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The application was made to him under the proviso to section 505 of the Civil Procedure Code, and under that section he had power to authorise the Subordinate Judge to appoint one of the persons recommended and he had also power to pass any other order. The order which he decided to pass was to refuse to allow the appointment of any receiver at all.

We are of opinion that that was an order passed under section 505, and not under section 503. It is, therefore, an order which is not appealable not being specified in the list of orders in section 588. We are supported in this conclusion by the decision of *Birajan Kooer* v. *Ram Churn Lall Mahata*[1].

We, therefore, think, that the preliminary objection which has been taken that no appeal lies is a good one, and we dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1881) 7 Cal. 719.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Heaton.

PUTLABAI KOM SADASHIV (ORIGINAL DEFENDANT), APPELLANT, *v.* MAHADU VALAD SADASHIV (ORIGINAL PLAINTIFF), RESPONDENT.*

1908. *October* 9.

Hindu widow—Gift of a son by first husband in adoption by widow after her re-marriage—Hindu Widow Re-marriage Act (XV of 1856), sections 2, 3, 4 and 5.

According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu Law a right to give her son in adoption the Hindu Widow Re-marriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it.

The right of guardianship, which under the provisions of Act XV of 1856, section 3, may, under certain conditions, be transferred from the mother to one of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

Panchappa v. *Sanganbasawa* (1), considered.

* Second Appeal No. 205 of 1907.

(1) (1899) 24 Bom. 89.

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APPEAL against the decision of Pandurang Shridhar Pathak, First Class Subordinate Judge of Dhulia in the Khándesh District, in Suit No. 467 of 1907.

The plaintiff, who was a minor represented by his next friend Vithal Naroba Shimpi, sued for a declaration that he was the legally adopted son of his maternal grandfather Sadashiv and for a perpetual injunction restraining the defendant from doing any acts prejudicial to the plain iff's interest and inconsistent with his rights of ownership over Sadashiv s property. The plaintiff alleged that his natural mother Bhagi was the only child of Sadashiv and that she and her husband Anna lived with Sadashiv and the plaintiff was born in Sadashiv's house, that Sadashiv brought up the plaintiff as his son after obtaining the consent of the plaintiff's parents for his adoption, that the plaintiff's father had authorized before his death his wife, that is plaintiff's mother, to perform the ceremony of adoption whenever Sadashiv wished to do so, that after Sadashiv's death his divided brother Balu having laid claim to his property, the claim was resisted by Putli who was the fourth wife of Sadashiv, that the litigation between them went up to the High Court and Putli succeeded in securing the property from Balu, that the plaintiff was adopted by Putli as son to Sadashiv on the 21st April 1906 under a registered deed of adoption and he was given in adoption by his mother Bhagi and that Putli having subsequently denied the legality of the plaintiff's adoption, he brought the present suit.

The defendant having failed to file a written statement, she was examined by the Court and she made a statement denying the *factum* of adoption and the execution of the deed of adoption. At the hearing it was contended on her behalf that though the plaintiff's adoption was proved, it was illegal inasmuch as the plaintiff's mother Bhagi had re-married a second husband before the adoption, the plaintiff was at the time of the adoption an orphan and so incapable of being taken or given in adoption.

The Subordinate Judge found that the plaintiff was adopted by the defendant and the adoption was legal, that the deed of adoption was proved and that the plaintiff was entitled to the reliefs claimed. He, therefore, made a declaration that

the minor plaintiff was the legally adopted son of Sadashiv and granted a perpetual injunction prohibiting and restraining the defendant from doing any act in connection with her husband's estate that would in any way interfere with the plaintiff's right as the adopted son of the deceased Sadashiv. In his judgment the Subordinate Judge made the following observations :—

I shall now address myself to the consideration of the contention seriously pressed by Mr. Chandorkar for the defence. His contention is that, although the adoption is proved, it is illegal inasmuch as the boy—the plaintiff—was an orphan at the date of the adoption and so incapable of being legally taken or given in adoption. In connection with this argument it must be borne in mind that the natural mother of the plaintiff had contracted a *mohotur* or *pát* marriage with Vithal before she gave the plaintiff in adoption to the defendant. It is argued that by her re-marriage Bhagi lost all her rights in her late husband's (*i.e.*, plaintiff's natural father's) family and had consequently no disposing power left in her and the minor plaintiff must be treated as an orphan. The Hindu Law as well as the Statute Law (Act XV of 1856, sections 2 and 3) bearing on the point have been discussed by the Bombay High Court in *Panchappa* v. *Sanganbasawa* (I. L. R. 24 Bom., p. 89) wherein earlier authorities on the same question have all been considered. It is held by the High Court that a Hindu widow has no power—after her re-marriage—to give in adoption her son by her first husband, unless he has expressly authorized her to do so. It is remarked by Ranade, J., at page 94 that if "she (Hindu widow) cannot take in adoption she cannot for the same reason give a son in adoption after re-marriage. It is true section 5 of the Act reserves to the widow certain rights of inheritance not covered by the exceptions in clauses 2, 3 and 4. It cannot, however, be contended that the right of giving a son in adoption is of the nature of a right reserved to her by section 5. It is a right subordinate to the right of inheritance from her husband and the guardianship of her sons, both of which rights are excepted by name in sections 2 and 3 of the Act..... The right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, and, being a part of the rights and interests she acquires as a widow, it is included within the provisions of sections 2 and 3 of the Act, and is not a reservation which the Act concedes to the widow." The adoption of the plaintiff would, no doubt, be illegal on the authority of this case. The case under consideration is, however, distinguishable from the one quoted above in two or more important particulars. In the first place there is evidence in the case to show that Bhagi was authorized by her first husband Nana (Anna?) to give the boy in adoption. The authority is, no doubt, not in writing; but as already remarked I am not prepared to disbelieve the oral evidence on the point. It is the evidence of Bhagi herself. In the second place, it seems quite clear from the evidence furnished by extracts from the school registers that the boy was

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treated by Sadashiv himself as his son as long since as 1901, *i. e.*, long before the death of plaintiff's natural father Narayan (Anna?). Thirdly in Panchappa's case the adoption was disputed, not by the person who made the adoption as is the case in the present case, but by the sister of the person to whom the adoption was made. In this case it was the defendant who made the adoption under competent legal advice. She is in my opinion legally estopped from disputing the validity or legality of the adoption. The reversioners of the deceased Sadashiv may do so, but the defendant cannot. Fourthly, it must be noted that, even apart from adoption, it is the plaintiff who is the legal heir of the deceased Sadashiv and is as much entitled to inherit his estate, unless of course the defendant made a valid adoption, in which the inheritance would go to the boy adopted. However, as I hold that Bhagi had authority from her first husband to give the boy in adoption, and that the adoption is therefore legal and valid, the contingency of second adoption by the defendant cannot arise.

The defendant appealed.

M. V. Bhat for the appellant (defendant):—We do not contest the *factum* of adoption but we impeach it as illegal. The plaintiff's mother Bhagi had taken a second husband before his adoption by the defendant. Therefore at the time of the adoption the plaintiff was an orphan. At that time Bhagi was no longer the widow of the plaintiff's father. By her second marriage she lost all her rights in the first husband's family and had consequently no disposing power left in her in that family. Three things are essential to a valid adoption, namely (1) the capacity to take in adoption, (2) the capacity to give in adoption and (3) the capacity to be validly taken in adoption, that is, the capacity of the adoptive mother to take, the capacity of the natural mother to give and the capacity of the boy to be adopted. The Hindu Law as well as the Statute Law, namely, the Hindu Widow Re-marriage Act and earlier authorities bearing on the point involved in the present case have been fully discussed in *Panchappa* v. *Sanganbasawa*[1] and the observations of Ranade, J., fully support our contention. Owing to Bhagi's re-marriage she ceased to be the widow of her first husband and so far as the plaintiff was concerned, she became a mother civilly dead. Therefore there was no capacity in her to give the plaintiff in adoption when he was adopted by Putli.

(1) (1899) 24 Bom. 89.

S. R. Gokhale for the respondent (plaintiff):—The *factum* of adoption being admitted, the only important question to be considered is whether the plaintiff's adoption was, as held by the lower Court, legal. First of all the evidence in the case clearly shows that the plaintiff's mother Bhagi was authorized by her first husband, that is, the plaintiff's father, to give the plaintiff in adoption to Sadashiv and that Sadashiv all along treated the plaintiff as his son. Only the ceremony of adoption was not performed during Sadashiv's life-time and it was performed subsequently by his widow. It is true that at the time of the adoption Bhagi, plaintiff's mother, had taken a second husband but by her re-marriage she did not cease to be the plaintiff's mother and that being so, she as mother had full authority to give the plaintiff in adoption to Putli. The Hindu Widow Re-marriage Act disqualifies a re-married woman from claiming certain rights in her first husband's family, but it does not affect blood relationship. It has been held that a re-married woman is entitled to succeed as heir to her son by the first husband: *Chamar Haru* v. *Kashi*[1]; *Basappa* v. *Rayava*[2].

Certain observations of Ranade, J., in *Panchappa* v. *Sanganbasawa*[3] were relied on for the appellant, but the point involved in that case was similar to the one now under consideration and it was therein held that the adoption was invalid for absence of authority from the first husband, while such authority has been proved in the present case. Therefore that ruling supports our contention.

It has been held that conversion to Mahomedanism does not debar the convert father from sanctioning the adoption of his Hindu son: *Shamsing* v. *Santabai*[4]. Though such a convert cannot himself go through the ceremony of giving the son in adoption, he can sanction the adoption and get the ceremony performed by some one else. Therefore giving the plaintiff in adoption by Bhagi being sanctioned by her first husband, the act of giving was merely a continuation of the sanction.

Bhat in reply.

(1) (1902) 26 Bom. 388.
(2) (1904) 29 Bom. 91.
(3) (1899) 24 Bom. 89.
(4) (1901) 25 Bom. 551.

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SCOTT, C. J.:—The question in this appeal is whether the plaintiff has been validly adopted as a son to his deceased maternal grandfather Sadashiv. The question has been answered in the affirmative in the lower Court.

The material facts are as follow:—

The plaintiff is the natural son of Anna and Bhagi. Bhagi is the daughter of Sadashiv. Anna, Bhagi and the plaintiff lived with Sadashiv. Bhagi says that her father intended from the first to adopt the plaintiff, that her husband asked him to do so and when attacked with plague told Sadashiv that the boy was given to him. This story is highly probable for Sadashiv was a well-to-do man possessed of property worth Rs. 25,000 or 30,000 while Anna had no property whatever. At intervals of a few months the deaths occurred of, first, Anna, then, Sadashiv and lastly, Bhowani, Bhagi's mother. Sadashiv had another wife Putli, the defendant in this suit. After Sadashiv's death Putli and Bhagi and the plaintiff lived together in Sadashiv's house until they were driven out by Balu, the divided brother of Sadashiv. Balu's action led to litigation between him and Putli in which Putli eventually secured from him all Sadashiv's property. For about 3 years Putli continued to treat the plaintiff as before as the son of Sadashiv. She also in April 1906 went through a formal adoption ceremony in which the plaintiff was given by Bhagi and taken by Putli as son to Sadashiv. A deed of adoption was then executed by Putli in the plaintiff's favour.

At this time Bhagi was no longer the widow of Anna having re-married about a year previously. In August 1906 previously Putli denied the validity of the adoption and this suit was then filed on behalf of the plaintiff to establish it.

The plaintiff's adoption is challenged by the defendant on the ground that he was owing to his mother's re-marriage an orphan in the eye of the law at the time of the adoption ceremony, without any parent capable of giving him in adoption.

We will first consider the right of a mother to give her son in adoption according to the Hindu Law.

According to the texts the right of the female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Thus Manu IX 168 'that (boy) equal by caste whom his mother or his father affectionately gives with water in time of distress as son must be considered as an adopted son'.

Yajnavalkya II 130 'the son whom his father or mother gives becomes Dattaka.' Vashista XV, 1, 2 'man formed of uterine blood and virile seed proceeds from his mother and his father as effect from cause, therefore the father and the mother have power to give, to sell and to abandon their sons.' The Mitakshara which is the paramount authority in that part of the country to which the parties belong has the following comment—Bk. 1, Section XI, 9 and 10:—'9. He who is given by his mother with her husband's consent while her husband is absent or incapable though present or without his assent after her husband's decease or who is given by his father or by both being of the same class with the person to whom he is given becomes his given son; so Manu declares "He is called a son given whom his father or mother affectionately gives as a son being alike by class and in a time of distress confirming the gift with water." 10. By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver, not the taker.'

Thus apart from the effect of special legislation which we will next consider, the maternal relationship of Bhagi justified the gift in adoption.

In Mandlik's Hindu Law p. 468 we find the following passage which accords with the conclusion at which we have arrived. "The widow's power of giving in her own right has, by some, been questioned, but, as it seems to me, on very insufficient grounds. In point of fact, even the texts by themselves are more clearly in favour of her competency to give, than her ability to take, and all the Digests held authoritative on this side of India, are equally pronounced in her favour. Nanda Pandita himself, though he would wish for permission for a widow to take, is obliged to hold that Manu's text being express in favour of the mother or the father being able to give, the widow has the right to give."

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It has however been argued before us that the effect of the Hindu Widow Re-marriage Act XV of 1856 is to deprive a re-married widow of all rights resulting from her first marriage and even of the right to act as guardian of her child. We are unable to agree with this contention.

Section 3 of the Act is as follows:—

> On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother:
>
> Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

It is to be observed first that the proviso preserves the right of the re-married mother to the guardianship of her children when they have no property of their own even from the interference of the Court except in cases where a grandfather or grandmother or male relative of the dead father has given security for the support and education of the children: secondly that even where there is a property of the children the Court has a discretion to refuse the application for the removal of the children from the guardianship of the mother.

Her right as mother to act as guardian of children not possessed of property is therefore but slightly affected by the Act.

Assuming that the mother has by Hindu Law a right to give her son in adoption, we do not think that the Act affords any indication that the legislature intended to deprive her of it.

Section 5 says that a widow, except as in the three preceding sections is provided, shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled. Accordingly a re-married woman has been held entitled to succeed as heir to her son by her first husband: see *Chamar Haru* v. *Kashi*[1] and *Basappa* v. *Rayava*[2].

The right of guardianship which under the provisions of section 3 (one of the sections excepted in section 5) may under certain conditions be transferred from the mother to one of the other relations of the child does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

It is however contended that the matter is not open to argument because it has been held by a Bench of this Court in *Panchappa* v. *Sanganbasawa*[3] that a Hindu widow has no power after her re-marriage to give in adoption her son by her first husband unless he has expressly authorised her to do so. These are the terms of the head note and appear to express the opinion of Parsons, J., one of the Judges who decided that case.

In our opinion the evidence to which we have referred in the earlier part of the judgment is good evidence of an express authority from Anna to Bhagi to give the plaintiff in adoption to Sadashiv. The adoption would therefore according to the opinion of Parsons, J., be valid.

For the above reasons we dismiss the appeal with costs.

Appeal dismissed with costs.

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(1) (1902) 26 Bom. 388. (2) (1904) 29 Bom. 91.

(3) (1899) 24 Bom. 89.