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of the numerous Native States, which are throughout the length and breadth of this great continent to be found in more or less dependence on the British Government, then it is not in one or two isolated places that this view of the present law will have the most important consequences. In this view we are of opinion that it would be a serious thing to dissent from so strong a body of judicial authority as is shown by the current of decisions of this Court, and we accordingly answer the question put to us in the affirmative.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1901.
January 8.

KRISHNA (ORIGINAL PLAINTIFF), APPELLANT, *v.* PARAMSHRI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption—Dwyamushyayana adoption—Power of a Hindu widow to give away an only son in adoption.

A Hindu widow can make a valid gift of her only son in adoption.

The power of giving and taking an only son in adoption in the *Dwyamushyayana* form is not confined to brothers, but may also be exercised by their widows.

Lakshmappa v. *Ramava*(1) explained and distinguished.

SECOND appeal from the decision of H. L. Hervey, District Judge of Kánara, confirming the decree of Ráo Sáheb V. D. Joglekar, Second Class Subordinate Judge at Kumta.

Devappa and Bomaya were separated Hindu brothers of the Sudra class.

Bomaya died, leaving a widow Shivamma and an only son Krishna (the plaintiff).

Devappa died without issue, but leaving a widow Parmashri (defendant).

In 1894 Parmashri sold part of the property left by Devappa to the second defendant for Rs. 200. The plaintiff was about to

* Second Appeal, No. 416 of 1900.

(1) (1875) 12 Bom. H. C. R. 364.

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file a suit to have this sale set aside when the village elders intervened and a settlement was effected in October, 1894, whereby the plaintiff was to pay the second defendant Rs. 200, and the latter was to give up the property which had been sold to him. The whole of the family property was then to be held in equal shares by the plaintiff and the first defendant, and on the first defendant's death her half share was to go to the plaintiff, who was then to become owner of the whole. The plaintiff was to become the son both of Devappa and Bomaya and was to perform the *shradh* of both. The plaintiff's mother accordingly gave him in adoption to the first defendant Parmashri.

Under this agreement the plaintiff paid Rs. 200 to the second defendant, but the latter did not give up the land he had bought from Parmashri. The plaintiff now sued to enforce the agreement of October, 1894, or to recover his Rs. 200 from the second defendant.

The Court of first instance did not go into the question whether the plaintiff's adoption was valid, but it held that the agreement should be enforced, and it passed a decree for the plaintiff.

On appeal the District Judge sent back the case for a finding upon the validity of the plaintiff's adoption. The lower Court found in favour of the adoption.

The District Judge, however, on appeal reversed that finding, and held that the adoption of the plaintiff was invalid as being the adoption of an only son given in adoption. On the authority of *Lakshmappa* v. *Ramava*[1] he was of opinion that it could not be presumed that the plaintiff's mother, a widow, had any implied authority to give him (an only son) in adoption.

The plaintiff appealed to the High Court.

Shamrao Vithal for appellant (plaintiff) :—The decision in *Lakshmappa* v. *Ramava*[2] is not applicable to the present case. The recent decision of the Privy Council in *Gurlingaswami* v. *Ramlakshmamma*[3] has altered the law as established in this Presidency and has recognized the validity of the adoption of an only son—*Vyas Chimanlal* v. *Vyas Ramchandra*.[4] The

(1) (1875) 12 Bom. H. C. R. 364.
(2) (1875) 12 Bom. H. C. R. 364.
(3) (1899) 22 Mad. 398 ; 26 I. A. 116.
(4) (1899) 24 Bom. 367.

Privy Council decision does not make any distinction between the powers of a father and a widowed mother to give an only son in adoption. The District Judge erred in holding that the widow required an express authority from her husband to give an only son in adoption. In this Presidency a widow's authority to give or take a son in adoption is always implied unless she is expressly prohibited by her husband—*Lakshmibai* v. *Sarasvatibai*.[1]

G. N. Nadkarni for respondents 1 and 2 (defendants 1 and 2):—The Privy Council decision in *Gurulingaswami* v. *Ramalakshmamma*[2] has effected no change in the old law, so far as the widow's power to give a son in adoption is concerned. She has no independent power to make a gift in adoption. Her power is delegated. She acts as the agent of her husband. The Privy Council decision applies only to the case of the adoption of an only son by his father. There can be no adoption, even in the *Dwyamushyayana* form, when the brothers are dead. Their widows are not competent to make such adoption.

G. S. Mulgavkar for respondents 3 and 5 (defendants 3 and 5).

RANADE, J.:—The parties to this suit are *Shudras*. Devappa and Bomaya were full brothers. The appellant-plaintiff is Bomaya's only son. Devappa left no issue, and respondent-defendant 1, his widow, adopted the plaintiff on the 10th of October, 1894, as a *Dwyamushyayana* son. An agreement was entered into at the time when this adoption was made. The parties to this agreement were the plaintiff and his natural mother Shivamma on one side, and on the other defendant No. 1 and defendant No. 2, to whom defendant No. 1 had sold part of the family property for Rs. 200 in April, 1894. Plaintiff desired to file a suit to have this sale, made by defendant 1 to defendant 2, set aside. The village elders intervened and effected the settlement represented by the agreement of October, 1894. In this agreement plaintiff undertook to pay Rs. 200 to defendant No. 2 on account of defendant No. 1. The property of Devappa and Bomaya was to be held in

(1) (1899) 23 Bom. 789. (2) (1899) 22 Mad. 398; 26 I. A. 116.

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equal shares by plaintiff and defendant 1. Defendant No. 1's interest, however, was only to last for her life, and on her death plaintiff was to be the sole owner of the entire property. Plaintiff was to become the son both of Devappa and Bomaya, and was to perform the *shradh* of both the fathers. Plaintiff's mother Shivamma accordingly gave him in adoption to defendant No. 1 in order that he might become the son of both the brothers, Bomaya and Devappa.

This is the principal substance of the agreement. The parties apparently did not carry it out, and plaintiff's present suit was brought to enforce the agreement, in respect of which he had paid Rs. 200 to defendant No. 2, but the latter had not given up possession of the lands sold to him by defendant No. 1.

The Court of first instance, without going into the question of the disputed adoption, decided that the alienation made by defendant No. 1 should be set aside, and the agreement enforced. In appeal the District Judge required the Court of first instance to record finding upon the questions of the proof and validity of the adoption.

The first Court decided both these points in the appellant-plaintiff's favour. The District Judge, however, while holding that the adoption was proved, decided that it was invalid as being of an only son given in adoption by the widow of Bomaya, plaintiff's natural father. The judgment shows that this finding was chiefly based on *Lakshmappa* v. *Ramava*[1] in which it was ruled that no implied authority can be presumed in favour of the gift of an only son made by the widow.

In second appeal Mr. Shamrao contended that the recent decision of the Privy Council—*Gurulingaswami* v. *Ramalakshmamma*[2]—had effected a change in the old law and the validity of the gift of an only son by his father must now be recognised, and this principle must be extended so as to validate the gift made by the widow under similar circumstances. The Privy Council ruling has been accepted by this Court in *Vyas Chimanlal* v. *Vyas Ramchandra*,[3] and the validity of an only son's adoption cannot

(1) (1875) 12 B. H. C. R. 364. (2) (1899) 22 Mad. 398; 26 I. A. 116.
(3) (1899) 24 Bom. 367.

now be questioned, whether the law of Mitákshará or the Mayukha prevails.

In *Lakshmibai* v. *Sarasvatibai*[1] it was ruled that in the absence of an express prohibition of the husband, there is always an implied authority to the widow to make a gift of his son in adoption.

Mr. Shamrao further contended that under these rulings of this Court and the Privy Council, his client's adoption by the respondent No. 1 was perfectly valid, more especially because it was that of a nephew taken in adoption as a *Dwyamushyayana* son. Lastly, it was urged that defendants Nos. 1 and 2, being parties to the agreement, were estopped from questioning the validity of their own acts.

Mr. Ghanasham, who appeared for the defendants Nos. 1 and 2, contended that the decision of the Privy Council in *Gurulingaswami* v. *Ramalakshmamma*[2] had not altered the law so far as the widow's power was concerned. He contended that the widow had no independent power to make a gift in adoption. Her power was dependent and delegated, and the decision in *Lakshmappa* v. *Ramava*[3] was not affected by the Privy Council ruling and the decisions of this Court which followed that ruling. These rulings only recognised the power of the father to give an only son in adoption, but it does not follow from them that the widow without the express authority from her husband can give an only son in adoption. As regards the *Dwyamushyayana* son, Mr. Ghanasham contended that this form of adoption was only permitted as between the fathers on both sides. There could be no *Dwyamushyayana* adoption when both the fathers are dead and only the widows remain behind. As regards the question of estoppel, it was contended that the District Judge had recorded no findings on that point.

We have thus set forth the contentions of both sides. It may be noted that even when the Courts were not disposed to favour the adoption of an only son, an exception was always made in respect of the validity of the *Dwyamushyayana* form of the adoption of an only son. It has always been regarded as an

(1) (1899) 23 Bom. 789. (2) (1899) 22 Mad. 398; 26 I. A. 116.
(3) (1875) 12 B. H. C. R. 364.

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unblamable form. The only objection urged on religious grounds against the adoption of an only son is obviated where the only son belongs both to the giver and the receiver. It does not thus come within the blamable forms in respect of which alone the widow's power to make a gift of an only son was regarded in *Lakshmappa* v. *Ramava* as one for which authority cannot be implied where it is not given. The decision in *Lakshmappa* v. *Ramava* must be restricted to those cases where the husband's gift would have been held blamable, and therefore the widow's power could not be implied. Now that the recent decisions have established the fact that the gift of an only son is not blamable, the implied effect ceases to be operative, and no restriction can be placed on the widow's power to make a valid gift of an only son.

It was, however, contended that the *Dwyamushyayana* form of an adoption can be made only between the fathers on both sides, and not between the widows as in the present case. No authority was cited in support of this view. The case of *Debee Dial* v. *Hur Hor Singh*,[1] referred to in *Lakshmappa* v. *Ramava*,[2] was not the case of *Dwyamushyayana* adoption. It was the case of a gift in adoption made by a widow of an ordinary character. The ceremonies prescribed in the *Dwyamushyayana* form of adoption are the same as in the case of an absolutely adopted son or a *Shudha Dattaka*. The only addition is of an undertaking or stipulation that the child should belong to both the giver and the adoptor. If an only son be given in adoption by a brother of the adoptor, Vasistha's prohibition of the gift of an only son is not violated. Nanda Pandit has indeed remarked that the gift of an only son is limited to the case of two brothers, but the Dattaka Mimamsa and the Dattaka Chandrika alike lay down that the *Dwyamushyayana* form of adoption is not confined to brothers, but is general in its application just as much as the case of a son begotten on a woman by other person than her husband is not confined to brothers. This is laid down in the *Mitákshará*. Indeed the presumption is that the husband will be more gratified than otherwise by the adoption of a nephew as in the present case. Mr. Mayne observes (section 132) that there is no objection to

(1) (1833) 4 Beng. S. D. 220. (2) (1875) 12 B. H. C. R. 364.

the adoption of an only son in the *Dwyamushyayana* form, and refers to cases where such adoptions have taken place. In the southern districts of this Presidency such adoptions have not been rare—*Basava* v. *Lingangauda*.[1] On the whole, therefore, it appears to us that no objection can be taken to the validity of the adoption in this case, (1) because the ruling in *Lakshmappa* v. *Ramava* does not apply to *Dwyamushyayana* adoption; (2) because the recent rulings, which make the gift of an only son valid in the case of father, naturally justify a similar presumption of validity where the gift was made by the widow; (3) because the power of making *Dwyamushyayana* adoption is not confined to brothers only, but their widows may give and receive in adoption an only son.

We would therefore reverse the decision of the lower appellate Court and remand the case back to that Court for its decision on the remaining issues. Costs to abide the result.

Decree reversed and case remanded.

(1) (1894) 19 Bom. 428.

APPELLATE CRIMINAL.

Before Mr. Justice Candy and Mr. Justice Whitworth.

QUEEN-EMPRESS *v.* NARAYAN.*

1901. *January* 14.

Evidence—Confession—Confession of an accused while in custody of the police—Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Criminal Procedure Code (Act V of 1898), section 164 (3)—Evidence Act (I of 1872), section 24.

When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of the Criminal Procedure Code (V of 1898) should ascertain how long the accused has been in custody. If there is no record of that fact, it is the duty of the Sessions Judge, before holding the confession relevant under section 24 of the Evidence Act (I of 1872), to send for the Magistrate and satisfy himself on the point.

* Criminal Appeals, Nos. 526 and 527 of 1900.