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ABADI BEGAM v. SA RAM.

It is contended that Asa Ram, sub-mortgagee, being in possession of the property charged with the payment of the monthly allowance of Rs. 12, is bound to pay it.

We are of opinion that the contention is right. The plaintiff is not affected by any arrangement made between Lachman Singh and Asa Ram. She looks to payment of her allowance from the income of the land charged with the burden of paying it, and therefore she has a claim upon the party who is in possession of the lands. In this case the sub-mortgagee, in accepting the mortgage from Lachman Singh, must have been aware of the conditions under which the latter had accepted the original mortgage, and therefore also must have been aware of the lien created by Maujad Ali Shah in favour of his wife, and which lien, with or without notice, extends to all persons claiming to hold the lands, to the extent of the amount of the profits set apart for the benefit of the plaintiff. With this view of the case we decree the appeal, reverse the decree of the lower appellate Court, and restore the decision of the first Court, with costs.

Appeal allowed.

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FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

HANUMAN TIWARI (PLAINTIFF) *v.* CHIRAI AND ANOTHER (DEFENDANTS).*

Hindu Law—Adoption of an only son.

Held (TURNER, J., dissenting) that the adoption of an only son cannot, according to Hindu law, be invalidated after it has once taken place.

THE facts of this case were as follows: One Mata Bakhsh, claiming to be the adopted son of Durga Prasad, deceased, sold a certain dwelling-house, of which Durga Prasad had died possessed, to Chirai, on the 25th February, 1874. The plaintiff in this suit, Durga Prasad's brother, claiming to be his heir, sued Mata Bakhsh and Chirai for a declaration of his right to, and possession of, the house, and the

* Special Appeal, No. 5 of 1876, from a decree of J. W. Sherer, Esq., C. S. I., Judge of Mirzapur, dated the 27th September, 1875, affirming a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Mirzapur, dated the 29th May, 1875.

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cancellation of the deed of sale, alleging, amongst other things, that Mata Bakhsh was not the adopted son of Durga Prasad, and that, admitting the adoption, the adoption was not valid, according to Hindu law, as Mata Bakhsh was the only son of his father. As to the fact of Mata Bakhsh's adoption by Durga Prasad, the Court of first instance held that such fact was fully established. As to the validity of the adoption, the Court held that, assuming that Mata Bakhsh was the only son of his father, and that the adoption of an only son was not valid according to Hindu law, yet the adoption in this case could not be deemed invalid, inasmuch as it had been recognised and acknowledged for a long period of time. On appeal by the plaintiff the lower appellate Court concurred in the views of the Court of first instance.

The plaintiff preferred a special appeal to the High Court, in which he contended that the adoption of an only son was not valid according to Hindu law.

The Court (SPANKIE, J., and OLDFIELD, J.) referred to the Full Bench the question whether the adoption of an only son is altogether void, or whether, once having been made, such an adoption is valid.

Munshi *Sukh Ram*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), Munshi *Hanuman Prasad*, and Lala *Lalta Prasad*, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C. J.—I remain of the opinion which I formed at the hearing that the answer to this reference must be that the adoption of an only son is not altogether void, but that, having once been made, the adoption is valid. Such is my conclusion on the authorities, which are, however, very conflicting, but the weight of them is clearly in favour of the validity of the adoption in question. In a Calcutta case (1) that was cited to us, the Judges being L. S. Jackson and Dwarka Nath Mitter, JJ., it was laid down (Mitter, J., being the Judge who delivered the judgment in his own name and that of his colleague), on the authority of certain passages from Dattaka Chandrika, that the adoption of an only son is forbidden by Hindu law. The judgment then proceeds : " It has been said that the prohibition contained in these passages amounts to nothing more than

(1) *Upendra Lal Roy* v. *Srimati Rani Prasannamayi*, 1 B. L. R., A. C. 221.

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a mere religious injunction, and that the violation of such an injunction cannot invalidate the adoption after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and its temporal aspects are wholly inseparable." But Mr. Justice Mitter goes on to observe: "It is true that the doctrine of *factum valet* is to a certain extent recognised by the lawyers of the Bengal school; but if we were to extend the application, every adoption, when it has once taken place, will be, as a matter of course, good and valid, however grossly the injunctions of the Hindu Shastras might have been violated by the parties concerned in it. The case of *Chinna Gaundan* v. *Kumara Gaundan* (1) is no doubt in favour of the appellant, but for the reasons stated above, we are unable to concur with the learned Judges who decided that case. On the other hand we find two cases in our presidency which are directly in favour of the view we have taken, and what is of still greater importance, both these cases have been cited with approbation by Sir William Macnaghten himself." The cases thus referred to will be found in Macnaghten's Hindu Law, 3rd ed., vol. ii, p. 178. They appear to have been decisions in 1806 by the late Calcutta Sudder Dewanny Adawlat, but they are not of much weight, their reasoning against the validity of such an adoption being unsatisfactory and superficial. There was also quoted to us a dictum in a judgment of the Privy Council, which will be found in p. 50 of the appendix to Munshi Hanuman Prasad's useful collection of precedents in these terms: "Again if there is, on the one hand, a presumption that Guru Prasad would perform the religious duty of adopting a son, there is, on the other hand, at least as strong a presumption that Parmanand would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dwayamushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family." This view will, among other things, be found very fairly answered and disposed of

(1) 1 Mad. H. C. R., 54.

by Sir Thomas Strange in his well known work on Hindu law (1). H estates the general principle relating to adoption to be that "one with whose mother the adopter could not legally have married must not be adopted." He then remarks: "Subject to this general principle, the nearest male relation of the adopter is the proper object of adoption. This of course is the nephew, or son of a brother of the whole blood, whose pretensions were, by the old law, such, that if, among several brothers, one had a son, he was so far considered to be common to all, as to preclude in every one of them the power of adoption. But the injunction of Menu has, in more modern times, been construed as importing only an intention to forbid the adoption of others, where a brother's son is obtainable." Further on he observes: "But the result of all the authorities upon the point is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who, upon spiritual considerations, ought to have been preferred." Then on page 86 he says: "It is true that a brother's son, as such, inherits and performs obsequies to his uncle, dying without preferable heirs; but then it is as his nephew, not as his son; and the spiritual efficacy in the one and in the other case is considered to be different. To render him a substitute for a son, he must have been filiated. When, therefore, a Hindu has but one son, and it is agreed that his brother, having none, shall adopt him, the adopted in this case has vested in him accumulated rights and duties. Son by adoption to his adoptive parent, he remains so, to all intents and purposes, to his natural one, becoming *dwayamushyayana*, or son to both;" and he points out other restrictions which, however, he observes are inculcated, "but not always enforced; since, as in other instances, so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only, and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good; according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet quod fieri non debuit.*" The High Courts of Calcutta, Madras, and Bombay have all ruled in favour of the doctrine of *factum valet.* In the Calcutta Court Sir Edward Ryan, C. J., in

(1) See 4th ed. by Mayne, pp. 83-86.

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delivering judgment in *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee* (1), said: "The adoption of an only son is no doubt blameable by Hindu law, but when done it is valid." In Bombay the question was distinctly raised in the case of *Raje Vyyankatrav Anandrav Nimbalkar* v. *Juyavantrav* (2), before Warden and Gibbs, JJ., who were both of opinion that the adoption of an only son having once taken place, and the requisite ceremonies having been duly performed, cannot be set aside. Gibbs, J., in delivering his judgment, said: "The rulings of this Court, as shown from 2 Borr. p. 83, downwards, as also of the Calcutta Court, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone, but the adoption must stand. In the High Court of Madras the same doctrine was approved and applied in the case of *Chinna Gaundan* v. *Kumara Gaundan* (3), before Scotland, C.J., and Frere, J. In delivering judgment, Scotland, C.J. went carefully through all the authorities, concluding thus: "On the whole the case (*i. e.*, the validity of such an adoption) is concluded by authority; but I must say, with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way." This appears to be the Madras case alluded to in the judgment of Mr. Justice Mitter in the Calcutta case I have referred to. In a subsequent Madras case, *Singamma* v. *Vinjamuri Venkatacharlu* (4), before Bittleston and Ellis, JJ., the law laid down by Scotland, C.J., was carefully considered and distinctly approved, and it appears to me to be sound and worthy of acceptance by us.

PEARSON, J.—The adoption of an only son is declared to be improper and is disapproved or prohibited by the Hindu law, but no text is shown to us declaring such an adoption to be void or voidable. The objections to such an adoption are its injurious consequences to the person who gives his son to another, and these consequences would not follow were the adoption a nullity. The view taken by Sir Thomas Strange that "the prohibitions respecting an eldest and an only son, where they most strictly apply, are directory only, and an adoption of either, however blameable in the

(1) 1 Fulton, 75.
(2) 4 Bom. H. C. Rep. A. C J., 191.
(3) 1 Mad. H. C. Rep., 54.
(4) 4 Mad. H. C. Rep., 165.

giver, would, nevertheless, for every legal purpose, be good, according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet quod fieri non debuit*" appears to have been generally accepted, and is supported by a great weight of authority; and I am disposed to adopt it.

SPANKIE, J.—I accept this view of the case. It does not appear that more can be said.

TURNER, J.—The rulings as to the validity of the adoption of an only son are cited at length in Mr. Mayne's admirable work on Hindu Law, ss. 126-133, and I need not further refer to them. It is sufficient to say that the rulings of the Courts are conflicting. I therefore feel myself at liberty to consider the question as unsettled, and in the absence of any evidence that the law enunciated by the commentators has been varied by custom, to rest my decision on the texts and principles which are to be gathered from their works. The object of adoption is the perpetuation of lineage and the spiritual benefits which accrue to the parent of a son, and in virtue of the benefits which he can render, the adopted son succeeds not only to the estate of the person who has adopted him, but to collaterals of that person, and to constitute a valid adoption, there must be a competent giver. The Mitakshara, ch xi, s. xi, v. 11, expressly declares "an only son must not be given (nor accepted). For Vasishtha ordains: Let no man give or accept an only son". The Dattaka Mimansa, a work of high authority in these provinces, declares (s. iv, vv. 5 and 6) that a father is incompetent to give an only son, and (v. 4) that the offence of extinction of lineage is incurred both by the giver and the adopter; and again (s. ii, v. 38) the author recognising the force of prohibition declares it does not apply to the case in which the son of one brother is made common to another brother also. In the Vyavahara Mayukha, ch. iv, s. v., vv. 9, 11, the same prohibition is declared, and in the Dattaka Chandrika, s. i, vv. 27 and 29, the rule is distinctly based and supported by the text of Caanaka,—"By no man having an only son is the gift of a son to be ever made."

It is to be noticed that, although the Mitakshara, ch. i, s. xi, v. 12, goes on to declare that "nor though a numerous progeny exists should an eldest son be given, for chiefly he fulfils the office of

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a son," neither in that work nor in any of the works to which I have referred is there any declaration that extinction of issue would follow the gift (as it obviously would not), nor is the limitation of the paternal power to make a gift extended to an eldest son. The Mitakshara also gives the reason for what appears to me a dissuasive rather than peremptory injunction: "By the eldest son as soon as born a man becomes the father of male issue."

On these grounds then that a father is incompetent to give an only son and that the object of adoption wholly fails if such a gift be attempted, I am of opinion that the adoption of an only son is invalid, and that the principle *fieri non debet factum valet* cannot be applied. The consequence of the contrary ruling would be according to Hindu law, to inflict a penalty not only on the giver and receiver, but on the collaterals of the receiver, whose property might descend to a person solely entitled to claim it on account of benefits he is presumed to confer, but which he could not possibly confer.

OLDFIELD, J.—There appears to be no sufficient reason for considering that the prohibitions in the text-books in respect of the adoption of an only son are more than of the nature of moral injunctions, rendering the gift and acceptance of an only son blameable, as interfering with the perpetuation of the lineage of the giver—Dattaka Mimansa, s. iv, vv. 3, 4—but not invalidating the adoption when made. Balam Bhatta appears to consider the gift and acceptance as blameable, but no more. His annotation to v. 11, s. xi, ch. i of Mitakshara is, "So an only son should not be given, nor should such a son be accepted: the blame attaches both to the giver and to the taker *if they do so*." The act is declared blameable but not absolutely void, and the adoption would not appear to fail civilly in effecting in favour of the adopter the material object for which adoption is made, the perpetuation of lineage. This view has been taken by the chief authorities on Hindu law,—Strange, 4th ed. by Mayne, 87; Macnaghten, 3d ed. vol. i, 67 (I do not find that the cases in pages 178-179 of vol. ii go so far as to decide that the adoption once made must be set aside),—and it has been enforced by the early decisions of the superior Courts, and, so far as I am aware, been maintained until now, with few exceptions, by the superior Courts of the three Presidencies.