Roy Chowdhry v. *Chunder Nath Pal*(1) is distinguished by the fact that in that case there was formal delivery. We must reverse the decree and we dismiss the suit with costs throughout.

PULLAYYA v. RAMAYYA.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, and Mr. Justice Shephard.

PARVATIBAYAMMA (DEFENDANT), APPELLANT,

v.

RAMAKRISHNA RAU (PLAINTIFF), RESPONDENT.*

1894. October, 12, 16, 26.

Hindu law—Adoption—Estoppel by conduct.

A childless Hindu widow, aged 19, agreed with the plaintiff's father to adopt the plaintiff, stating that her husband, who died at the age of 12, had given her authority to adopt. Subsequently she adopted the plaintiff and had his upanayanam performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about 18 months, when she repudiated the adoption and refused to maintain the plaintiff:

Held, that, the adoption being invalid on the ground that the widow had not, as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of 18 months.

In order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must then become so altered that it would be impossible to restore him to it.

Gopalayyan v. *Raghupatiayyan* (7 M.H.C.R, 250) followed.

APPEAL against the decree of E. C. Rawson, District Judge of Vizagapatam, in pauper original suit No. 11 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgments of the High Court.

Kothandarama Ayyar for appellant.

Ramachandra Rau Saheb and *Narayana Rau* for respondent.

SHEPHARD, J.—The plaintiff claims as the adopted son of the late Seetharamiah. This title he fails to make good because he has not proved that the widow by whom the adoption was made

(1) I.L.R., 14 Calc., 644.

* Pauper appeal No. 71 of 1894.

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acted under authority from her husband. There is admittedly no evidence of such authority having been given, and the circumstances are not such as to raise any presumption in the plaintiff's favor. This being so, the plaintiff charges that the defendant is estopped from denying his adoption, and on the strength of that estoppel claims to recover the property to which as adopted son he would be entitled.

At first sight it certainly would seem somewhat anomalous to hold that an adoption, invalid according to Hindu Law, may nevertheless become effectual so as to confer on the person concerned the right in the family of a stranger which he could only acquire by a valid adoption. No doubt under certain circumstances the law may raise a presumption in favor of the validity of an adoption as it may in questions of marriage or legitimacy. But the principle contended for goes further than this and is one which I conceive could never be extended to marriage. Nevertheless in the case of adoption the principle has been admitted, and the question we have to consider is within what limits it can properly be applied. In *Gopalayyan* v. *Raghupatiayyan*(1) the defendant claimed as the adopted son of the plaintiff's brother. It was found that the adoption although true in fact was invalid in point of law; but having regard to the allegation that the conduct of the plaintiff's family had "debarred them in consequence "of their acting as if the law allowed the adoption and the changed "situation induced, from now taking the benefit of the ordinary "rule of law," the High Court directed the following issue to be tried: "Has the conduct of the plaintiff and that of the members "of his family been such as to render it now inequitable for him "to set up as against the present defendant the rule of law upon "which he now insists?"

Subsequently in dealing with the finding on this issue, which was in the defendant's favor, the Court observed: "The situa-"tion is the result of the conduct of the whole family of plaintiff "continued through a long course of years, and we think that we "cannot properly decree for the plaintiff upon the footing that the "defendant is wholly unentitled to any part of the family property. "On the contrary we are of opinion that although the adoption was "invalid and inadequate of itself to create communion, that com-

(1) 7 M.H.C.R., 250.

"munion has been created by the course of conduct of the plaintiff "and his family, coupled with the defendant's changed situation "which has resulted."

This case was cited in a recent case before the Judicial Committee, and although it was not considered that any question of estoppel arose in the case, stress was laid upon considerations similar to those mentioned in the Madras case. "It is no slight "matter for a boy to be passed from one family into another. Even "in England such a thing cannot be done without a serious effect, "for good or ill, on the boy's welfare. In India the ties of family "life are far stricter, and if a boy has been transplanted from his "own family into another by a *de facto* adoption, and then the "adoption turns out to be invalid in law, and he is rejected out of "his adopted family, his relations to his natural family must be "seriously disturbed. Whether his previously existing legal status "would be taken away is a point not calling for any opinion. "Assuming that the plaintiff could return after an absence of five "years, and so resume his legal position, it is impossible that his "personal position should be the same as if the tie to his family "had never been broken." Several other cases were cited to show that the principle of estoppel may be applied to claims founded on alleged adoption: *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate*(1), *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai*(2), *Gopalayyan* v. *Raghupatiayyan*,(3) *Kannammal* v. *Virasami*(4). In *Sadshiv Moreshvar Ghate* v. *Hari Moreshvar Ghate*(1), the estoppel was founded on the fact of a long and general recognition of the adoption by the family into which he was brought by the adoption. In *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshimibai*(2), the plaintiff, whose adoption was questioned had been brought up and married by his adoptive mother, and although the period during which his adoption had been recognized had not been long, it had exceeded six years, and therefore it was no longer open to the persons who would have taken in default of adoption to challenge it. The judgment in *Kannammal* v. *Virasami*(4) proceeds on the authority of these cases. There too the adoptee had been married in the family in which he had been affiliated.

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(1) 11 Bom. H.C.R., 190.
(2) I.L.R., 11 Bom., 381.
(3) 7 M.H.C.R., 250.
(4) I.L.R. 15 Mad., 486.

PARVATI-BAYAMMA v. RAMAKRISHNA RAU.

From these cases it appears that estoppel like limitation may, for purposes not of a religious character, raise an adoption *ab initio* invalid to the level of a valid adoption. The members of the family by which the adoption is recognized or by whom it is not questioned within the six years from their learning of it which are allowed by the law of limitation—cannot deny to the adoptee the property-rights in the family which a legal adoption would have given him. See *Jagadamba Chowdhrani* v. *Dakhina Mohun*(1). If the claim is rested simply on estoppel, as it was in *Gopalayyan* v. *Raghupatiayyan*(2), I think the true limits, within which the doctrine is to be applied, are those stated in that judgment. The claimant has to show that by a course of conduct long continued on the part of the family which has purported to affiliate him, his situation in his original family has been altered so that it would be impossible to restore him to it.

Now in the present case there is no question of limitation. At the date when the suit was filed, it was not too late for the defendant's family to challenge the alleged adoption, for the six years had not elapsed, and, on the other hand, as the plaintiff was, as he still is, a minor, he had not by force of the law of limitation lost his rights in his original family. The material facts proved are these :—In 1875 the defendant's husband died at the age of 12, leaving his widow aged 10; in 1884 a kararnamah was drawn up between the widow and the plaintiff's father which is said to have been executed by the widow; in 1887 the adoption of the plaintiff by the widow took place and immediately afterwards the ceremony of upanayana was performed. The suit was instituted in 1892, the widow having meanwhile repudiated the adoption and refused to maintain the plaintiff. The plaintiff rests the claim by estoppel chiefly on the representation of authority from her husband contained in the kararnama executed by the defendant. On the faith of that representation it is said that he was given by his father in adoption to the defendant and her deceased husband. It might be objected that there is no evidence of the circumstances under which the karar was executed or of any explanation of it having been afforded to the defendant. She was only 19 at the time. There is also an entire absence of evidence to prove that the plaintiff's father in 1887

(1) L.R., 13 I.A., 84. (2) 7 M.H.C.R., 250.

really acted on the faith of the statement made three years before. No doubt, assuming that the assertion of authority was really made by the defendant, there was a positive statement which might under ordinary circumstances, have put the plaintiff's father off inquiry, and it might be assumed that he had acted upon it. But here the circumstances were peculiar. The statement was not in itself a probable one having regard to the ages of the husband and wife at the time when the authority was supposed to have been given. No reasonable parent would have taken serious action upon such a statement standing by itself and uncorroborated. The plaintiff's father had access to other means of ascertaining the truth. He was not called as a witness and there is absolutely no positive evidence to prove that when he gave his son in adoption in 1887 he had in his mind the statement made in 1884 or had ever believed that it was true. Under these circumstances, we think the plaintiff has failed in establishing this part of his case.

Then it is said that upanayanam was performed in the adoptive family and that the plaintiff was, therefore, debarred from returning to his natural family, the suggestion being that the performance of upanayanam irrevocably fixes the subject of it in the family in which it takes place. That this, however, is not the correct view is pointed out in *Virarayava* v. *Ramalinga*(1). It is by gift and acceptance of the boy and not by upanayanam that filiation is constituted. So from the text of Prajapati cited in that case (page 162) it appears that an adoption made after upanayanam, although inferior, is not invalid. The evidence does not show whether or not the defendant's husband and the plaintiff's father belonged to the same gotra. However that may be, I do not think that the mere performance of upanayanam altered the position of the plaintiff or prevented his restoration to his original family. It was not proved that the plaintiff had been married by the defendant as was the case in *Kannammal* v. *Virasami*(2). No attempt was made to show that recognition of the plaintiff as an adopted son was accorded generally by the members of the defendant's family; and accordingly the plaintiff's pleader seeing that the estoppel could not bind third persons not claiming under the widow, was forced to contend that as against her only the

(1) I.L.R., 9 Mad., 161. (2) I.L.R., 15 Mad., 486.

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plaintiff's title should be allowed to prevail. The contention is manifestly untenable. The widow represents the inheritance and as such is entitled to possession. She can only be displaced on proof of the plaintiff's affiliation into the family. The affiliation must be good against the whole family or not at all. It is impossible to hold that a Hindu widow may by a false assertion of authority from her husband, constitute a stranger a member of the family and invest him with all the rights of a son during her life-time.

Applying the principle laid down in *Gopalayyan* v. *Raghupatiayyan*(1). I am of opinion that the plaintiff has failed to prove his claim to be considered the adopted son of the defendant. The decree of the District Judge must, therefore, be reversed. The appellant is entitled to her costs throughout.

The respondent must pay the fees due to Government.

MUTTUSAMI AYYAR, J.:—The substantial question for determination in this appeal is whether there are any, and, if so, what limitations subject to which the doctrine of estoppel has to be applied in the case of invalid adoptions. In the case before us, the Judge finds that the defendant agreed to adopt the minor plaintiff in February 1884; that she formally adopted him in April 1887 and had his upanayanam performed in the adoptive family on the next day. He further finds that from that day forward she administered her husband's property as the minor's guardian for a period of about 18 months. The Judge has also found that the defendant had no authority to adopt from her husband and that there is not a particle of evidence in proof of such authority. It is true that there is a recital in the agreement (A) executed by the defendant to the minor's natural father in 1884 that her husband had given her permission to adopt, but in the absence of any evidence the recital must be taken to be untrue.

That it is so is rendered probable by the fact that her deceased husband, Sitaramiah, was 12 years of age when he died, the defendant herself being about 10 years' old. If any authority had been given it must have been given in the presence of elderly relations and under the circumstances it would have been reduced to writing. The adoption being thus invalid as one made by a childless Hindu widow without authority, the Judge proceeded to consider the further question whether, by reason of the representation

(1) 7 M.H.C.R., 250.

in exhibit (A) that she had such authority, she was estopped from pleading that the adoption is invalid and resisting his claim to recover her husband's property. On this point the Judge was of opinion that she took an active part in making the adoption and was therefore estopped; and in support of his decision relied on the cases in *Kannammal* v. *Virasami*(1) and in *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai*(2).

In this opinion, however, I am unable to concur. The doctrine of estoppel is but a graft, somewhat incongruous though equitable, on the law of the adoption, to be applied in cases in which by the invalid adoption the status of the adopted boy is so irrevocably altered as to render it impossible for him to resume his original position in his natural family. In *Bawani Sankara Pandit* v. *Ambabay Ammal*(3) it was held that the natural rights of a person adopted remain unaffected when the adoption is invalid. I am, therefore, of opinion that so long as the adopted boy is in a position to resume those natural rights, his status cannot be treated as not irrevocably altered to his prejudice by the invalid adoption. His ordinary remedy would then be to resume those natural rights and he is not at liberty to invoke the aid of the doctrine of estoppel unless he could show that it was impossible for him so to resume. Otherwise, the Hindu law as to invalid adoption would be practically repealed. In every case of adoption the adopter must more or less take an active part and to say that because he took an active part he must not disaffirm his act, though it is clearly invalid under Hindu law is tantamount to repealing it as to the requisites of a valid adoption. The foundation for the equity of applying the doctrine of changed position appears to me to consist in the view that it is not possible for him to resume his status in the natural family either by the operation of the law of limitation or by some other cause. In *Gopalayyan* v. *Raghupatiayyan*(4) where the doctrine of estoppel was applied, the adoption had been recognized for more than 50 years. The learned Judges observed that even a long course of acquiescence by all the members of the family in the validity of the sonship asserted, would be hardly enough if, through the influence of that course of representation by conduct, the defendant had not altered his situation so that it would be impossible to restore him to

(1) I.L.R., 15 Mad., 486.
(2) I.L.R., 11 Bom., 381.
(3) 1 M.H.C.R 363.
(4) 7 M.H.C.R., 250.

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that original situation. The learned Judges proceeded further to observe that the course of conduct of the plaintiff and his family coupled with the defendant's changed situation created that communion which adoption was intended to create, and which by reason of its invalidity was inadequate of itself to create. The Judges considered that the application of the doctrine of estoppel even in a case like that was an extreme application of the doctrine of changed situation. Though in *Kannammal* v. *Virasami*,(1) the exact period during which the invalid adoption was recognized does not appear, yet there is reason to think that it was recognized for a long time. Moreover, it appears that the widow not only brought up the adopted son, but also allowed him for years to perform the funeral ceremony of her husband and married him to a girl of her choice. Here a long period of acquiescence and the marriage of the boy were properly considered to have irrevocably altered the status of the boy to his prejudice. In *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai*(2) which is referred to in *Kannammal* v. *Virasami*(1) there was a long course of acquiescence in the invalid adoption so as to render it impossible to restore the adopted boy to his original situation. Mere active participation in the adoption is not of itself enough—unless it has the effect of altering his situation so as to be impossible to restore him to his original situation.

In the case before us the adoption took place in 1887 and was recognized but for 18 months. It is, therefore, clear that there was no sufficiently long course of acquiescence as in the cases in which the doctrine of estoppel was applied. Nor was there any other cause which might be accepted as altering the boy's position to his prejudice. Though the upanayanam was performed in the adoptive family, the ceremony is inefficacious because of the invalidity of the adoption, and there is no objection to its being repeated in the natural family as is generally done when the ceremony first performed had some essential defect which rendered it inefficacious. As to the contention that upanayanam has the effect of fixing the gotram it would be valid only if the upanayanam ceremony itself were valid.

For these reasons, I concur with my learned colleague that the adoption should be declared invalid and that the doctrine of estoppel has no application. I would also allow the appeal

(1) I.L.R., 15 Mad., 486. (2) I.L.R., 11 Bom., 381.

reversing the decree of the Court below and direct that the suit be dismissed with costs throughout.

Plaintiff is to pay the Court fees to Government.

PARVATI-HAYAMMA v. RAMAKRISHNA RAU.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, and Mr. Justice Best.

KRISHNASAMI AYYAR (PETITIONER), APPELLANT,

v.

JANAKIAMMAL AND OTHERS (COUNTER-PETITIONERS AND THEIR REPRESENTATIVES), RESPONDENTS.*

1893. November 15. 1894. May 1.

Execution—Sale in execution of decree of mortgaged land—Purchase of equity of redemption by decree-holder under section 294 of the Code of Civil Procedure—Execution of decree in respect of balance—Nature of price paid by purchaser on the purchase of the equity of redemption.

A mortgaged certain land to B, but remained in possession thereof. Subsequently A sold a portion of the said land to C in consideration of her paying off the mortgage debt due to B. C entered into possession, but was unable to satisfy the debt. C died, and A sued C's daughter and legal representative, for damages sustained by him from the non-payment of the purchase money by C. A obtained a decree and, the money not being paid as therein decreed, applied for execution and brought to sale the equity of redemption vested in C by virtue of the sale. By leave of the Court A bid at the Court-sale and bought the right of redemption and recovered back possession of the land sold to C. Subsequently he again applied for execution of the decree in respect of the balance by attachment of certain movable property, and contended that he was bound to give the defendant credit only for the price which he actually paid at the Court-sale for the equity of redemption. The defendant contended that A was bound to give credit for the full value of the land under mortgage:

Held, that having obtained leave of the Court to bid under section 294 of the Code of Civil Procedure, A's position was that of an independent purchaser, and that the price, which an independent purchaser must be taken to pay when he buys property under mortgage for a cash payment made to the mortgagor on account of his equity of redemption, is the cash payment for the equity of redemption *plus* the debt, *i.e.*, the amount undertaken to be paid to the mortgagee, and that for these amounts A was bound to give credit.

APPEAL against the order of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, dated 26th November 1891, passed in

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* Appeal against order No. 67 of 1892.