1962

April 26.

V. T. S. CHANDARASEKHARA MUDALIAR (DIED) AND OTHERS.

v.

KULANDAIVELU MUDALIAR AND OTHERS.

(A.K. SARKAR, K. SUBBA RAO and J.R. MUDHOLKAR, JJ.)

Hindu Law—Adoption—Nearer Sapindas—Refusal of consent—When improper.

The appellants, the nearer sapindas of the husband of the 2nd respondent who had adopted the 1st respondent, the son of her agent, filed a suit for a declaration that the adoption was invalid on the ground that they had properly refused their consent and that the remote sapinda who had given his consent was disqualified from so doing as he did not believe in the Hindu scriptures. The appellants who had been asked for their consent had refused it on the ground that the 1st respondent was not an agnate and that among their grand children or children there were eligible boys whom their parents were willing to give in adoption. The trial court at Madurai as well as the High Court of Madras dismissed the suit, holding that the nearer sapindas had improperly refused their consent and that in the circumstances the adoption with the content of the remote sapinda was valid.

On appeal by a certificate under Art. 133 (1)(c).

Held, that the power of Hindu widow to adopt is coextensive with that of her husband and when her discretion is not limited by her husband it is absolute and is only subject to the assent of the sapindas. *Balusu Gurulingaswami* v. *Balusu Ramalakshmamma* (1899) I.L.R. 22 Mad.398, referred to.

The validity of an adoption has to be judged by spiritual rather than temporal considerations and that devolution of property is only of secondary importance.

The Collector of Madras v. *Mootoo Ramalinga Sethupathy* (1868) 12 M.I.A. 397, *Sri Raghunadha* v. *Shri Brozo Kishore.* (1876) K.R. 3. I.A. 154, *Raja Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narasayya*, (1876) L.R. 4, I.A 1, *Veera Basavaraju* v. *Balasurya Prasada Rao*, (1918), L.R. 4, I.A. 265, *Amarendra Mansingh* v. *Sanatan Singh*, (1933) L.R. 60, I.A. 242 and *Ghanta China Ramasubbayya* v. *Mooparthi Chanchuramayya*, (1947) L.R. 74, I.A. 162, referred to.

Held, further, that consent of sapindas was an assurance of the *bonafide* performance of a religious duty and the guarantee against capricious action by a widow in taking a boy in adoption and not the possible deprivation of proprietory interests of the reversioners.

Sri Krishnayya Rao v. *Surya Rao Bahadur Garu;* (1935) 69 M.L.J. 388, referred to.

The sapindas who are in a fiduciary relation to the widow should exercise their power objectively and without being actuated by their own self interest and that the rules regarding taking only a sapinda in adoption were only recommendatory and the fact that the widow wishes to adopt a non-sapinda is no proper ground for withholding consent by a sapindas.

Sundara Rama Rao v. *Satynarayanamurti* I.L.R 1950 Mad. 461, *Venkamma* v. *Subramaniam,* (1906) L.R. 34 I.A. 22, *Srimati Uma Devi* v. *Gokoolanund Das Mahabata,* (1876) L.R. 5 I.A. 40, *Alluri Venkata Narasimbaraju,* v. *Alluri Bangarraju* v. C. A. No. 226 of 1944 dated 25-7-46 by the Madras High Court and *Venkatayudu* v. *Seshamma* A.I.R. 1949 Mad. 745, referred to.

Observations of Bhashyam Ayyangar, J. in *Subrahamanyam* v. *Venkamma* (1903) I.L.R. 25 Mad. 127 held to be *obiter* and not approved.

The refusal of consent by the appellants was improper.

Order XVI r. 4 and Or. XVIII r. 3 (2) of the Supreme Court do not by themselves enable the High Court to limit the certificate under Art. 133 of the Constitution to certain grounds and upon this grant of such a certificate the whole appeal was before this Court and all questions urged before the High Court were open.

The consent given by the remote sapinda on a proper appreciation of the relevant facts and despite has non-belief in rituals, he still being a Hindu, was valid.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 289 of 1959.

Appeal from the judgment and decree dated December 16, 1955, of the Madras High Court in Appeal No. 231 of 1954.

N. C. Chatterjee, K.N. Rajagopala Sastri, V.S. Venkata Raman and *T. K. Sundara Raman,* for the Appellants Nos. 2 to 6.

A. V. Vishwantha Sastri, R. Ganapathy Iyer

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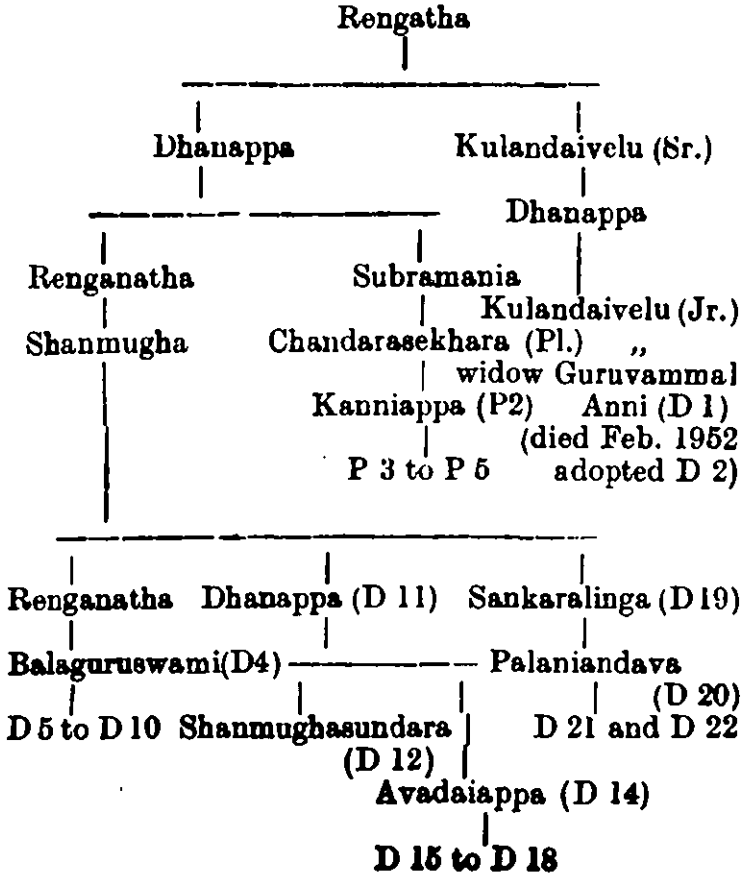
S. Gopalaratnam and *G. Gopalakrishnan*, for respondent No. 1.

T. S. Venkataraman, for respondent No. 2

1962. April 26. The Judgment of the Court was delivered by

SUBBA RAO, J.—This appeal on a certificate is preferred against the judgment and decree of the High Court of Judicature at Madras confirming those of the Subordinate Judge, Madurai, in a suit for a declaration that the adoption of the 2nd defendant by the 1st defendant was invalid. The following genealogy will be helpful to appreciate the facts and the contentions of the parties :



Shanmugha, Subramania and Kulandaivelu (Jr.) became divided in 1878 and since the division each of the three branches of the family was living separately. Kulandaivelu (Jr.) died in the year 1912 possessed of considerable property described in the plaint schedule leaving him surviving his widow, Guruvammal Anni, who is the 1st defendant as his sole heir. In 1951, Guruvammal Anni, with a view to adopt the 2nd defendant to her deceased husband, wrote letters to her husband's sapindas who were majors i.e., plantiffs 1 and 2, and defendants 5, 11, 12, 14, 19 and 20, seeking their consent to her adopting the 2nd defendant. The said sapindas, except defendants 12 and 14, refused to give their consent for the reasons mentioned in their replies. Defendant 12 did not receive the letter, but the 14th defendant gave his consent to the adoption. On May 25, 1951, Guruvammal Anni adopted Kulandaivelu (Jr.), the 2nd defendant as a son to her late husband. On May 30, 1951, she executed Ex. A-1, the adoption deed, and registered the same on June 12, 1951. Chandarasekhara, the son of Subramania, and his son, Kanniappa, and three minor grandsons filed O. S, No. 156 of 1951 in the Court of the Subordinate Judge, Madurai, for a declaration that the adoption of the 2nd defendant by the 1st defendant was invalid, void and of no effect. Defendant 3, is the natural father of defendant 2; defendants 4 to 21 are the other sapindas of 1st defendant's husband, being the descendants of Renganatha. The particulars of their relationship to Kulandaivelu will be seen from the aforesaid genealogy. It was, *inter alia*, alleged in the plaint that the adoption made by the 1st defendant of the 2nd defendant without the consent of the sapindas was bad and that the consent given by the 14th defendant was purchased and therefore would not validate it. Defendants 1, 2 and 3 filed written-statements supporting the adoption; they pleaded that, as the nearer sapindas

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improperly refused to give the consent, the adoption made on the basis of the consent given by the 14th defendant was valid. The learned Subordinate Judge, on a consideration of the evidence and the relevant law on the subject, came to the conclusion that the 12th defendant, though received the notice seeking his consent, returned the same, that the other sapindas, excluding defendant 14, improperly refused to give their consent to the adoption and that, therefore, the adoption made with the consent of defendant 14 was valid in law. The Subordinate Judge also rejected the contention of the plantiffs that the 14th defendant, having regard to his disbelief in the religious efficacy of adoption and the Hindu rituals, was disqualified from giving his consent. In the result, he dismissed the suit. On appeal a division Bench of the Madras High Court, agreeing with the view of the learned Subordinate Judge, came to the conclusion that the sapindas were actuated by improper motives in refusing to give their consent. The second contention directed against the consent given by defendant 14 does not appear to have been seriously pressed before the High Court. In the result the High Court dismissed the appeal with costs. It may be mentioned that the 1st defendant, Guruvammal Anni, died pending the suit and that the 1st plaintiff died after the appeal was disposed of by the High Court. The other plaintiffs have preferred to present appeal against the judgment of the High Court.

The main question raised in this appeal is whether the refusal of the sapindas, other than defendant 14, to give consent to the adoption of the 2nd defendant by the 1st defendant was improper and, therefore, could be disregarded.

Before we consider the legal aspects of the question raised, we shall briefly state the relevant facts, either admitted or concurrently found b

the courts, below. Kulandaivelu, the last male-holder, died on January 29, 1912, possessed of extensive property. His widow, Guruvammal Anni, was managing the said property through power of attorney agents. The 1st defendant is the 3rd defendant's father's mother's sister's daughter's. The 3rd defendant was also helping the 1st defendant in respect of certain transactions during the management of her properties by one of her power of attorney agents. The 3rd defendant and his wife were living with the 1st defendant; and the second defendant was born in 1930 in the house of Guruvammal Anni. She was very much attached to him and as he grew up she also performed pujas in company with him. The 2nd defendant studied in the District Board High School, Sholavandan taking Sanskrit as his second language and was studying for B. A. (Hons.) degree in 1951 when he was adopted. In 1951 Guruvammal Anni was about 67 years old and wanted to take a boy in adoption who would not only discharge religious duties to her husband as his son and preserve the continuance of her husband's lineage, but would also be of great solace and help to her during the remaining years of her life. With that object, she issued notices to the sapindas of her husband intimating them of her intention to adopt the 2nd defendant, who, according to her, had all the necessary qualifications to fulfil the role of an adopted son. The boy proposed to be adopted by her was young healthy, educated, religious minded and devoted to her, having been born in her house and brought up by her.

In April 1951, the 1st defendant sent letters Ex.A-1 to the 1st plaintiff, Ex.A-10 to the 2nd plaintiff, Ex.A-15 to the 4th defendant and a similar one to the 5th defendant, Ex.A-18 to the 11th defendant, Ex. B-3 to the 12th defendant, Ex. B-52 to the 14th defendant, Ex.A.21 to the 19th defendant, and Ex.A-25 to the 20th

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defendant, seeking for their consent to her adopting the 2nd defendant. As already stated, all the said persons excepting defendants 12 and 14, replied refusing to give their consent to the proposed adoption; the 12th defendant received the letter but returned it unopened, and the 14th defendant gave his consent.

Ex. A-3 is the reply sent by the 1st plaintiff. He has given various reasons for refusing to give his consent to the proposed adoption. As much of the argument turned upon the contents of this letter, we would briefly give the said reasons. They are: (1) the Ist defendant did not think fit to take a boy in adoption for many years though her husband died 38 years ago and that four years ago there was some talk about it, but, at the instance of the 1st plaintiff and other agnates, she gave up the idea of making an adoption stating that she would not think of adopting a boy to her husband; (2) the present attempt to take a boy in adoption was at the instance of the 3rd defendant, who was exercising considerable influence over her: (3) to take a boy in adoption aged about 20 years and who was not an agnate was opposed to the uniform and invariable custom prevailing in the community; and (4) there were eligible boys among his grandsons under the age of 7 years and among his cousin's great-grandsons under the age of 18 years and the parents of the said boys had no objection to give any one of them in adoption. He summarized his objections in the following words:

> "I do strongly object to the adoption of Kulandaivelu,your agent's son; not only for the reason that he is aged and ineligible, but also for the reasons that he is not agnate and the proposed adoption is prompted by corrupt and selfish design on the part of your agent. The proposed adoption has behind it the motive of defeating the legitimate reversionary

interest of your husband's agnates and is absolutely wanting in good faith."

Ex. A-12 is the reply of the 2nd plaintiff, i.e., the son of the 1st plaintiff. He has practically repeated the objections found in his father's letter; while the father stated in his letter that there were eligible boys for adoption among his grandsons and great-grandsons of his cousin, the 2nd plaintiff only referred to his sons; he says in his letter: "Moreover, if you really desire to take a boy in adoption I have got sons who are less than seven years old and who are fit for being taken in adoption. I have no objection whatever to give in adoption anyone of the aforesaid boys whom you like." Ex.A-16 in the reply given by the 4th defendant. He has eligible boys, who are the great-grandsons of the cousin of the 1st plaintiff and who can be given in adoption; these are some of the boys mentioned by the 1st plaintiff in his letter. He sets up the case that the 1st defendant's husband had adopted one Sankarlinga Mudaliar even when he was alive. He refuses to give the consent on the ground that there was already an adoption. Ex. B-5 is the reply given by the 5th defendant and he only adopts the reasons given by his father, the 4th defendant. Ex-A-19 is the reply given by the 11th defendant, who is the father of the 14th defendant. His reply is on the same lines as given by the 1st plaintiff. Ex.B-4 is the reply given by the 14th defendant; he gives his wholehearted consent to the adoption. He has four eligible sons, defendants 15 to 18, who could be given in adoption. Ex.A-22 is the reply of the 19th defendant and Ex.A-26 that of his son, the 20th defendant. The 19th defendant stated that he has grandsons aged less than 8 years and that the parents of the said boys have no objection to give any one of them in adoption. The 20th defendant offers one

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of his sons to be taken in adoption by the 1st defendant.

The position that emerges from the aforesaid replies is this: (1) the 1st plaintiff suggested that any one of his grandsons or his cousin's great-grandsons might be taken in adoption; (2) the 2nd plaintiff, the 19th defendant, the 16th defendant and the 20th defendant offered their sons or grandsons, as the case may be, for adoption; (3) the 14th defendant, the son of the 11th defendant gave his consent to the adoption; (4) to 12th defendant, who has only one son, though he received the notice did not reply; and (5) the 4th and the 5th defendants set up another adoption by the last male-holder. In short, the elderly members of the branch of Danappa, except defendants, 4, 5, 12 and 14, objected to the adoption mainly on the ground that the proposed boy was not a sapinda and that they were willing to give one of their sons or grandsons as the case may be, in adoption. The other grounds given by them are similar to those given by the 1st plaintiff. The said grounds indicate that they were anxious that the widow should not take the boy in adoption but should leave the properties to the reversioners. The other reasons given, namely, the alleged influence of the 3rd defendant over the widow, the custom against adoption of a person other than an agnate and the ineligibility of the boy, were all found by both the courts below to be untenable. The replies disclose a concerted action on the part of the sapindas to prevent the widow from taking the 2nd defendant in adoption. They had nothing to say against the qualifications of the boy, for, as we have already noticed, he was in every way the most suitable boy from the standpoint of the widow. The only objection, therefore, was that the boy was not an agnate and that there were eligible boys among the agnates. The question, therefore, in this case is whether the refusal to give consent to the

adoption by the widow of a boy, highly qualified in every way, on the simple ground that he was not an agnate and the other agnates were available for adoption would be an improper refusal by the sapindas so as to entitle the widow to ignore their refusal and take the boy in adoption with the consent of the remoter sapinda.

Mr. N.C. Chatterjee, learned counsel fore th appellants, contends that the refusal of the sapindas to give consent, in the circumstances of the present case, was proper for two reasons, namely, (1)according to Hindu *shastras* a widow has to take only a sapinda in adoption in preference to one outside that class, and (2) the 1st plaintiff did not refuse but gave consent on condition that one or other of his grandsons or great-grandsons of his cousin should be taken in adoption and the said condition is sanctioned by Hindu law.

Mr. Vishwanatha Sastri, learned counsel for the respondents, on the other hand, contends that the refusal by the agnates to give consent for the adoption was improper, for, they, being the guardians and protectors of the widow, were in a fiduciary relationship with the widow and that they should have exercised their discretion objectively and reasonably from the standpoint of the advisability of taking the 2nd defendant in adoption in the last male-holder's branch and that in the present case the agnates refused to give consent from selfish motives in order to protect their reversionary interest, and therefore the adoption made with the consent of the remoter sapinda was valid.

The main question that arises in this appeal is whether the refusal by the nearer sapindas to give consent to the adoption as learned counsel for the respondents described it, or the giving of the consent subject to a condition as learned counsel for the appellant calls it, is improper, with the

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result the adoption made by the 1st defendant of the 2nd defendant with the consent of the remoter reversioner was valid under the Hindu law.

Before we notice the relevent case-law and textual authority on the subject, it would be convenient to clear the ground. This appeal arises out of an adoption made in the Dravida country and this case is governed by the school of Hindu law applicable to that part of the country. Further we are not concerned here with an adoption in a Hindu joint family but only with one in a divided family. We must, therefore, steer clear of the ramifications of the doctrine of consent in its impact on an adoption made by a widow in a joint Hindu family. It is not disputed that in a case where the last male-holder is a divided member of the family, his widow can make an adoption with the consent of a remoter sapinda if a nearer sapinda or sapindas improperly refused to give consent to the adoption. It is also common case that an adoption of a boy by a widow outside the class of sapindas is valid.

This controversy centres round the question whether in the present case the conditional consent given by some of the sapindas and the refusal by the others to give consent to the adoption were proper. This question depends for its solution on the answer we give to the following interrelated questions: (1) What is the source and the content of the power of the widow to adopt a boy? (2) What is the object of adoption? (3) Why is the condition of consent of the sapindas for an adoption required under the Hindu law for its validity? (4) What is the scope of the power of the sapindas to give consent to an adoption by a widow and the manner of its exercise?; and (5) What are the relevant circumstances a sapinda has to bear in mind in exercising his power to give consent to an adoption?

It is common place that a widow adopts a boy to her husband and that nobody except a widow can make an adoption to her husband. The reason is that Hindu law recognizes her not merely as an agent of her husband but, to use the felicitous Hindu metaphor, as his surviving half : see Brihaspati XXV, II and Yagnavalkya I, 156. In Sarkar Sastri's Hindu Law. 8th edn., pp. 161-162, it is, stated that though according to the commentaries the widow adopts in her own right, the modern view is that she acts merely as a delegate or representative of her husband, that is to say, she is only an instrument through whom the husband is supposed to act. Mulla in his book "Principles of Hindu Law" stated that she acts as a delegate of her husband.

The Judicial Committee in *Balusu Gurulingaswami* v. *Balusu Ramlakshmamna* (1) pointed out that if the consent of the husband's kinsmen has been obtained, the widow's power to adopt is co-extensive with that of her husband. It is, therefore, clear that a Hindu widow in making an adoption exercises a power which she alone can exercise, though her competency is conditioned by other limitations which we shall consider at a later stage. Whether she was authorised by her husband to take a boy in adoption or whether she obtained the assent of the sapindas, her discretion to make an adoption, or not to make it, is absolute and uncontrolled. She is not bound to make an adoption and she cannot be compelled to do so. But if she chooses to take a boy in adoption there is an essential distinction between the scope of the authority given by her husband and that of the assent given by the sapindas. As the widow acts only as a delegate or representative of her husband, her discretion in making an adoption is strictly conditioned by the terms of the authority conferred

(1) [1899] I.L.R. 22 Mad. 398, 406.

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on her. But in the absence of any specific authorisation by her husband, her power to take a boy in adoption is coterminus with that of her husband, subject only to the assent of the sapindas. To put it differently, the power to adopt is that of the widow as the representative of her husband and the requirement of assent of the sapindas is only a protection against the misuse of it. It is not, therefore, right to equate the authority of a husband with the assent of the sapindas. If this distinction is borne in mind, it will be clear that in essence the adoption is an act of the widow and the role of the sapindas is only that of advisers.

The next question is, what is the object of adoption ? It would be unnecessary and even be pedantic if we attempted to consider the old Hindu law texts at this very late stage in the evolution of Hindu law on the subject, for the law on this aspect had been fully and adequately considered by the Judicial Committee from time to time. It would be sufficient if we noticed a few of the leading decisions on the subject.

Sir James W. Colvile, speaking for the Judicial Committee, in *The Collector of Madurai* v. *Moottoo Ramalinga Sathupathy* (1) observed :

> "The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos".

The Judicial Committee again speaking through Sir James W. Colvile in *Sir Raghunadha* v. *Sri Brozo Kishore* (2) restated the principle with some modification thus :

> "It may be the duty of a Court of Justice administering the Hindu law to consider the

(1) [1868] 12 M.I.A. 317, 442. (2) 1876] L.R. 3 I.A., 154, 198.

religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence"

But he hastened to add :

"But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property".

This caution given by the Judicial Committee is relied upon to emphasize the point that right to property of the last male-holder is a dominant consideration in the matter of taking a boy in adoption. But, if the passage was read along with that preceding it, it would be obvious that the Judicial Committee emphasized the performance of a religious duty as an essential foundation of the law of adoption, though it did not fail to notice that the devolution of property was a legal consequence. In *Raja Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (1), the Judicial Committee through Sir James W. Colvile reiterated the principle that adoption was made by a widow only in a *bona fide* performance of a religious duty. In *Veera Basavaraju* v. *Balasurya Prasada Rao* (2), Mr. Ameer Ali, delivering the judgment on behalf of the Board, appeared to strike a new note and lay more emphasis on property rights. The Board gave as one of its reasons why the consent of divided brothers was required, namely. that they

(1) (1876) L.R. 4 I.A. 1, 14. (2) (1918) L.R. 45 I.A. 265, 273.

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had an interest in the protection of the inheritance. The Judicial Committee observed :

> "It is true that in the judgment of this Board in the *Ramnad case* (1) some expressions are used which might imply that the question of reversionary interest forms only a secondary consideration in determining what sapindas' assent is primarily requisite, but the remarks that follow as to the right of co-parceners in an undivided family to consider the expediency of introducing a new co-parcener, coupled with the observations of the Board in the subsequent case (4), show clearly that rights to property cannot be left out of consideration in the determination of the question".

It may be said with some justification that till this stage the Judicial Committee had not clearly disclosed its mind, but was wavering between two positions, namely, whether religious duty was the sole object of adoption or whether proprietary interests had an equal or a subordinate place with or to that of a religious object. *But in Amurendra Mansingh* v. *Sanatan Singh* (2) the Judicial Committee reconsidered its earlier decisions, resurveyed the entire law on the subject and veered round to the view that the validity of an adoption was to be determined by spiritual rather than temporal considerations. Sir George Lowndes observed :

> ".....it is clear that the foundation of Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites....."

> "It can, they think, hardly be doubted that in this doctrine the devolution of property, though recognized as the inherent right

(1) (1868) 12 M.I.A. 397. (2) (1933) L.R. 60 I.A. 242, 248.

of son, is altogether a secondary consideration....."

"Having regard to this well-established doctrine as to the religious efficacy of sonship, their Lordships feel that great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man.....Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property."

This decision is, therefore, a clear pronouncement by the highest judicial authority of the time that the substitution of a son of the deceased for spiritual reasons is the essence of adoption and the consequent devolution of property is mere accessory to it. Whatever ambiguity there may have still remained it was dispelled by a later decision of the Privy Council in *Ghanta China Ramasuabbayya* v. *Moparthi Chenchuramayya* (1), wherein Sir Madhavan Nair, delivering the judgment on behalf of the Board, after a resurvey of the textual authorities and the earlier decisions, observed at p. 170:

"Under the Hindu law it is the "taking of a son" as a substitute for the failure of male issue. Its object is two-fold: (1) to secure the performance of the funeral rites of the person to whom the adoption is made; and (2) to preserve the continuance of his lineage."

Adverting to observation of Mr. Ameer Ali in *Veera Benavaraju* v. *Balasurya Prasada Rao* (2), he proceeded to state at p. 175:

"The utmost that could be said in favour of the appellants is the statement in the judgment that right to property cannot be left out of consideration in the determination of the question", while the spiritual

(1) (1947) L.R. 74 I.A. 162. (2) (1918) L.R. 45 I.A 265, 275.

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welfare of the deceased also is referred to in the course of the judgment. That the above regular view of adoption cannot any longer be maintained appears to be clear from the judgment of the Board in *Amarendra Mansingh* v. *Sanatan Singh* (1)

Reverting to the object of adoption, he remarked at p. 179:

> "Their lordships do not desire to labour this point, as in their view the following opinion of the Board, delivered by Sir George Lowndes in *Amarendra's case* (1) should be considered to have settled the question finally so far as the Board is concerned."

It may, therefore, safely be held that the validity of an adoption has to be judged be spiritual rather than temporal considerations and that devolution of property is only of secondary importance.

The next question is, why does the Hindu law insist upon the assent of the sapindas as a pre-requisite for the validity of an adoption made by a widow ? A basis for the doctrine of consent may be discovered in the well-known text of vasishtas:

> "Let not a woman give or accept a son except with the assent of her Lord."

The following two texts of Yagnavalkya in Chapter 1, verse 85 and in Chapter 2, verse 130 are also ordinarily relied upon sustain the said doctrine:

> "Let her father protect a maiden; her husband a married woman; sons in old ega; if none of these, other gnatis (Kinsmen). She is not fit for independence.
>
> "He whom his father or mother gives in adoption is Dattaka (a son given)."

(1) (1933) L. R. 60 I. A. 242, 248.

A brief summary of the evolution of the law by subsequent commentators by the process of interpretation of the said two texts is found in the judgment of a division Bench of the Madras High Court in *Sundara Rama Rao* v. *Satyanarayanamurti* (1). It was pointed out therein how Devanna Bhatta reconciled the two seemingly contradictory positions by laying down that a Hindu widow could give her son in adoption if she be authorized by an independent male, how by parity of reasoning the said principle was extended to a widow taking a boy in adoption, how the same view was expressed by Nandapanditha, how Vidyaranyaswami in his Dattaka Mimamsa recognized the validity of an adoption by a widow with the permission of the father, etc., and how the later commentators relying upon the word "etc." evolved a thesis that the word "father" in the text was only illustrative, and gradually extended it to other kinsmen. The said doctrine is mainly founded on the state of perpetual tutelage assigned to women by Hindu law expressed so tersely and clearly in the well-known text of Yagnavalkya in Chapter 1, verse 85, quoted above.

The leading decision, which may be described as classic on the subject, is what is popularly known as the *Ramnad case* (2). Sir James W. Colvile, who has made a real contribution to the development of this aspect of Hindu law, observed at p. 439:

> "But they (the opinions of Pandits) show a considerable concurrence of opinion, to the effect that, where the authority of her Husband is wanting, a Widow may adopt a Son with the assent of his kindred in the Dravida Country."

The reason for the rule is clearly stated at p. 442 thus:

> "The assent of kinsmen seems to be required by reason of the presumed incapacity

(1) I.L.R. 1950 Mad. 461. (2) (1868) 12 M.I.A. 397, 442.

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of women for independence, rather than the necessity of procuring the consent of all these whose possible and reversionary interest in the estate would be defeated by the adoption.

The nature and effect of the consent is stated thus:

> "All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the Widow in the proper and *bona fied* performance of a religious duty, and neither capriciously nor from a corrupt motive."

The same principle has been affirmed and restated by the Judicial Committee in subsequent decisions: See *Raja Vellanki Venkata Krishna Row* v. *Venkaya Rama Lakshmi Narsayya* (1), *Veera Basayaraju* v. *Balasurya Prasada Rao* (2) *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu* (3) and *Ghanta China Ramasubbayya* v. *Moparthi Chenchuramayya* (4).

It will be seen that the reason for the rule is not the possible deprivation of the proprietary interests of the reversioners but the state of perpetual tutelage of women, and the consent of kinsmen was considered to be an assurance that it was a *bona fide* performance of a religious duty and a sufficient guarantee against any capricious action by the widow in taking a boy in adoption.

The next question, which is very important for the present inquiry, is, what is the scope and content of the power of consent the Hindu law places in the hands of the kinsmen? and why does the Hindu law confer the said power on the kinsmen? In the *Ramnad Case* (5), the judicial Committee described the father of the husband as the natural guardian of

(1) (1876) L.R. 4 I.A. 1, 14. (2) (1918) L.R. 45 I.A. 265, 273.
(3) (1935) 69 M L J. 388. (4) (1917) L.R. 74 I.A. 162.
(5) (1868) 12 M.I.A. 397, 442.

the widow and her venerable protector. In *Raja Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi Narsayya* (1); the Judicial Committee described the sapindas as the family council; in *Venkamma* v. *Subramaniam* (2) as the natural advisers of the widow; in *Veera Basayaraju* v. *Balasurya Prasada Rao* (3) as her natural guardians and protectors of her interest; in *Sri Krishnayya Rao* v. *Surya Rao Bahadur Guru* (4) as family council, natural guardians and protectors of her interest; and in *Ghantu China Ramasubbayya* v. *Moparthi Chenchuramayya* (5) as the widow's guardians and competent advisers. Whatever phraseology may have been used in the various decisions, it is manifest that all of them are only consistent with their exercising fiduciary power having regard to the object for which the said power was conferred on them. The scope of the exercise of the power depends (1) on the nature of the power, and (2) on the object for which it is exercised. The nature of the power being fiduciary in character, it is implicit in it that it shall not be exercised so as to further the personal interests of the sapindas. The law does not countenance a conflict between duty and interest, and if there is any such conflict the duty is always made to prevail over the interest. It would be a negation of the fiduciary duty, were we to hold that a sapinda could refuse to give his consent on the ground that the members of his branch or those of his brother's would be deprived of their inheritance. If that was the object of the refusal, it could not make any difference in the legal results, howsoever the intention was camouflaged. Suppose a sapinda gives his consent on the condition that a member of his branch only should be adopted. In effect and substance he introduces

(1) (1876) L.R. 4 I.A. 1, 14.
(2) (1906) L.R. 34 I.A. 22.
(3) (1918) L.R. 45 I.A. 265, 273.
(4) (1935) 69 M.L.J. 348.
(5) (1947) L.R. 74 I.A. 162.

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his personal interest in the matter of his assent, with a view to secure the properties to his branch. It would only be a matter of degree should he extend the choice of the widow to the divided branches of his family comprehending a large group of sapindas, for even in that case the sapinda seeks to inforce his choice on the widow on extraneous considerations. In giving or withholding his consent in his capacity as guardian or the protector of the widow, the sapinda should form an honest and independent judgment on the advisability or otherwise of the proposed adoption with reference to the widow's branch of the family: see *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu* (1). Sapinda should bring to bear an impartial and judicial mind on the problem presented to him and should not be served by extraneous and irrelevant considerations. He shall ask himself two questions, viz., (i) whether the proposed adoption would achieve the object for which it was intended, and (ii) whether the boy selected was duly qualified. We have already noticed that the object of the adoption is two-fold: (1) to secure the performance of the funeral rites of the person to whom the adoption is made, and (2) to preserve the continuance of his lineage. The sapinda should first answer the question whether the proposed adoption would achieve the said purpose. If the widow's power to take a boy in adoption was not exhausted, there would hardly be an occasion when a sapinda could object to the widow taking a boy in adoption, for every valid adoption would invariably be in discharge of a religious duty. But is also permissible for a sapinda to take objection in the matter of selection of the boy on the ground that he is not duly qualified for being adopted; he may rely upon any mandatory prohibitory rules laid down by shastras and recognised by courts in regard to the selection of a particular boy. He may object on

(1) (1935) 69 M.L.J. 385.

the ground that the boy belongs to a different caste or that he is married, for such an adoption would be invalid. He may also object on the ground that the boy is an idiot, that he is suffering from an incurable disease, that he is notoriously in bad character, for in such cases he would not be suitable to continue the line. Such and similar other objections are relevant to the question of the advisability of the adoption with reference to the widow's branch of the family. In this context an argument is raised to the effect that a sapinda is equally entitled to object to an adoption on the ground that the boy proposed to be adopted is not a sapinda. In a modified form, it is further contended that even if there is no legal prohibition against a non-sapinda being taken in adoption by a widow, the sapinda whose consent is asked for can legitimately relay upon the recommendatory texts of shastras in objecting to an adoption or imposing a condition on the proposed adoption. This raises the question whether under the Hindu law there is any prohibition against a widow taking a non-sapinda in adoption in preference to a sapinda. In Kane's "History of Dharmasastra", Vol. III, it is pointed out that Dattaka Mimamsa and Dattaka Chandrika quote passages of Saunaka and Sakala to the effect that a man should refer a sapinda or a sagotra to one who is not a sapinda or of the same gotra. The following order is recommended: the full brother's son, then a sagotra sapinda, then a sapinda though not of the same gotra, then one not a sapinda though of the same gotra, then one who is neither a sapinda nor a sagotra. But the learned author opines that the said order is purely recommendatory and an adoption in breach of it is quite valid. In Mayne's Hindu Law, it is stated :

> "According to the Dattaka Mimamsa and the Dattakh Chandrika, in the first place, the nearest male sapinda should be selected, if

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suitable in other respects, and, if possible, a brother's son, as he is already, in contemplation of law, a son to his uncle. If no such near sapinda is available, then one who is more remote; or in default of any such, then one who is of a family which follow the same spiritual guide, or, in the case of Sudras, any member of the caste.

The learned author is also of the opinion that these precepts are merely recommendatory and that the adoption of a stranger is valid, even though near relatives, otherwise suitable, are in existence. It is suggested that this rule of reference is not applicable to sudras and that in their case any member of the caste can be adopted and that among the members of the caste no references are indicated. In Sarkar Sastri's "Hindu Law of Adoption" the relevant passage of Saunaka is translated thus at p. 309:

> "Amongst Brahmins; the affiliation of a son should be made from amongst sapindas; or on failure of them a non-sapinda (may be affiliated); but any other should not be affiliated; amongst Kshatriyas, one from their own tribe, or one whose gotra is the same as that of the adopters guru or preceptor (may be affiliated) : amongst Vaisyas, from amongst those of the Vaisya tribe: amongst Sudras, from amongst those of the Sudra tribe : amongst all classes, from amongst their respective classes, not from others."

This passage lends support to the suggestion made by learned counsel for the respondents that amongst Sudras no preferential treatment is meted out to a sapinda in the matter of adoption. Be it as it may, for the purpose of this case, we shall assume that according to the commentators a sapinda may have to be referred to a non-sapinda in the matter of

adoption. The effect of the said rules was considered by the Judicial Committee as early as 1878 in *Srimati Uma Devi* v. *Gokoolammi Das Mahapatra* (1), wherein Sir James W. Colvile observed:

> "Sir Thomas Strange, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the Plaintiff relies, says: "But the result of all the authorities upon this 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 in him who upon spiritual considerations ought to have been referred."

Then the Judicial Committee quoted Sir William Macnaghten in this regard: the relevant part of the passage reads:

> ".....the validity of an adoption actually made does not rest on the rigid observance of that rule; of selection, the choice of him to be adopted being a matter of discretion."

The Judicial Committee concluded its decision thus at p. 54:

> "Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text writers as Sir William Macnaghten and Sir Thomas Strange. Their treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question might disturb many titles."

It may, therefore, be taken that as early as 1878 the Judicial Committee treated the said rules as

(1) (1878) L.R. 5 I.A. 40, 52, 53.

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more moral injunction on the conscience of a pious Hindu, and that the selection is finally a matter of his discretion. If those injunctions were disobeyed and not followed in 1878 and adoption were made ignoring them, it would be unrealistic to rely upon them in the case of adoptions made in recent years. The choice of the boy is with the widow: it is a matter of her conscience and it is left to her discretion. The sapindaship is not a legal qualification nor the nonsapindaship a legal disqualification either. An orthodox lady may give some heed to the religious texts which have fallen into desuetude, but she need not do so. It is open to her to select any qualified boy from a large circle. It would be open to a sapinda to say that the boy selected by her is not qualified from physical, moral or religious stand-point. But it would be incongrous to hold that a sapinda in giving his advice should enforce the rule of preference which has no legal sanction behind it. This approach would have the effect of enforcing a rule of preference which has fallen in desuetude by an indirect process: what was a moral injunction on the conscience of the adopter in the olden days would now be made a legal injunction by a circuitous method. If this be allowed, a sapinda in the guise of a moral injunction could deprive a widow of her right to take a qualified boy of her own choice in adoption and thus securing the inheritance for himself, if she does not adopt an unwanted boy or preserving the estate for a close relative of his, if she does. We should therefore hold that a sapinda has no right to refuse to give his consent or impose a condition on ground that the widow should take a sapinda in preference to a non-sapinda in adoption. Such a condition would in the modern context be entirely extraneous to the question of the selection of a boy by a widow for adoption to her husband's branch of the family.

In this context two judgments of the Madras High Court on which strong reliance is placed by learned counsel for the appellants may be noticed. The first is a judgment of a division Bench in *Subrahmanyan* v. *Venkamma* (1), wherein the learned Judges held that the adoption made by a widow was invalid because she did not apply for the consent of one of the two sapindas of equal degree on the ground that such an application would have been in vain. Bhashyam Ayyangar, J., speaking for the division Bench, made the following observation at p. 637:

> "But, assuming, as the first defendant says, that some five years before the adoption the plaintiff wanted her to take one of his sons in adoption, there is nothing improper in a sapinda proposing to give his assent to the widow adopting his own son, if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda, if there be no reasonable objection to the adoption of his own son....."

These observations are in the nature of *obiter*, for these were not necessary for disposing of that appeal in view of the fact that no consent of the said sapinda was asked for. Be it as it may, the observations of Bhashyam Ayyangar, J., deserve the highest respect, for his erudition in Hindu law is unquestioned. But these observations were made in the year 1903 at a time when the scope of the power of sapindas' consent had not become crystallised. As we have already pointed out, the doctrine of fiduciary relationship was gradually evolved by later decisions. The recommendatory character of the preferential right of a sapinda to be adopted was emphasised as early as 1875; and even that moral force gradually ceased to have any persussive effect on an adopter as time passed by. In

(1) (1903) I. L. R. 26 Mad. 627.

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the modern conditions it would not be proper to allow the old texts to be used by a sapinda to force his son or nephew on an unwilling widow. In *Amarendia's case* (1) it was finally decided that spiritual reasons are the essence of adoption and that devolution of property is only a consequence of it, and therefore the preferential claim of a sapinda to be adopted ceased to have any validity. With greatest respect to the learned Judge, we must hold that the said observations have no longer any relevance in the context of a modern adoption. The next decision, which is an unreported one, is in *Alluri Venkata Narasimharaju* v. *Alluri Bangarraju* (2). In that case, a widow made an adoption with the consent of a coparcener of her deceased husband: two other coparceners who were asked for permission refused to give the same. The said coparceners suggested that each of them had sons and that they were prepared to give one of their sons in adoption. This offer was not acceptable to the widow. They subsequently intimated their desire to give their own sons in adoption, but the widow refused. Having regard to that fact and other circumstances of the case, the learned Judges said that the refusal was proper. The learned Judges had not considered the question from the standpoint of the fiduciary power of sapindas, but they were influenced mostly by the intransigent conduct of the widow in taking a boy in adoption without considering their proposal with a view to prevent the induction of an outsider into the joint family. That was a case of an adoption by a widow to a deceased member of a coparcenary and it may be that different consideration might arise in such a situation on which we do not propose to express any opinion. Adverting to that judgment, Satyanarayana Rao, J., observed in *Sundara Rama Rao* v. *Satyanarayanamurti* (3):

(1) (1933) L. R. 60 I.A. 242.
(2) Appeals Nos. 95 & 226 of 1944 (decided on 15.7.1946).
(3) I.L.R. 1950 Mad. 661.

> "No general rule can, therefore, be laid down that in all cases and under all circumstances the refusal of a sapinda to give his assent to the adoption on the ground that the widow refused to accept the boy of his own in adoption as a proper refusal. The question has to be considered on the facts of each case."

Another division Bench of the Madras High Court consisting of Rajamannar, C.J., and Balakrishna Ayyar, J., in *Venkatarayudu* v. *Sashamma* (1), held that refusal by a sapinda to give his assent to the proposed adoption by a widow, of a boy, on the ground that the boy was not a Sapinda or sagotra or a gnati, was not proper. It is true in that case the sapinda did not offer his son or make any suggestion that a sapinda or sagotra was available for adoption. The learned Chief Justice, speaking for the Court, observed:

> "As Mayne (Hindu law, tenth Edition) remarks at pages 221 and 222 it is very difficult to conceive of a case, where a refusal by a sapinda can be upheld as proper. "The practical result of the authorities therefore appears to be that a sapinda's refusal to an adoption can seldom be justified". It may be that in a case where the sapinda refused his consent to the adoption of a boy on the ground that the boy was disqualified, say, on the ground of leprosy or idiocy, the refusal would be proper. In this case, we have no hesitation in holding that the refusal by the plaintiffs on the ground that the proposed boy was not a sapinda or sagotra or a gnati was not proper."

The division Bench did not follow the observation of Bhashyma Ayyangar, J. Another division Bench of the Madras High Court, consisting of Satyanarayana Rao and Viswanatha Sastri, JJ., noticed the

(1) A. I. R. 1949 Mad. 745, 746.

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observations of Bhasyham Ayyangar J., in *Sundara Rama Rao* v. *Satyanrayanamurti* (1). Therein Viswanatha Sastri, J., observed:

> "With the greatest deference to that great Judge, it seems to me to be questionable whether refusal to consent by a sapinda to an adoption by the widow except on condition that his son should be adopted is a valid or proper refusal."

In the present case, the High Court followed and accepted the said observations, and we also agree with them. We, therefore, hold that the observations of Bhashyam Ayyangar, J., are only in the nature of *obiter* and that they have rightly been treated as such in later decisions. That apart, as we have pointed out, the said observations are opposed to the principle of fiduciary power which has now been accepted.

The result of the foregoing discussion may be summarized thus: The power of a sapinda to give his consent to an adoption by a widow is a fiduciary power. It is implicit in the said power that he must exercise it objectively and honestly and give his opinion on the advisability or otherwise of the proposed adoption in and with reference to the widow's branch of the family. As the object of adoption by a widow is two-fold, namely, (i) to secure the reference of the funeral rites of the person to whom the adoption is made as well as to offer spindas to that person and his ancestors, and (2) to preserve the continuence of his lineage, he must address himself to ascertain whether the proposed adoption promotes the said two objects. It is true that temporal consideration, through secondary in importance, cannot be eschewed completely but those considerations must necessarily be only those connected with that branch of the widow's family.

(1) I.L.R. 1950 Mad. 461.

The sapinda may consider whether the proposed adoption is in the interest of the wellbeing of the widow or conducive to the better management of her husband's estate. But considerations such as the protection of the sapindas' inheritance would be extraneous, for they pertain to the self-interest of the sapinda rather than the wellbeing of the widow and her branch of the family. The sapindas, as guardians and protectors of the widow, can object to the adoption, if the boy is legally disqualified to be adopted or if he is mentally defective or otherwise unsuitable for adoption. It is not possible to lay down any inflexible rule or standard for the guidance of the sapinda. The Court which is called upon to consider the propriety or otherwise of a sapinda's refusal to consent to the adoption has to take into consideration all the aforesaid relevant facts and such others and to come to its decision on the facts of each case.

Bearing the said principles in mind, let us now scrutinize the persons given by the different sapinda is refusing to consent to the proposed adoption with a view to ascertain whether their refusal was proper or not. At an earlier stage of the judgment we have given the reasons given by each one of the sapindas who were approached by the widow for their assent.

The 1st plaintiff is the only sapinda who made a genaral suggest that the widow could make an adoption from one of his grandsons or his cousin's great grandsons. But a scrutiny of his reply discloses that he also looked at the problem presented to him from a personal and selfish angle. His reply reveals a biased mind. He has expressed surprise that the widow should have thought fit to take a boy in adoption, for earlier, according to him, she gave up the idea of making an adoption at the request of the 1st plaintiff and other agnates and also stated that

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when she decided to make the adoption she would select a suitable boy from those of his first cousin. This clearly shows that he was more concerned with the reversioners' inheritance to the estate of the last male-holder rather than with the religious benefit that would accrue to him. He then questions the widow's motive, which again is an irrelevant consideration. He then relies upon the custom prevailing in their community whereunder an agnate alone could be taken in adoption, but no attempt has been made to establish the said custom: therefore, it may be taken that a false reason is given. As regards the boy proposed to be adopted, he vaguely states that he is aged and ineligible for adoption. Finally, he declares that he has no objection to the widow making an adoption, provided one of his grandsons or the great-grandsons of his cousin is taken in adoption. It will be seen that except the vague generalities he cannot point out any particular disqualification attached to the boy either on religious or secular grounds: nor can he say that by adopting him the interests of the widow or of the branch of her family would be adversely affected. The entire reply discloses a closed and biased mind against the widow taking a boy in adoption; and the proposal made to her to take one of the sapindas is only made with full consciousness on his part that it would be refused. On a consideration of the entire letter, we have no hesitation in holding that the 1st plaintiff improperly refused to give his assent to the adoption.

The refusal by defendants 4 and 5 was obviously improper, for they set up an adoption alleged to have been made by Kulandaivelu, the last male-holder, before his death. Defendant 12 did not care to reply: he had only son and was, presumably, not willing to give his only son in adoption or take sides. Defendant 11 in his reply offered one of his grandsons or of his brother's i.e., the only son of

defendant 12 and the sons of defendant 14. For the reason already stated, 12 would not give his son in adoption, and defendant 14 had given his consent to the adoption. Therefore, 11's grandsons were not available for adoption. This leaves only the replies of the 2nd plaintiff and defendants 19 and 20 for consideration. 2nd plaintiff wanted his son to be adopted, and defendant 19, and his son defendant 20, wanted the sons to be adopted. These three sapindas were clearly actuated by self-interest.

The replies given by the sapindas appear to us to be a part of their concerted action to prevent the widow from taking a boy in adoption. The sapindas either singly or collectively did not bring to bear their impartial mind on the request made to them, but they either refused to give their consent or gave it subject to an improper condition with a view to advance their self-interest. They did not consider the advisability or otherwise of the proposed adoption in and with reference to the widow's branch of the family. We, therefore, hold that their refusal was improper and that the widow rightly ignored it.

The next question is whether defendant 14 was legally competent to give his consent to the question. It is contended that defendant 14 was a member of the Dravida Munnetra Kazhagam, having no faith in Hinduism and Hindu scriptures and practice and therefore he was incompetent to give his advise on the question of adoption, which is a religious act. Learned counsel for the respondents contends that the certificate issued by the High Court is confined only to one question, namely, whether the refusal by the spindas to give their consent to the adoption was improper on the facts found and, therefore, it is not open to the appellants to raise any other question before us. Reliance

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is placed upon Order XVI, r. 4 and Order XVIII, r. 3(2) of the Supreme Court Rules. Under Order XVI, r. 4.

> "Where a party desires to appeal on grounds which can be raised only with the leave of the Court, the petition of appeal shall be accompanied by a separate petition indicating the grounds so proposed to be raised and praying for leave to appeal on those grounds and the Petition shall, unless the Court otherwise directs, be heard at the same time as the appeal."

Under Order XVIII, r. 3 (2), the case lodged by a party " shall not travel beyond the limits of the certificate or the special leave, as the case may be, and of such additional grounds, if any, as the Court may allow to be urged on application made for the purpose." These two provisions do not *proprio vigore* lay down that the High Court can issue a limited certificate; but they assume that under certain circumstances it can do so. Under Art. 133 of the Constitution, under which the High Court gave the certificate, does not empower the High Court to limit certificate to any particular point. If the decree of the High Court is one of affirmance the High Court certifies that the appeal involves a substantial question of law; and it has been the practice of some of the High Courts to state the substantial question of law in the certificate issued. Once the certificate is issued and the appeal is properly presented before this Court, the entire appeal will be before it. The assumption underlying the said rules of the Supreme Court may appropriately refer to a certificate issued by a High Court under Art. 132 of the Constitution, whereunder the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution: and where such a certificate is given.....any party in the case may appeal to the Supreme Court on the ground that any

such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground." But we are not concerned here with a certificate issued under Art. 132 of the Constitution. We, therefore, hold that the entire appeal is before us. But it does not follow from the said legal position that we should allow the appellants to raise that plea before us, if they had failed to do so before the High Court. The points argued before the High Court are recorded by the learned Judges thus:

> Mr. Venkatasubramania Ayyar learned counsel for the plantiffs appellants, did not address arguments to us to displace the findings of the trial Judge on the additional issues though he made it clear that he was not abandoning those any of his clients' contentions embodied in those issues. He however confined his arguments before us to Issues 1, 2 and 3."

From this statement it appears that though this point was not argued before the High Court, it was not abandoned. We shall, therefore, deal with the same.

The contention is that defendant 14 is a member of the Dravida Munnetra Kazhagam, having no faith in Hinduism and Hindu scriptures and practice and, therefore, he is incompetent to give consent to the adoption, which is a religious act. Under the Hindu law a sapinda has power to give consent to a proposed adoption by a widow. Defendant 14 is admittedly a sapinda and, therefore, he can ordinarily give his consent to the adoption, unless it has been established that he is mentally or otherwise unfit to give his consent. It is not suggested that he is not intellectually competent to give an unbiased advice on the advisability of taking a boy in adoption in the widow's branch

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of the family. But it is said that he has no belief in Hindu scriptures and, therefore, he cannot give consent to an adoption which is a religious act. The act of giving consent is not a religious act; it is the act of a guardian or protector of a widow, who is authorised to advise the widow, who is presumed to be incompetent to form an independent opinion. His non-belief in Hindu scriptures cannot in any way detract from his capacity to perform the said act. That apart, defendant 14 in his evidence clearly says that he had considered the qualifications of the proposed boy for adoption and gave his consent. His reasons are :

> "Defendant 2 had faith in God just like Defendant 1. He used to go to the temples and give charities. He had good physical build. He was in a position to take over the management of Defendant 1's estate immediately. In view of these facts I considered him to be fit for adoption. He was then reading in B. A. class".

These reasons clearly disclose that he applied his mind to the crucial question and gave his consent after satisfying himself about the advisability of taking the boy in adoption. But it is suggested to him in the cross-examination that he had no faith in God, but he denies it and says : "I believe that there is a God but I do not believe in the meaningless religious rites and ceremonies". To further question, he answers :

> "I have no faith in taking a boy in adoption. Nor do I believe that a person has "atma" and that it should get salvation after death. Nor do I believe that there is anything called "hell" or "paradise". Nor do I believe that a person leaving no son will go to hell".

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The fact that he does not believe in such thing does not make him any the less a Hindu. The non-belief in rituals or even in some dogmas does not *ipso facto* remove him from the fold of Hinduism. He was born a Hindu and continues to be one till he takes to another religion. But what is necessary is, being a Hindu, whether he was in a position to appreciate the question referred to him and give suitable answer to it. After going through his evidence, we have no doubt that this defendant had applied his mind to the question before him. Whatever may be his personal predilections or views on Hindu religion and its rituals, he is a Hindu and he discharged his duty as a guardian of the widow in the matter of giving his consent. In the circumstances of the case, his consent was sufficient to validate the adoption.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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April 26.

S. S. GAREWAL

v.

MESSRS. BHOWRA KANKANEE COLLERIES

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR and T. L. VENKATARAMA AIYAR, JJ.)

Mines—Accident—Court of Inquiry—Order to pay expenses—Amount not quantified—Court, if becomes functus officio on submitting report—Subsequent order quantifying amount—If such quantification valid—Assessors, if must join in all orders of the Court of Inquiry—Mines Act, 1952 (35 of 1952), s. 24—Mines Rules, 1955, r. 22.

The Government of India under s. 24 of the Mines Act, 1952, ordered an enquiry into the disaster in the respondent's colliery. The Court of Inquiry submitted its report on