwa Kunbi caste, to which the parties belonged, prohibiting a widow from adopting a son, or making a will in respect of her husband's estate, and that for the reasons stated in the plaint the adoption was invalid. On these grounds the Subordinate Judge allowed the plaintiff's claim.

Against the decree passed by the Subordinate Judge, the defendants appealed to the High Court.

Facts in addition to those stated above appear in the argument of the counsel and the judgment of the High Court.

Macpherson (with *Nagindas Tulsidas* and *Govardhanram Madhavram Tripathi*), for the appellants.—The lower Court has found that the adoption of Vandravan and the will of Bai Rupali were proved, but it held them to be invalid. We submit that as Bai Rupali was the widow of a separated co-parcener, she succeeded as heir to her husband's property, and was, therefore, [568] entitled to make a will and to adopt a son to her deceased husband. The mere fact that Bai Rupali's husband, Maneklal, was a minor when he died, cannot affect the adoption. Moreover, he had, when he died, attained the age of discretion, so that his assent to the adoption ought to be implied—*Rajendro Narain* v. *Saroda Soonduree* (1). This ruling has been approved by the Privy Council in *Jumoona Dassya* v. *Bamasoondari Dassya* (2). We rely also on West and Bühler, pp. 905, foot-note (*d*), 947, 948, 960 (*f*); Mayne's Hindu Law and Usage, ss. 100, 105 (4th ed.). These authorities show that it is not necessary to consider the point whether Maneklal had attained the age of majority at the time of his death.

No authority, however, from Maneklal was necessary for the purpose of adoption, and, if any authority from him was necessary, it could be implied—*Rajendro Narain* v. *Saroda Soonduree* (1); *Jumoona Dassya* v. *Bamasoondari Dassya* (2); *Rakhmabai* v. *Radhabai* (3); *Ramji* v. *Ghamau* (4); *Giriowa* v. *Bhimaji Raghunath* (5).

As regards the motive of Bai Rupali in making the adoption, we contend that it would be unfair to infer from a mere existence of ill-feeling between the parties that she was actuated by corrupt and capricious motives. The burden lay very heavily upon the plaintiff to prove corrupt motive, and he has failed to discharge it—*Vellanki Venkata* v. *Venkata Rama Lakshmi* (6); West and Bühler, p. 905; Mayne's Hindu Law and Usage, ss. 115, 116 (4th ed.); *Vithoba* v. *Bapu* (7).

(1) 15 W.R. C.R. 548. (2) 1 C. 289=3 I.A. 72. (3) 5 B.H.C.R. A.C.J. 181.
(4) 6 B. 498. (5) 9 B. 58. (6) 1 M. 174; 4 I.A. 1.
(7) 15 B. 110.

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The plaintiff alleges that by custom of the Kadwa Kunbi caste, to which the parties belonged, a widow is prohibited from adopting a boy, and in support of this contention he relied on Borrodaile's Collection of Caste Rules and on a statement made outside the Court by a large number of his caste-people and improperly received in evidence by the lower Court. Borrodaile's Collection refers to Kadwa Kunbis of Surat, while the parties to [569] the present suit are ths Kadwa Kunbis of Ahmedabad. It cannot be inferred that a particular custom which prevails among the Kadwa Kunbis of Surat, necessarily prevails also among the Kadwa Kunbis of Ahmedabad. There are instances to show that a particular custom which obtains in a community in a particular part of the country, does not so obtain in the same community in another part of the country. Again, Borrodaile's remarks apply to a foster son (*palak putra*) and not to an adopted son. Further, Borrodaile's Collection says that there is no custom of adoption among the Kadwa Kunbis, but the plaintiff's case is different ; according to his allegation, the custom is that the widows are not allowed to adopt. It is clear, therefore, that Borrodaile's Collection does not render any assistance to the plaintiff.

On the suggestion of the lower Court, the plaintiff has produced evidence of a peculiar kind to prove the custom. Under s. 32 of the Evidence Act the lower Court allowed the plaintiff's witnesses, about 110 in number, to make and sign a statement out of Court with respect to the alleged custom, and allowed the plaintiff to prove those statements by the affidavit of the persons in whose presence the statements were made and signed by the witnesses. We submit that such evidence was inadmissible to prove the custom which was a fact in issue, and not merely a relevant fact ; further there was no opportunity given to us to cross-examine the witnesses. Even supposing that such evidence is admissible, we contend that it is insufficient to prove the custom—*Ravji Vinayakrav* v. *Lakshmibai*(1). We gave two instances of adoption in the Kadwa Kunbi caste at Ahmedabad, but those adoptions were not acted upon, because in one case the adopted boy was insane and in the other he happened to be a daughter's son. But it was never alleged that those adoptions were invalid by reason of the caste custom.

The will of Bai Rupali was perfectly good and valid, at least with respect to the moveable property inherited from her husband—*Bechar Bhagvan* v. *Baee Lukmee* (2) ; *Damodar Madhowji* v. *Purmanandas* (3), Even if it be found that our adoption was invalid, [570] still under the will of Bai Rupali we shall be entitled to hold the property as a donee—*Fanindra Deb Raikat* v. *Rajeswar Dass* (4) ; *Dyami Naik* v. *Lingappa* (5) ; Theobald on Wills (3rd ed.), p. 373.

Lathan, Advocate-General (with *Ganpat Sadashiv Rao*), for the respondent.—In Gujarat an adoption is very rare. A man who has not attained the age of majority cannot adopt, and, therefore, his widow cannot adopt, because there would be no implied authority from the husband for the adoption. The rulings of the Bombay High Court with respect to adoption are as follows :—*Rakhma bai* v. *Radhabai* (6). This was a case from the Southern Maratha country. The law as to adoption stands on a different footing in Gujarat 2 Borrodaile, 75 ; *Bayabai* v. *Bala* (7). This ruling lays down that a Hindu widow cannot adopt if she has

(1) 11 B. 381. (2) 1 B. H. C.R. 56. (3) 7 B. 155.
(4) 12 I. A. 72=11 C. 463. (5) P. J. for 1889, p. 37.
(6) 5 B. H. C. R. A. C. J. 181. (7) 7 B. H. C. R. App. 1.

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been expressly or impliedly prohibited by the husband during his lifetime—*Rupachand Hindumal* v. *Rakhmabai* (1). This case rules that when an adoption has the effect of divesting an estate already vested in a third person, the adoption would be invalid, unless made with the consent of that third person. *Bhagavandas* v. *Rajmal* (2) lays down that there must be express or implied authority to adopt. *Ramji* v. *Ghamau* (3) decides that a widow in an undivided family cannot adopt without the consent of the undivided co-sharers or without the express authority of her husband—*Giriowa* v. *Bhimaji Raghunath* (4), in which it was held that the widow of a separated co-sharer can adopt without the consent of the other co-sharer.

We impeach the defendant's adoption on three grounds, namely, that (1) there could be no implied authority to Bai Rupali to adopt from her husband, he having died a minor; (2) the custom of the caste prohibits adoption; (3) the adoption was made with malicious motive to defeat our interest. The adoption was, in fact, brought about by one Dalpat, who was dismissed by us from our service.

[571] As to the first point in *Jumoona Dassya* v. *Bamasoondari Dassya* (5), the Privy Council held that the adoption by one who was of the age of fifteen or sixteen years was, in Bengal, a valid adoption, that being the age of discretion. The age of discretion is the same as the age of majority according to Hindu law. The age of majority in Bengal was fifteen years and that in western India was sixteen years: Mayne's Hindu Law and Usage, p. 191. In the case of *Rajendro Narain* v. *Saroda Soonduree* (6), the age of discretion is not stated. The Indian Majority Act excludes marriage, dower, divorce and adoption from its operation. For the purposes of adoption the rule as to the age of majority is left to be governed by the Hindu law, and that age and years of discretion are convertible terms—*Mussamat Pearee Dayee* v. *Mussamat Hurbunsee Kooer* (7); Mayne's Hindu Law and Usage, s. 100 (4th ed.); West and Bühler, p. 140.

As to the second point, the lower Court was, no doubt, wrong in taking evidence in the manner it did. The procedure adopted in recording the evidence was irregular. We should, therefore, be allowed to give evidence. We are not to blame for the irregularity, because this method of recording evidence was proposed by the Court itself. We submit that there is sufficient evidence in the case to prove the custom; but, if the Court be of a contrary opinion, we should be given an opportunity to tender evidence on the point. Even in a single family there can be a particular custom regarding adoption—*Fanindra Deb Raikat* v. *Rajeshwar Das* (8); West and Bühler, pp. 869, 870, 924, 925, 1213. The evidence, which has been irregularly put on the record, shows that among the members of the Kadwa Kunbi caste a man may adopt, but not a widow.

The witnesses examined on our behalf also prove the same.

Under the will of Bai Rupali, the defendant cannot claim as a donee, because the gift to him would be in his capacity as the adopted son. If the adoption fails, the gift also must fail along with it.

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(1) 8 B.H.C.R. A.C.J. 114.
(2) 10 B.H.C.R. 241 (257).
(3) 6 B. 498.
(4) 9 B. 58.
(5) 1 C. 289 = 3 I.A. 72.
(6) 15 W.R. C.R. 548.
(7) 19 W.R. C.R. 127.
(8) 12 I.A. 72 = 11 C. 463.

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As to the third point, Bai Rupali made the adoption with a view to defeat our interest. None of her husband's relatives were [572] present at the time of the adoption. None of the caste people have come forward to depose to the fact of adoption, and none is alleged to have been present. Even the natural mother of the adopted son did not attend. Bai Rupali was at the time on her death-bed, quite unable to leave it. An inauspicious day was fixed for the performance of the adoption ceremony. Bai Rupali had a strong grudge against us, and wished that her husband's property should not, under any circumstances, come to our hands. The whole transaction of adoption was brought about by Dalpat, a dismissed servant of ours. It was he who consulted an astrologer about the day to be fixed for adoption; it was he who signed and attested the will of Bai Rupali and attested the deed of adoption. The adoption was made about seven years after the death of Bai Rupali's husband. All these circumstances tend to show that, in making the adoption, Bai Rupali was not actuated by the motive of securing the final beatitude to her husband, but, on the contrary, they show that she was actuated by malicious motives towards us. It is a condition precedent that a widow should make an adoption with good and not with capricious and corrupt motives—*The Collector of Madura* v. *Mootto Ramlinga Sathupathy*, otherwise known as the *Ramnad case* (1); *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (2); *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3); Mayne's Hindu Law and Usage, pp. 126, 127, 129 (4th ed.); West and Bühler, p. 975.

(At this stage the appellant made an application to the Court to put in a deposition of the respondent given by him before a Mamlatdar in the year 1885, stating that Bai Rupali had resolved to adopt a son. The respondent did not object to the going in of the deposition.)

Macpherson in reply.—The respondent did not make an application for giving further evidence, and, therefore, no fresh evidence can now be taken. Even if further evidence be taken, it cannot prove the adoption to be null and void—*Ravji Vinayakrav* v. *Lakshmibai* (4). The evidence may go to show that there is no [573] custom among the Kadwa Kunbis to adopt, but it cannot prove that the adoption, if made, would be invalid. Some of the witnesses have already deposed that their caste people have not prohibited an adoption.

All the authorities show that the consent of the husband is not necessary for an adoption: Mayne's Hindu Law and Usage., s. 105 (4th ed.); West and Bühler, pp. 865, 970 (foot-note *c*), 1005; 1 Borrodaile, p. 218, question 7.

The Vyavahar Mayukha is applicable to Gujarat and the island of Bombay, and no distinction is made therein with respect to the law of adoption in Gujarat and the Deccan. According to that authority, a widow has the power to adopt without the permission of her husband: Mandlik's Hindu Law, pp. 56, 57. If the husband's authority be necessary, it can be implied, and the husband's tender age is no bar to such implied authority. The test for the capacity of adoption is the age of discretion, and not majority: Mayne's Hindu Law and Usage, s. 191 (4th ed.); Lyon's Code, Vol. I, p. 49. The fact, that the deceased was fifteen years and ten months old when he died, cannot affect the question.

(1) 12 M.I.A. 397=1 B.L.R. (P.C.), 1=10 W.R. (P. C.), 17.
(2) 1 M. 69=3 I.A. 154. (3) 1 M. 174=4 I.A. 1. (4) 11 B. 381.

Majority and the age of discretion are not identical: Colebrooke, Vol. I, p. 202 ; Mandlik's Hindu Law, p. 467.

JUDGMENT.

SARGENT, C.J.—This is a suit by one Manilal to set aside the adoption of the minor defendant Vandravan Jekisan by Bai Rupali, the widow of his separated brother Maneklal, and also the will of the said Rupali. The infant defendant cannot, in our opinion, take under the will of his adoptive mother, having regard to the language of the devise to him, except in the character of an adopted son—*Fanindra Deb Raikat* v. *Rajeswar Dass* (1) ; and the important question, therefore, arises as to the validity of adoption.

Maneklal died on 12th September, 1882, two months before he attained the age of sixteen, and Manilal took possession of his property, setting up an alleged will of Maneklal. Rupali sued Manilal to recover possession of the property and obtained a decree in her favour in November, 1887, from which an appeal is now pending before the High Court. As Rupali is dead, the [574] appeal cannot be proceeded with until it is determined who is her representative, which will itself depend on the question as to the validity of the adoption, the *factum* of which is not disputed, but which is impeached on the ground that it was not made with the assent of her husband.

In *Rakhmabai* v. *Radhabai* (2), it was decided that in the Maratha country, wherein the property in that case was situated, a Hindu widow may without the permission of her husband and without the consent of her kindred adopt a son to him if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive. This has always been regarded as the settled law of the Court subject to the qualifications subsequently introduced by *Baybaba* v. *Bala* (3) and *Rupchand Hindumal* v. *Rakhmabai* (4), *viz.*, that the adoption must not have been expressly forbidden by the husband and that the adoption would not have the effect of divesting an estate already vested in a third person. It is, however, contended that this ruling is confined to the Maratha country properly so called, and is not applicable to Gujarat. No authority has been cited in support of this distinction, but it was pointed out that the decision in *Rakhmabai* v. *Radhabai* was in terms only as to the law in force in the Maratha country. It is, however, to be observed that the decision was based on the authority of the Mayukha (the Mitakshara being silent on the subject of adoption), which, although belonging to what is called the Maratha school of Hindu jurists, is of high authority throughout the entire West of India. Mr. Borrodaile in his preface to his translation of the Mayukha speaks of it as one of the most remarkable local works for the Maharastra and the West. Indeed it has always been considered in this Court as the paramount authority in Gujarat and the island of Bombay. See *Krishnaji Vyankatesh* v. *Pandurang*(5) and *Lallubhai Bapubhai* v.*Mankuvarbai* (6). It is further to be remarked that the judgment in *Rakhmabai* v. *Radhabai* was also based on the answers of the Shastris in various parts of the Presidency, including such important places in Gujarat as

(1) 12 I.A. 72=11 C. 463.
(2) 5 B.H.C.R. A.C.J. 181 (191).
(3) 7 B.H.C.R. Appx. 1.
(4) 8 B.H.C.R. A.C.J. 114.
(5) 12 B.H.C.R. 65.
(6) 2 B. 388 (418).

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[575]Broach and Surat. We see no sufficient reason, therefore, for drawing any distinction, as regards the general law, between Gujarat and the Maratha Country properly so called, and must hold that, apart from local or caste custom (and that such customs are to be found in Gujarat is clear from Borradaile's Collection of Cases and Steel's Hindu Law), the general law in Gujarat must be taken to be as stated in *Rakhmabai* v. *Radhabai*.

Two objections, however, have been taken to the adoption in this case—1st, that the rule proceeds on an implied authority from the husband, which it is said could not be the case where the husband died whilst yet a minor in the eye of the law; 2nd, that there is a well-established custom amongst the Kadwa Kunbis of Ahmedabad forbidding adoption by a widow without the authority of her husband.

As to the first objection, we have been referred to the case of *Jamoona Dassya* v. *Bamasoondari Dassya* (1), where the Privy Council, apparently relying on the authority of the opinion expressed by Mitter, J., in *Rajendro Narain* v. *Saroda Soonduree* (2) that a Hindu who has attained years of discretion according to Hindu law could adopt, held that the adoption by one who was of the age of fifteen or sixteen was in Bengal a valid adoption, that being according to law prevalent in Bengal to be regarded as the age of discretion. It was said that this is a decision that discretion and majority are convertible terms. But it is plain from Mr. Justice Mitter's judgment, which was approved of by the Privy Council, that he considered a Hindu youth might arrive at discretion for the purposes of adopting before he attained his majority according to law, for his judgment concludes with the decision that the "Court could not hold the adoption in that case to be invalid merely because the adoptive father was in the eye of the law a minor." Mr. Justice Mitter obviously considered that the question was whether the youth had arrived at the age of discretion which enabled him to perform religious ceremonies prescribed for his salvation. It is true, as Mr. Mayne points out in his Hindu Law and Usages, the judgment does not state when the Hindu arrives at years of discretion so as to enable him to "perform [576] religious ceremonies prescribed for his salvation:" but as it is plain it may be before he attains his legal majority, it would be unreasonable to hold, in the present case, that he had not done so two months before he attained sixteen when he would have ceased even in the eye of the law to be a minor. But, in any view of the power to adopt by a minor, we agree with the Subordinate Judge that there is no reason why the assent of a minor should not be inferred so as to give validity to his widow's adoption. It is to be observed that the assent of the husband is implied by those schools which hold that no express authority of the husband is required for the adoption by the widow for its being, as the Privy Council points out in the *Ramnad case* (3), a meritorious act "beneficial to her husband's soul," and if this be so, it is difficult to understand why the assent should not be implied in the case of a minor as well as of one who has attained his majority. We think, therefore, that the adoption was not invalidated by Maneklal's having died two months before he attained sixteen.

It was urged, however, that the widow adopted from improper motives, a circumstance which it is said from the judgment in *Rakhmabai*

(1) 1 C. 289=3 I.A. 72. (2) 15 W.R. C.R. 548 (549).
(3) 1 B.L.R. (P. C.). 1=10 W.R. (P.C.), 17=12 M.I.A. 397 (436).

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v. *Radhabai* would invalidate the adoption. This condition precedent of the validity of an adoption is first found in a passage in the judgment of the Privy Council in the *Ramnad case* (1), which afterwards came under the consideration of their Lordships in *Rajah Vellanki Venkata* v. *Venkata Rama Lakshmi* (2). In that case the High Court of Madras had held the adoption to be invalid on the authority of the *Ramnad case*, because "there was no appearance of any anxiety or desire on the part of the widow for the proper and *bona fide* performance of any religious duty to her husband. Her object appears to have been to hold the estate till her death, and then continue the line in the person of the plaintiff." Their Lordships, when expressing their disapproval of the application of this passage in the *Ramnad case*, observe "the passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of the authority of the kinsmen that was required. [577] After dealing with the *vexata quæstio* which does not arise in this case, whether such an adoption can be made with the assent of one or more *sapindas* in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of a father-in-law would probably be sufficient, they said:—

"'It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence,' not, be it observed, of the widow's motives, but 'of the assent of kinsmen, as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bona fide* attained.'" Their Lordships then proceed to say, page 14, that they think "it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives or in order to defeat the interest of this or that *sapinda*, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. If that be so, there seems to be every reason to suppose that in the present case there was such a consideration, both on the part of the widow and on the part of the *sapindas*; and their Lordships think that in such a case it must be presumed that she acted from the proper motives which ought to actuate a Hindu female, and that, at all events, such presumption should be made until the contrary is shown."

This would seem to imply, as Mr. Mayne appears to have understood the remarks of their Lordships, (see p. 113), that where the assent of *sapindas* has been obtained, it must be presumed that the widow acted from proper motive, and it was so [578] held in *Vithoba* v. *Bapu*(3). Where, however, the assent of *sapindas* is not required, as in this Presidency, where the family is divided, then there will be only the

(1) 1 B. L. R. (P.C.), 1=10 W.R. (P.C.), 17=12 M.I.A. 397 (436).
(2) 4 I.A. 1 (13)=1 M. 174 (180, 189, 190).
(3) 15 B. 110.

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ordinary presumption that the widow has performed a duty from proper motives, and the *onus* lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive.

The Subordinate Judge has held that the widow owed the plaintiff a grudge and made the adoption at the instigation of Dalpat Mondas, a discharged servant of the plaintiff, with the view of defeating the interest of the plaintiff. This conclusion does not appear to us to be based on satisfactory evidence. Here the widow had doubtless been engaged since 1885 in litigation with the plaintiff respecting the right to succeed to her husband's property which was not concluded when she made the adoption in 1889, an appeal being still pending against the decision which had been passed in her favour. This may fairly account for the delay in adopting a son, but in any case, although it took place in her last illness when she was confined to her bed, the circumstance alone does not afford any sufficient reason for supposing that she was not actuated by the sense of the duty she owed to her husband which would remain inextinguished by the delay where twenty years had elapsed—*Giriowa* v. *Bhimaji Raghunath* (1).

There is no evidence that she was instigated to adopt by Dalpat. Such a conclusion cannot properly be drawn simply from his attesting the deed of adoption. Its being done on an inauspicious day showed her anxiety to adopt before she died, but not the motive. On the whole, although it is probable from the admitted fact that only two adoptions by widows have been made in recent times in the caste, the widows may have acted from mixed motives, still we see no sufficient reason for supposing that she acted from corrupt or malicious motives such as would invalidate the adoption. We are, therefore, unable to adopt the finding of the Subordinate Judge on the seventh issue.

It remains, therefore, to consider the fourth issue, whether according to the custom or caste usage of the Kadwa Kunbi caste of Ahmedabad, the adoption by a widow is forbidden without the [579] express consent of her husband. The Subordinate Judge has not recorded a distinct finding on this issue, but says he is inclined to believe in the existence of such a caste usage, on the ground that in Borradaile's Collections of Caste Rules it is said that Kadwa Kunbis at Surat cannot adopt; that the oral evidence on the record shows that a widow of the Kadwa Kunbi caste cannot adopt without the express authority of her husband; that the defendant's pleader admits that with the exception of two recent cases no other instance has occurred in the Kadwa Kunbi caste; lastly, that it is highly probable that there would be such a custom in a caste in which widows freely contract *natra* marriages and would be able by adopting to frustrate the Hindu Widows' Marriage Act XV of 1856. A statement was also admitted in evidence with the consent of the Subordinate Judge signed by several hundred witnesses, to the effect that a widow of the Kadwa Kunbi caste cannot adopt, without the express authority of her husband. The Subordinate Judge admitted the evidence under s. 32 and sub-clause 4, apparently considering that it would be unreasonable to oblige the plaintiff to incur the expense of procuring the attendance of the witnesses. But that section is not applicable to a case like the present where the evidence was required to prove a fact in issue and not merely a relevant fact: and the above statement was, therefore, inadmissible to prove the custom as alleged.

(1) 9 B. 58 (62).

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We must, therefore, send back the case for a finding on the fourth issue after taking such evidence as both parties may wish to give. Finding to be transmitted to this Court within three months.

Case sent back for a finding.

15 B. 565.

15 B. 580.

[580] APPELLATE CIVIL.

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

NARAYAN BHAU BARTAKE AND ANOTHER (*Original Plaintiffs*) *v.* TATIA GANPATRAO DESHMUKH AND OTHERS (*Original Defendants*).* [14th January, 1891.]

Succession Certificate Act (VII of 1889), s. 4—Debtor of a deceased person—Certificate —Sale of deshmukhi hak*—Vesting of the* hak *in the vendee—Death of the vendee— Recovery of the* hak *by the vendors—Suit for damages—Money had and received.*

Section 4 of Act VII of 1889 (1) (Succession Certificate Act) prevents a civil Court from passing a decree against a debtor of a deceased person for payment of his debt, except on production of one or other of the documents there mentioned.

T. and others, who were entitled to recover from the Government treasury a certain sum on account of *deshmukhi hak*, sold it to B. in 1873 in consideration of a debt due to him. B. died in the year 1884. In the year 1886 T. and his co-vendors themselves recovered from the Government the said sum, which, under the sale-deed, was recoverable by B. In a suit brought by the heirs of B. to recover the amount from T. and the other executants of the sale-deed.

Held, that a certificate under Act VII of 1889 was not required to enable the plaintiffs to sue. By the sale in 1873 the property in the amount of the *hak* sold had become vested in the deceased before his death, but the defendants never became his debtors at any time, as the amount so assigned was not received by them from the revenue authorities till after his death in 1884. For wrongfully receiving it in 1886, the defendants could either be sued in damages by the persons entitled to receive the *hak*, or treated as their debtors and sued for money had and received to their use.

[Disappr., 22 M. 139 (142); **R.**, 18 M. 457=5 M.L.J. 61.]

[581] THIS was a reference made by C. E. G. Crawford, District Judge of Thana, under s. 617 of the Code of Civil Procedure (Act XIV of 1882).

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* Civil Reference, No. 19 of 1890.

(1) Section 4 of Act VII of 1889. (1), No Court shall—

(*a*) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof, or

(*b*) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of—

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under s. 36 or s. 37 of the Administrator-General's Act (II of 1874), and having the debt mentioned therein, or

(iii) a certificate granted under this Act and having the debt specified therein, or

(iv) a certificate granted under Act XXVII of 1860 or an enactment repealed by that Act, or

(v) a certificate granted under the Regulation of the Bombay Code No. VIII of 1827 and, if granted after the commencement of this Act, having the debt specified therein.

(2). The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.