APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Whitworth.

SHAMSING (ORIGINAL DEFENDANT), APPELLANT, *v.* SANTABAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1901. *January 18.*

Hindu Law—Adoption—Gift of a son in adoption by a Hindu convert to Mahomedanism—Validity of such adoption.

A Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.

Quære, whether this holds good in the case of Brahmans, among whom the *Datta-homa* ceremony is necessary.

Plaintiff, a Rajput, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, was given in adoption by his uncle to whom the natural father had given the necessary authority.

Held, that the adoption was valid.

SECOND appeal from the decision of E. M. Pratt, District Judge of Sholápur-Bijápur, varying the decree of Ráo Bahádur Mahadeo Shridhar, First Class Subordinate Judge at Sholápur.

One Umravsing, a Rajput, died in 1886, leaving behind him a widow and also two daughters, Santabai and Parvatibai, who were the plaintiffs in this suit.

The defendant was adopted by Umravsing's widow. At the time of his adoption defendant's natural father had become a convert to Mahomedanism and his natural mother was dead. But he was given in adoption by his uncle to whom the natural father had given the necessary authority.

In 1896 the plaintiffs brought the present suit to set aside the defendant's adoption as being illegal and invalid, or in the alternative to recover possession of certain property given to them under a deed of gift executed by defendant and his adoptive mother.

The Subordinate Judge held that the adoption was valid. He awarded the plaintiffs' claim in so far as it was based on the deed of gift, and rejected the rest of their claim.

In appeal the District Judge held that the defendant's adoption was illegal on the ground that a Hindu convert to Mahomedan-

* Second Appeal, No. 513 of 1900.

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ism had no authority to give his son in adoption or delegate such authority to any other person. He therefore awarded the whole of the plaintiffs' claim.

Against this decision defendant preferred a second appeal to the High Court.

S. S. Patkar for appellant (defendant) :—The lower Appellate Court has found as a fact that the adoption was made. The only question therefore is whether it is valid. The conversion of the natural father to Mahomedanism did not deprive him of his authority to give his son in adoption. A father does not lose the guardianship of his son by reason of his conversion. He is not civilly dead, and by Act XXI of 1850 he does not lose his rights by conversion—West and Bülher on Hindu Law (Third Edition), pages 907, 951 and 1079; Steel on Hindu Law, pages 43 and 182. The right of giving a son in adoption is an act of guardianship—*Panzhappa* v. *Sanganbasawa*[1]; *Kanahi Ram* v. *Biddya Ram*[2]; *Muchoo* v. *Arzoon*.[3] The father being thus competent after his conversion to give his son in adoption, he could delegate to his brother the duty of making the actual gift of the boy—Mayne on Hindu Law, page 167, Third Edition; *Vijiarangam* v. *Lakshuman*[4]; *Venkata* v. *Subhadra*[5]; *Subbarayar* v. *Subbammal*.[6]

G. S. Mulgaokar for respondents (plaintiffs) :—The adoption is not valid under Hindu law. Act XXI of 1850 applies to questions of inheritance and succession to property. It does not apply to the present case. Adoption under Hindu law is not purely a secular act. It is also a religious act. Assuming that no religious ceremonies were necessary in the present case, the parties being Rajputs, still the act of adoption is none the less a religious act. Consider what is the effect of an adoption. Adoption entitles one to inherit in the adoptive family because the adoptee becomes a member of that family. It has the effect of

(1) (1899) 24 Bom. p. 89 at p. 91.
(2) (1878) 1 All. 549.
(3) (1866) 5 W. R. 235.
(4) (1871) 8 Bom. H. C. (O.C.J.) 244 at p. 257.
(5) (1884) 7 Mad. 548.
(6) (1898) 21 Mad. 497.

changing the *gotra* of the adopted son and he in fact ceases to exist as a member of his natural family. His connection with the latter is completely severed. He need not perform *shradhas* for his natural parents but only for the adoptive parents. The question then is whether an act which has this effect can be performed by a father who is a convert to Mahomedanism, either by himself or by an agent. If he can do it himself, then we do not contend that he cannot do it by an agent. But he cannot do it himself, because by conversion he becomes a *patita*. He no longer remains a father of his Hindu sons for the purposes of religious acts and the effect of adoption is religious as it changes the *gotra*. No doubt the effect of Act XXI of 1850 is to maintain the relation of father and son, but that is for the purpose of guardianship. For religious purposes the Hindu children of a convert are orphans. They cannot be given away in adoption by one who is dead in the eye of Hindu law and religion. Act XXI of 1850 is only an enabling Act. It removes in a sense the disability consequent on conversion; that is to say, it retains to a convert *purely* civil rights. But religious disabilities are not affected by the Act. We therefore submit that the adoption is invalid.

CANDY, J.:—The question for consideration is whether the plaintiffs' adoption is valid. At the time of the adoption his natural mother was dead and his natural father had become a convert to Mahomedanism. He was therefore given in adoption by his uncle, whom the Mahomedan father had authorised in that behalf.

The District Judge held that the natural father could not then delegate authority, because he had by becoming a Mahomedan ceased to be governed by Hindu law, and thus he could not give, and consequently could not authorise the giving.

It is not denied that if the father was competent to give the son in adoption, then he was competent to delegate the authority to his brother. As Mr. Mayne puts it (Sixth Edition, page 257): "Where the necessary sanction has been given by an authorised person, the physical act of giving away in pursuance of that sanction may be delegated to another." And Mr. Justice West said in *Vijiarangam* v. *Lakshuman*[1] (page 257) :—"The Hindu law re-

(1) (1871) 8 Bom. H. C. R. 244 (O. C.).

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cognises the vicarious performance of most legal acts; the object of the corporeal giving and receiving in adoption is obviously to secure due publicity (Colebrook's Digest, Book V, Text 273, Commentary,) and Yeshwada's employing her uncle to perform this physical act, which derived its efficacy from her own volition accompanying it, cannot, we think, deprive it of its legal effect."

But the position taken for the defendant in the present case is that the father having become a Mahomedan was not an "authorized" person: his act of giving his son in adoption would not be "legal"; he was, by his renouncement of the Hindu religion, in Hindu law dead, and his son was an orphan, and so could not be given at all in adoption.

That was the view apparently adopted by the District Judge. He held that in matters of adoption, law and religion must be inseparable, and therefore, when the father ceased to be a Hindu, his power of giving a son in adoption ceased also. If that is the correct view, then Act XXI of 1850 will have no application. For though the effect of that Act is said to be that degradation or exclusion of caste, from whatever cause it may arise, is absolutely immaterial in all cases where, except for the Act, it would have debarred a person from enforcing or exercising a right, on the other hand where there are circumstances which, independent of all consideration of caste, create a disability under the Hindu law, the fact that degradation from caste follows upon the disability, leaves it just where it was before; the disability is not removed, because the degradation is inoperative (Mayne, Sixth Edition, page 781). So here it is contended that a man who is no longer a Hindu cannot, from the very nature of the case, give his son in adoption; it is not the case of any law or usage inflicting on him forfeiture of the right of giving his son in adoption by reason of his renouncing the Hindu religion, but it is the case of his being absolutely incapable of joining in the Hindu rite of adoption. We are unable to concur with this contention.

In *Panchapa* v. *Sanganbasawa*[1] Mr. Justice Parsons remarked: "It seems almost useless to refer to Hindu texts for assistance in the case of a status, the existence of which they never contem-

(1) (1899) 24 Bom. 89 at p. 91.

plated. It is, however, I think clear that the power to give in adoption was only conferred upon the father and mother, because they were the owners and natural guardians of their son, and it follows that if the mother should lose that position, then her power to give in adoption would be lost also."

That was a case which came under Act XV of 1856, section 3 of which declares that the effect of remarriage is (except under certain circumstances) to deprive the mother of her right of the guardianship of her children. But there is no such statute applying to the present case. On the contrary, it has been expressly ruled that under Act XXI of 1850 the inherent right of a Hindu father to the custody of his children, not only as guardian by nature, but by nurture is a right which is preserved to him, even though he has renounced the Hindu religion—*Muchoo* v. *Arzoon*[1] and *cf. Narayen* v. *Luxmeebaee*.[2] Adoption may be regarded as a civil transaction as well as a religious ceremonial. If civilly the father is competent to give, he is equally competent to sanction the giving. Were the parties here Brahmans and not Rajputs, and *Datta-homa* essential, then possibly the father after becoming a Mahomedan could not sanction his brother to be present at the giving during the *Datta-homa*; but the point does not arise here. The question is really narrowed to this: if the father is not civilly dead, if he is still the guardian of his son, why should he not be able to exercise his volition and sanction his son being given in adoption according to the Hindu religion? The son is still a Hindu: he is one who may be taken in adoption. We see no reason why the adoption should be treated as invalid.

We are unable to understand the District Judge's remark that "if a convert to Mahomedanism could give his Hindu sons in adoption, he would be enabled to divest them of their share in the family property which had vested in them prior to his conversion." The remark is equally true, even though the father may not have renounced the Hindu religion.

We accordingly reverse the decree of the District Judge and restore that of the Subordinate Judge. Plaintiffs must pay the defendants' costs in the District and High Courts.

Decree reversed.

(1) (1866) 5 Cal. W. R. 235. (2) (1850) 1 Morris Sel. Rep. (1850-51), p. 61.