APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

YAMNAVA KOM GOVIND APPAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* LAXMAN BHIMRAO KULKARNI AND OTHERS (ORIGINAL PLAINTIFF AND OTHERS), RESPONDENTS.*

1912.
February 5.

Hindu Law—Adoption—Rule that the adopted boy should be such that his mother could be legally married by the adopting father—Limits of the rule.

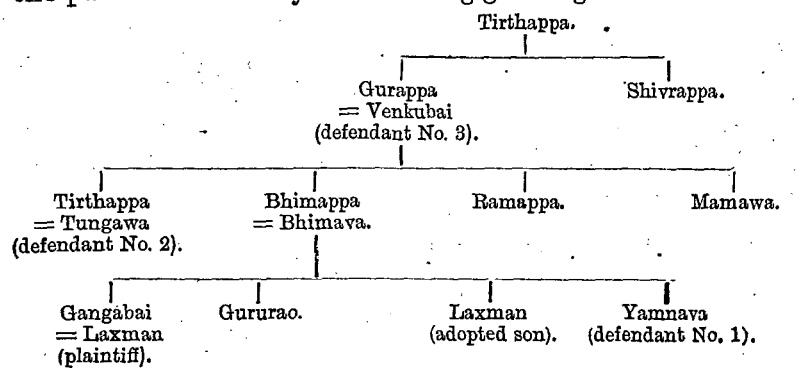
Under Hindu Law, the rule that no one can be adopted whose mother the adopter could not have legally married, is confined to the three cases of a daughter's son, a sister's son and a mother's sister's son.

Ramchandra v. *Gopal* (1), followed.

A person can validly adopt the son of his mother's brother.

SECOND appeal from the decision of F. X. DeSouza, District Judge of Bijapur, confirming the decree passed by Vishvanath V. Wagh, First Class Subordinate Judge, at Bijapur.

The plaintiff claimed to recover possession of certain property, alleging that he was the adopted son of Bhimappa, to whom the property belonged. Bhimappa died leaving him surviving a son Gururao, who died three days after him. The plaintiff alleged that he was adopted by Bhimava (widow of Bhimappa), on the 19th March 1902. The plaintiff was a son of the brother of Venkubai (defendant No. 3) who was the mother of Bhimappa. He was also married to Gangabai (a daughter of Bhimappa) who had predeceased her father. The plaintiff's claim was resisted by Yamnava (a daughter of Bhimappa) (defendant No. 1) and Tungawa (defendant No. 2), who was the widow of Tirthappa, a brother of Bhimappa. The relationship between the parties is shown by the following genealogical tree :—



* Second Appeal No. 980 of 1910.

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Defendants Nos. 1 and 2 contended *inter alia* that the plaintiff could not be legally adopted.

The lower Court held that there was no objection in law to the plaintiff's adoption and relied on *Ramchandra* v. *Gopal*[1]. The plaintiff's claim was decreed.

Defendant No. 1 appealed to the High Court.

D. A. Khare, for the appellant.

Jayakar with *N. V. Gokhale*, for the respondent, were not called on.

CHANDAVARKAR, J.:—The question of Hindu Law which has been argued before us is covered by direct authority in the case of *Ramchandra* v. *Gopal*[1] and it would be impossible for us to differ from the law propounded in the judgments there, unless we were clearly satisfied either that the conclusion was obviously opposed to the texts in Hindu Law, or opposed to any earlier case decided by this Court or by the Judicial Committee of the Privy Council. That the decision in question decided the point as one arising before it directly for the first time is unquestionable. That there is no earlier case either of this Court or of the Judicial Committee of the Privy Council deciding the point in direct terms is also undoubted.

Mr. Khare's learned argument invites us to put upon certain texts in the Dattaka Mimansa an interpretation different from that which has been put upon them by the judgments of Chaubal, J., and my learned colleague who forms a member of this Division Bench. If the texts on which Mr. Khare relies, namely, placita 16, 17, 18 and 19, of section 5 of the Dattaka Mimansa had stood alone, it might have been reasonable to interpret them in the way in which Mr. Khare has invited us to understand them. But in order to understand the meaning of a text-writer on Hindu Law we must read the whole of his work and find out whether there are other passages in the work which throw distinct light upon the passage under discussion.

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Now, in the present case we have light thrown upon the placita referred to by other placita in the Dattaka Mimansa. In section 2, placita 107 and 108, Nanda Pandita, after discussing among other questions the question who is eligible for adoption, clinches the matter by citing the authority of *Cakala* who says: "Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son, the offspring of a sapinda relation particularly: or also next to him, one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son and the son of the mother's sister." And then in placitum 108, Nanda Pandita draws his conclusion: "By this it is clearly established that the expression 'sister's son' is illustrative of the daughter's son, and mother's sister's son, and this is proper, for prohibited connection is common to all three." 'Prohibited connection' here means what is called '*viruddha sambandha.*' Nanda Pandita in clear terms tells us that the words 'sister's son,' stand for the sister's son and also for the daughter's son and mother's sister's son and the implication is that they do not extend to any other son. Where a general rule is prescribed and an exception is made to it, the latter must be confined to the cases specified as falling within the exception. (See West and Buhler's Digest of Hindu Law: 3rd Edn., p. 880, note (*c*); the Mitakshara, Moghe's Edn., No. 3, p. 296.) If that is so, then it is a reasonable inference to draw from the whole of the Dattaka Mimansa that Nanda Pandita intended that anybody could be adopted, so long as he was not within the cases specified as prohibited. So long as, that is, he was not the sister's son, or the daughter's son, or the mother's sister's son.

Under these circumstances, I think, it is difficult to differ from the conclusion which was arrived at after careful consideration and discussion in the judgments in *Ramchandra* v. *Gopal*[1]. For these reasons I think that the law laid down there must be adhered to as the established rule of this Court. We must, therefore, confirm the decree with costs.

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BATCHELOR, J. :—As one of the Judges who took part in the decision in *Ramchandra* v. *Gopal*[1] I desire to add a word. Mr. Khare's argument before us has not been wanting either in subtlety or ingenuity, but having listened to all that he has said I am bound to say that I have heard nothing which could induce me to hold that the decision of Mr. Justice Chaubal and myself was not at least as reasonable and probable a view of the material passages in the Dattaka Mimansa, as is the view for which Mr. Khare has now contended. I do not suggest that the case is not susceptible of argument from Mr. Khare's point of view, but I do say, that in my opinion, the argument on the other side is at least as convincing. In these circumstances, and on the principle *stare decisis*, I am of opinion, that the appellant's argument on this point should be disallowed.

Decree confirmed.

R. R.

(1) (1908) 32 Bom. 619.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912. *February* 20.

GOVIND RAMCHANDRA SHEMBEKAR AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VITHAL GOPAL SAHASRABUDHE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—Appeal—Status of agriculturists—The question if not appealed from as preliminary decree cannot be agitated in appeal on merits—Party's duty to ask Court to draw up decree—Practice and procedure.

The plaintiffs brought a suit to redeem a mortgage according to the provisions of the Dekkhan Agriculturists' Relief Act, 1879. A preliminary issue was raised whether the plaintiffs were agriculturists, and decided against the plaintiffs. The Court ordered the plaintiffs to pay the requisite Court-fee within a week's time, which not having been done, the suit was dismissed. In the appeal which the plaintiffs preferred against the final decree they sought to question the finding on the preliminary issue :—

Held, that the preliminary decree having become extinct by reason of the final decree, and the plaintiffs not having exercised their right of presenting an appeal

* First Appeal No. 75 of 1911.