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fine confirmed. The order as to compensation must, of course, stand.

Conviction and sentence altered.

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APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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DALPATSINGJI NAHARSINGJI (ORIGINAL PLAINTIFF) APPELLANT, *v.* RAISINGJI NAHARSINGJI AND OTHERS (ORIGINAL DEFENDANTS 1 and 2) RESPONDENTS.*

Hindu Law—Adoption—Effect of invalid adoption—Invalidly adopted son not entitled to maintenance—Declaration in writing that the declarant will give certain lands as maintenance—Formal agreement not executed—Grantor cannot be sued on the declaration—Incomplete contract.

Under Hindu Law, a boy whose adoption has been found to be invalid has no right to be maintained out of the estate of the adopted family.

The plaintiff, claiming to be the adopted son of the late Thakor of Mehelol, applied to obtain certain lands from the estate by way of maintenance, to the Collector who was in charge of the estate. The Collector persuaded the present Thakor (defendant) to settle the matter. Accordingly, the defendant made a declaration in writing that he would give the Kankanpur *wanta* by way of maintenance to the plaintiff and his direct lineal heirs. The defendant did not execute any formal deed to convey the lands. The plaintiff sued to recover the Kankanpur *wanta* from the defendant on the strength of the declaration:—

Held, that the defendant was not bound by the declaration, which marked only a stage in the negotiations, which, unless completed, could be broken off at any time by either side.

FIRST appeal from the decision of C. N. Mehta, Joint Judge of Ahmedabad.

Suit to recover possession of lands, which belonged to the Mehelol estate in the Panch Mahals District.

* First Appeal No. 281 of 1912.

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The late Thakor of Mehelol, Naharsingji, died on the 27th November 1883, leaving him surviving two widows: Dariaba and Bajirajba. Later, Bajirajba gave birth to a son Raisingji (defendant); but Dariaba alleged that the child was spurious. Bajirajba brought a suit in the Ahmedabad Court to establish that Raisingji was the validly born son of Naharsingji. She succeeded in the suit. But the High Court decided on the 25th July 1892 that Raisingji was only a supposititious son.

On the 8th August 1892, Dariaba adopted Dalpatsingji (plaintiff) as son to her husband.

Bajirajba appealed to the Privy Council on the 17th November 1892; and she succeeded on the 3rd August 1898 in having the decision of the High Court reversed; and in establishing that Raisingji was the genuine son of Naharsingji.

In the meanwhile, the Collector was appointed guardian of the Mehelol estate, on the 10th August 1895.

On the 15th September 1909, the plaintiff applied to the Collector claiming "a fourth share in the estate or at least something equivalent thereto as would be sufficient for his maintenance." The Collector sought the advice of the Government Pleader, who was of opinion that "on the authorities quoted and the circumstances of the case there is very great force in it;" that "in justice, equity and good conscience, as well as according to law, the petitioner has a good cause," and that "he can claim an equivalent maintenance (*i..e*, equivalent to his fourth share) from the income of the estate or lands in lieu thereof." Influenced by this advice, the Collector desired Raisingji to settle Dalpatsingji's claim. Accordingly on the 1st June 1910, Raisingji made the following declaration before the Assistant Collector under his signature :—

"I, Raisingji Naharsingji, Thakor of Mehelol, state that I have to give an *inam* to my adopted brother Dalpatsing and his direct male descendants for

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maintenance, *i.e.*, I have to give lands out of my *wantas*. I accordingly, voluntarily, give the Kankanpur *wanta* to him and his direct male descendants on whose extinction it will revert to me."

A formal agreement to convey the Kankanpur *wanta* to Dalpatsingji was to be later prepared and executed by Raisingji; but the latter under one pretext or other evaded the execution of the deed.

Eventually, the plaintiff brought the present suit to recover lands in *Jivai* (maintenance) equal to one-fifth share in the properties belonging to the Mehelol estate as the adopted son of Naharsingji or in the alternative the lands known as the Kankanpur *wanta*.

The defendant Raisingji contended *inter alia* that the plaintiff's adoption was illegal and void; that he was forced to give the Kabulayat dated 1st June 1910 under compulsion and fear of injury; and that the Kabulayat was unenforceable in law and no claim could be based on it.

The trial Judge held that the adoption was invalid and gave no right to the plaintiff; and that the Kabulayat was not enforceable, on the following grounds:—

The plaintiff's next contention is that even if he be held not entitled to a share in the estate, still he has a right to be maintained by the estate and sections 163 and 164 of Mayne's 4th edition (or sections 176—178 of 7th edition) are cited in support. But Mayne there also observes that the text of Manu enjoining the person adopting a son without observing the rules ordained to make him "a participator of the rites of marriage, not a sharer of wealth," *i.e.*, to maintain him, seems to be interpreted as applying to a person who makes an adoption without observing the proper forms, *i.e.*, in cases where the adoption is informal, not invalid *ab initio*; and cites in support the rulings in *Bawani* v. *Ambabay* (1 Mad. H. C. 363), approved by Westropp, C. J., in *Lakshmappa* v. *Ramava* (12 Bom. H. C. 364, p. 397). And the reason of this rule has been stated to be that "where no valid adoption, in other words, no adoption has taken place, no claim of right in respect of the legal relationship of adoption can properly be enforced at law." The Court in those cases also expressed their opinion that the natural rights of the plaintiff remained quite unaffected.

But even in the above view of the *Kabulayat* it is only a contract for the transfer of the property and has not the effect of itself creating any interest in, or charge on, such property (*vide* the concluding portion, section 54 of the Transfer of Property Act, 1882). It may form the basis of a suit for specific performance of the contemplated deed of conveyance, but the present suit is not for that. And I am distinctly of opinion that I, as a Court of Equity, would be extremely reluctant to decree specific performance in such a suit, even supposing that the "compromise" was quite voluntary and free from undue influence.

The suit was therefore dismissed.

The plaintiff appealed.

H. C. Coyaji with *G. N. Thakor*, and *H. V. Divatia* (for *T. R. Desai*), for the appellant.

G. K. Parekh, *D. A. Khare*, and *U. K. Trivedi*, for respondent 1.

S. S. Patkar, Government Pleader, for respondent 2.

SHAH J.:—The facts which have given rise to this appeal are briefly these. Naharsingji, Thakor of Mehelol, died in the year 1883, leaving two widows Dariaba and Bajirajba. Bajirajba gave birth to a son named Raisinjgi, whose legitimacy was disputed by Dariaba. Bajirajba filed suit No. 967 of 1886 to establish that Raisingji was the natural son of Naharsingji. She succeeded in the suit, but in appeal the High Court reversed the decree of the trial Court and held that Raisingji was not the son of Naharsingji. There was an appeal, however, preferred by Bajirajba to Her Majesty in Council with the result that the decision of the High Court was reversed and that of the trial Court restored in 1898. The High Court decided the appeal on the 25th July 1892. A few days after that Dariaba adopted Dalpatsingji, the present plaintiff, on the 8th August 1892, before the application for leave to appeal to Her Majesty in Council was made on the 17th November 1892. The estate was managed by the Collector after 1895 as the guardian of Dalpatsingji, and after 1898 on

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behalf of Raisingji. Even after Raisingji attained majority the management of the estate remained with the Collector of the Panch Mahals under section 26 of the Gujarat Talukdars' Act (Bombay Act VI of 1888). The estate among other things consists of Talukdari estate and certain *wanta* lands. The Collector continued to give varying sums by way of maintenance to Dalpatsingji even after the judgment of the Privy Council. In September 1909, Dalpatsingji made an application to the Collector requesting him to bring about an amicable settlement between him and Raisingji. In this application he put forward his claim to a part of the estate as the adopted son of Naharsingji. In 1910 it is said that Raisingji agreed to give to Dalpatsingji certain land known as Kankanpur *wanta* by way of *jivai* (maintenance). But Raisingji failed to carry out this agreement, and Dalpatsingji filed the present suit to enforce his rights as Naharsingji's adopted son. He claimed one-fifth share in the estate and, in the alternative, the Kankanpur *wanta*, both according to law as well as under the agreement of 1st June 1910. The defendant Raisingji, who is the really contesting party, resisted the claim on various grounds. The learned Joint Judge, who heard the suit, decided against the plaintiff on the material issues, and dismissed his claim.

The plaintiff has now appealed to this Court. Mr. Coyaji on his behalf has argued two points only in support of the appeal. Firstly, it is contended that even if the plaintiff's adoption be invalid he has a right of maintenance on his adoptive family according to Hindu Law, and secondly, that under the agreement the plaintiff is entitled to the Kankanpur *wanta*. It is conceded by Mr. Coyaji—and I think very properly conceded—that after the finding of the Privy Council as to the status of Raisingji, the plaintiff's adoption by Dariaba cannot be maintained as valid. Naharsingji

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having a natural son according to the finding of the Privy Council, at the date of adoption, Dariaba could not be presumed to have any authority from her husband to adopt. The fact that the adoption was made by her at a time when the High Court had decided in her favour and against Raisingji's status, and before an application for leave to appeal to Her Majesty in Council was made in November 1898, cannot affect the question. It is not necessary to deal with this point any further as it is not contended before us that the adoption of the plaintiff by Dariaba is valid according to Hindu Law.

As regards the contention that a boy, whose adoption is found to be invalid, has a right to be maintained out of the estate of the adoptive family, there is neither text nor precedent in support of it. Dariaba had no authority to adopt. The mere fact that ceremonies were properly performed and that Dariaba thought that she had authority to adopt would not affect the question. As pointed out by Sir Michael Westropp C. J. in *Lakshmappa* v. *Ramava*[1] "An invalid adoption works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated." The Madras High Court has taken the same view in *Bawani* v. *Ambabay*[2] which is referred to with approval by Westropp C. J. in *Lakshmappa's case.* Mr. Coyaji relied upon certain observations in *Ayyavu* v. *Niladatchi.*[3] But they were not necessary for the decision of the case. It is difficult on principle to allow the contention that even though the adoption may be invalid, the adoptee has a legal right to maintenance in the adoptive family. I say this strictly with reference to the facts of this case. There is no question of

(1) (1875) 12 Bom. H. C. R. 364 at p. 397. (2) (1863) 1 Mad. H. C. R. 363.
(3) (1862) 1 Mad. H. C. R. 45.

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acquiescence here on the part of Raisingji apart from the agreement of June 1910. The plaintiff is not proved to have lost his right in the family of his birth. It may be that in consequence of the Mehelol estate being far more valuable than the estate of his natural father he may have preferred to take his chance, whatever it may be, in the adoptive family. Mere omission on his part to assert his right to a share in the estate of his natural father cannot enhance his rights in the family of adoption. It is not necessary to consider whether the plaintiff would have any right of maintenance in his adoptive family, if it were proved that he had in fact lost his status in the family of his birth, though even then it would be difficult to accept the plaintiff's contention. I hold that having regard to the facts of the case, the plaintiff's adoption is invalid and that he has no legal rights in his adoptive family.

Coming to the argument based on the agreement, it is necessary to state a few facts relevant to the point. I have already mentioned the plaintiff's application to the Collector for an amicable settlement. The Collector consulted the Government Pleader of the District, who happened to know the case of Dalpatsingji. The Government Pleader advised that "in justice, equity and good conscience as well as according to law the petitioner (*i. e.*, Dalpatsingji) had a good cause." It is not unlikely that the Collector and the Assistant Collector were influenced by this opinion. Raisingji was persuaded to settle the matter. Accordingly he undertook on the 1st June 1910 in the presence of the Assistant Collector to give his Kankanpur *wanta* by way of maintenance to Dalpatsingji and his direct lineal heirs. It is not denied by the plaintiff, in fact it is his case, that a document conveying the *wanta* to him was to be executed and registered later on by Raisingji and that he (Raisingji) never appeared to

execute the document. It is the declaration or the statement made by Raisingji before the Assistant Collector that is relied upon by the plaintiff as an agreement to give him the Kankanpur *wanta*. There are various difficulties in accepting the said declaration as a final and binding agreement. In the first place it is clear that the declaration marks a stage in the negotiations as to the proposed amicable settlement. A document giving effect to the declaration, or statement was to be executed later on, though it is not mentioned in the declaration. Raisingji refused to execute it, and after giving an undertaking never expressed his willingness to carry it out. In form the document is not an agreement. It is neither stamped nor registered. If in effect it creates an interest in immoveable property, it must be registered. The plaintiff contends, however, that it is merely an agreement to convey, and does not by itself create any interest in his favour in the property and that it should be specifically enforced as embodying a fair settlement of the dispute between the parties. The whole conduct of the defendant Raisingji shows that he was ready at the time of the declaration to give the Kankanpur *wanta*, and that he changed his mind when it came to the stage of giving effect to the settlement. Apparently the plaintiff had given no correlative undertaking at the time, and I am unable to see anything in the case, which restricted his liberty in the eye of law to assert his claim to a fifth share in the estate as he has done in the present suit. Of course it may be that having regard to his own interests he may not in fact have cared to do so. But that is not the test. Having regard to these considerations it seems to me that it was quite open to the defendant Raisingji to change his mind. There was no completed contract. An undertaking of this kind marks only a stage in the negotiations, which, unless completed, may be broken off at any time by either side.

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Secondly, it is clearly an undertaking, which no Court would enforce against Raisingji. He was admittedly a man of weak intellect. His estate was managed by the Collector under section 26 of the Gujarat Talukdars' Act, probably because he was incapable of managing his own estate as stated by the witness (Exhibit 52). He would be under a disability to enter into any agreement with reference to any part of his property without the sanction of the Managing Officer under section 29 A of the Act. I do not desire to express any opinion on the question whether this agreement, even if otherwise good, is not invalid for want of the necessary sanction under section 29 A, as the point is not argued and as it is not quite necessary to come to any definite conclusion on the point. But these facts clearly render it necessary to examine closely the promise made by such a man. The promise made by him is practically without any consideration to support it. I am not sure that the defendant fully realised the effect of the expression referring to the direct lineal heirs of Dalpatsingji in the statement, which would apparently include daughters. It is a matter of common knowledge that persons in the position of the Thakor of Mehelol would be ordinarily unwilling to give *jivai* lands on terms, which would make it possible for the property to go out of the hands of the male members of the family. The *wanta* land was selected because, as stated by the Assistant Collector in his evidence, it was not possible to alienate Talukdar's estate under section 29 A of the Gujarat Talukdars' Act. It was hardly realised that the sanction under section 29 A would be necessary not only for the alienation of the Talukdar's estate but also for the alienation of *wanta* land (*i. e.*, for non-Talukdari estate). Even if the reason for selecting the *wanta* land was to avoid the necessity of a sanction of the Governor-in-Council under section 31 of the Act, which is held by this Court to relate to the Talukdars'

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estate of a Talukdar and not to any property of the Talukdar held on non-Talukdari tenure, the result was that *wanta* land was to be given up by the defendant. It is obvious—and in fact it was not denied by Mr. Coyaji—that generally speaking the tenure of the *wanta* land would be more favourable to the holder than the Talukdari tenure. These are several considerations, which render it necessary in the interests of justice to hold that Raisingji is not bound by a promise of this character. I would certainly decline to specifically enforce an agreement of this kind, even if the suit were treated as being substantially one for the specific performance of the agreement.

Lastly, it may be stated that Mr. Coyaji has discussed the oral evidence relating to the so called agreement fairly and fully before us, and we have not found it necessary in this case to hear the counsel for the defendant Raisingji. It is clear that the Revenue Authorities acted fairly and honestly. They were persuaded by the Government Pleader to believe that Dalpatsingji had a good claim, and the Assistant Collector states that in bringing about this result he did use persuasion but no pressure. I do not think that the learned Judge below means to hold anything more than this, *viz.*, that a man of Raisingji's intellect, if persuaded by the Assistant Collector and Collector, is likely to yield even against his own real wishes, and that a consent given as the result of such persuasion should not be acted upon, if in fact it happens to be against the interests of the consenting party, and if he has retracted it almost immediately after giving it. This appears to be a fair inference from the evidence on the point; and as I have already stated the defendant cannot be bound by a bare promise of that character.

The result, therefore, is that the decree of the lower Court is affirmed with costs. Each respondent is to have a separate set of costs.

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HEATON, J.:—I wish to add only a few words in the matter of the conduct of the Revenue Officers which has been brought to our notice. I wish to say that in my opinion these Officers acted with perfect propriety. They obtained the legal opinion of their local advisers. They then endeavoured on the strength of that opinion to persuade this young Talukdar to make some provision for a very unfortunate man and in so doing it seems to me that they were acting very properly. But the document which this young Thakore signed, was, it seems to me, merely a written record of a declaration. It was not in its true sense an agreement at all. In so far as it had any formal character, it was merely a declaration made before the Collector. Obviously it was not intended to be a final declaration because a more formal deed was to follow.

I agree in the order proposed by my learned Colleague.

Decree affirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

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KESHAV HARGOVAN (ORIGINAL DEFENDANT), APPELLANT, *v.* BAI GANDI, MINOR, BY HER NEXT FRIEND, HER FATHER, PAKHALI MOTI KALA (ORIGINAL PLAINTIFF), RESPONDENT, AND KESHAV HARGOVAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI GANDI, MINOR, BY HER FATHER MOTI KALA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Dissolution of marriage—Custom of caste—Custom authorising either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognised by the Court—Indian Contract Act (IX of 1872), section 23.

A custom, stated to exist among Hindus of the Pakhali caste by which the marriage tie can be dissolved by either husband or wife against the wish of the

*Second Appeals Nos. 1001 of 1913 and 80 of 1914.