APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912. April 1.

MEDA VENGAMMA (PLAINTIFF), APPELLANT.

v.

MITTA CHELAMAYYA AND TEN OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Widow's estate—Nature of interest arising out of contract with surviving co-parceners.

P and *C* were undivided brothers of a joint Hindu family. *P* died. *C* entered into an agreement with *L* the widow of *P* whereby *P* was to receive a younger son of *C* (if such should be born) in adoption or in default a half share in the family properties. No adoption took place. *C* died leaving his widow *B*. *B* and *L* effected a partition of the properties in equal shares. The plaintiff was a daughter of *P* by another wife.

Held, that the half share taken by *L* was a widow's interest and that it would pass on her death to her husband's reversioners and the plaintiff being the nearest reversioner was entitled to succeed.

A woman's estate can be obtained by a Hindu female not only by inheritance but also by contract of parties, by a grant, or by prescription.

APPEAL against the decree of M. GHOSE, the acting District Judge of Cuddapah, in Original Suit No. 2 of 1907.

In this case one Pedda Tippayya died in 1868 leaving his widow Lakshmakka, (his second wife) and daughter (plaintiff) by his first wife, and a brother Chinna Tippayya. It was found by the Lower Court that Pedda Tippayya and Chinna Tippayya were undivided at the date of the former's death in 1868.

Seven days after Pedda Tippayya's death an agreement Exhibit IV was entered into between Lakshmakka and Chinna Tippayya by which the latter agreed to give her in adoption one of his younger sons which might in future be born to him and also agreed to give her a half share in the properties.

The following is Exhibit IV :—

Kararnama dated 6th December 1868 executed and given in favour of Lakshmakka, wife of Mitta Pedda Tippayya, son of Pedda Singanna, residing at Peddagutturu of Pulivendla taluk

* Appeal No. 73 of 1908.

by junior brother-in-law (Maridi) Chinna Tippayya, the terms of which are :— VENGAMMA v. CHELAMAYYA.

As my brother your husband having died 7 days ago, what you have asked me to-day through Sunku Balayya Gari Peddarazu and other respectable persons is "your brother died in his youth without leaving issue to me, so if you were to beget sons in future, excluding the eldest son, you shall give one of the remaining sons in adoption to me as per my choice, according to shastras, and if we were not to be on good terms at any time, give us by partition our half share in the cattle, five metals, houses, topes, lands and thus enable us to obtain salvation." So I have agreed accordingly and executed and given you this *kararnama* which is as follows :—If I were to beget sons, I shall give you in adoption any one of my sons as per your choice excluding the eldest according to shastras, and I shall divide and give you your half share as aforesaid. In case I beget only one son and no second son is born to me, I shall bring for myself as per my choice another boy from another quarter and give you in adoption and shall give you your half share in place of my brother. If I were to fail either in bringing and giving you a boy from outside, in adoption, or, if I were not to give you one of my sons, I shall give you a half share, after division, of the property. This *kararnama* is executed and given with my consent.

(Signed) Mitta Chinna Tippayya,
son of Pedda Singanna.

He further agreed in case only one son was born to him to procure for her some boy of his own choice for adoption and to give her a half share in place of his brother. He finally agreed in default of his doing so to give "her half share in the property" after division. Chinna Tippayya having died his widow Bagamma and Lakshmakka effected in 1878 a division between themselves of the properties in equal shares—Exhibit XVI.

The arbitration *muchilika*, dated 5th day of Karteeka Sudha of Bahudhanya year (30—10—1878), executed and given in favour of (1) Subbayya, son of Mitta Chinna Singanna, (1) Do. Pedda Ramayya (1) Achappillagari Gangayya, (1) Vemulasenku Balayyagari Pedarauz, (1) Maddala Tiruvelisetti, (1) Gattasala Chinna Subbiah, (1) Ghattisala Pullayya of Pedda Jutturu of Pulivendla taluk of Cuddapah district jointly by the two,

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Lakshmakka, wife of Pedda Tippayya of Metta Pedda Singanna Garu, and Bagamma, wife of Do. Chinna Tippayya.

As we both of us have requested you to be arbitrators for our partition, therefore all the property consisting of the moveable and immoveables we had (*i.e.*,) houses, topes, lands, cattle and metals and to settle the disputes we had over this property, *i.e.*, Pendli vottalu, gifts and endowments, and disputes regarding the senior and junior shares as would appear to you the respectable people by which we shall be bound to hear and we shall be bound by any other decisions over and above as would be said by the abovesaid respectable persons. This arbitration deed is executed and given with our consent.

(Mark of) Lakshmakka.
(„) Bagamma.

The Honourable Mr. *T. V. Seshagiri Ayyar* for appellant.

The Honourable Mr. *P. S. Sivaswami Ayyar*, the Advocate-General and *S. Gopalaswami Ayyangar* for first respondent.

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JUDGMENT.—In this case the plaintiff is a daughter of one Pedda Tippayya by his first wife, and sues for the recovery of the properties mentioned in the schedules attached to the plaint. Pedda Tippapya had a brother named Chinna Tippayya, and had married a second wife, Lakshmakka, who was only about ten years old at his death. She died in February 1905. The plaintiff's case is that Pedda Tippayya and Chinna Tippayya were divided in interest, and that they effected an actual division of the moveable properties and the houses, but that the other properties remained in the joint enjoyment of both at the time of Pedda Tippayya's death in 1868. The plaint alleges that Lakshmakka, the widow of Pedda Tippayya, took possession of his properties after his death in 1868 and that the first defendant, who joined Lakshmakka, and was looking after her properties took possession of them on her death in 1905, and that he is wrongfully withholding them from the plaintiff. She denies that the first defendant who claims to have been adopted by Lakshmakka, was really adopted by her, and that Lakshmakka had any authority to adopt him. The second and the other defendants are made parties on the ground that they are in possession of some of the properties without any lawful title.

The first defendant contends that Pedda Tippayya and his brother Chinna Tippayya were undivided and that all the

family properties devolved on Chinna Tippayya on the death of his brother, that Pedda Tippayya a few days before his death gave authority to Lakshmakka to make an adoption to him, and that Chinna Tippayya also gave authority to Lakshmakka to adopt any one of his own sons except the first in the event of his begetting sons, or otherwise any other boy. The first defendant further contends that Chinna Tippayya also agreed to give a half share of the properties to Lakshmakka, and that subsequently the properties were divided. He further contends that he was adopted by Lakshmakka in the year 1881, and that he had since been in enjoyment of the properties obtained in the division in his own right as well as of other properties acquired by him subsequently, apparently out of the income of the property obtained at the division.

Issues were framed as to the question of the status of the two brothers, as to the capacity in which Lakshmakka took a half share in the properties, as to the factum and validity of the adoption of the first defendant, as to limitation, and as to the properties the plaintiff would be entitled to recover in case she was entitled to succeed as reversioner after the death of Lakshmakka.

Having reviewed the evidence their Lordships accepted the District Judge's findings that the brothers were not divided during the life-time of Pedda Tippayya, and that Lakshmakka had no authority to make an adoption.

We have now to consider the second issue, "In what capacity did Lakshmakka, the widow of Pedda Tippayya, take a half share in the property?" The learned vakil for the appellant contends that she took only a widow's interest in it as the representative of her husband Pedda Tippayya, and that the plaintiff as his daughter was entitled to succeed to it on the death of Lakshmakka. The learned Advocate-General on the other hand contends that as the two brothers were undivided in interest and the property passed by survivorship to the junior brother, Lakshmakka must be taken to have obtained the half share purely as a bounty. He contends that on the correct construction of Exhibits IV and XVI what she took was a gift from her brother-in-law, and that, even if under those documents she was intended to have only a life-interest, her right cannot be taken to be a widow's estate descendible to the reversionary heirs of her husband, and that on her death the

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reversion would pass to Chinna Tippayya or his heirs, and that the plaintiff in any event has no right to succeed to the property. If Lakshmakka was promised an absolute right to the half share under Exhibit IV or got it subsequently by division between her and Bagamma, the plaintiff, is of course out of Court, as she is only a step-daughter of Lakshmakka. In our opinion, Exhibits IV and XVI must be taken together in order to determine the right acquired by Lakshmakka in the half share of the family property; and taken with the circumstances of the case, we have no doubt that the intention of the parties was that she was to have the half share as the representative of her deceased husband. If she validly adopted a boy, this share would pass to him; otherwise she would continue to hold it. She was no doubt not entitled to partition as the widow of a deceased coparcener. But it seems to be clear that it was the intention of Chinna Tippayya to treat her as if she was entitled to such a share. For what reason he did so it is immaterial to consider. If Chinna Tippayya could in law validly give her a widow's interest, we feel no doubt that her half share must pass to her husband's reversioners and the plaintiff being the nearest reversioner would be entitled to succeed. The learned Advocate-General contended that a woman's estate could be obtained by a Hindu female only by inheritance, that such an estate cannot be created by contract of parties or by a grant. We are unable to agree with him. It is not denied that a Hindu female is capable of possessing two different kinds of estate passing by different rules of inheritance, namely a woman's estate, with respect to which she does not become a stock of descent and which passes after her death to her husband's heirs, and an absolute estate which passes to her own heirs, *i.e.*, the heirs to a woman's *peculium*. It has been decided by the Judicial Committee of the Privy Council that a woman's estate may be created in favour of a daughter by contract. See *Radha Prosad Mullick* v. *Ranimoni Dassi*(1) and *Karim-ud-Din* v. *Gobind Krishna Narain*(2). And in determining the character of the estate taken in any particular case the rule enunciated in *Mahomed Shumsool* v. *Shewukram*(3) must be borne in mind that "in

(1) (1908) L.R., 35 I.A., 118. (2) (1909) L.R., 36 I.A., 138.
(3) (1874) L.R., 2 I.A., 7 at p. 14.

construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." That such an estate could be created is assumed in *Sambasiva Ayyar* v. *Visvam Ayyar*(1) and *Sambasiva Ayyar* v. *Venkataswara Ayyar*(2), though the learned Judges did not agree on the construction of the particular instrument in the case as to whether it created a widow's estate or an absolute estate. It has also been decided that property could be given to a Hindu male with the incidents of ancestral property in which his sons would acquire a right by birth. [See *Subbarayar* v. *Subbammal*(3) and *Sudarsanam Maistri* v. *Narasimhulu Maistri*(4). Per BHASHYAM AYYANGAR, J.; *Seth Jaidial* v. *Seth Sita Ram*(5) and *Munisami* v. *Maruthammal*(6).] We do not think that the observation in *Anandrão Vináyák* v. *Administrator-General of Bombay*(7), relied on by the learned Advocate-General throws any doubt on the possibility of such an estate being created. In *Timanna-charya* v. *Balacharya*(8) and *Bai Diwali* v. *Patel Bechardas*(9), there are observations to the effect that a stranger cannot give property to a Hindu impressing it with the character of ancestral estate. But assuming these observations to be well founded, they do not touch the present case where instead of an allotment for maintenance being made to Lakshmakka she is treated by her husband's coparcener more generously, and if given a half share of the property which her husband would have got on partition. The Advocate-General contended that to allow parties to create such an estate would enable them indirectly to contravene the provision of law that they cannot by grant create rights of property in favour of unborn or unascertained persons,

(1) (1907) I.L.R., 30 Mad., 356. (2) (1908) I.L.R., 31 Mad., 179.
(3) (1901) I.L.R., 24 Mad., 214 (P.C.).
(4) (1902) I.L.R., 25 Mad., 149 at pp. 154 and 155.
(5) (1881) L.R., 8 I.A., 215 at pp. 227 and 228. (6) (1910) 20 M.L.J., 687 (F.B.).
(7) (1896) I.L.R., 20 Bom., 450 at p. 465. (8) (1902) 4 Bom. L.R., 257.
(9) (1902) I.L.R., 26 Bom., 445.

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and he relies on the decision in *Nistarini Dassi* v. *Nundo Lal Bose*(1). That went in appeal to the Privy Council in *Benode Behari Bose* v. *Nistarini Dassi*(2). It was no doubt held in that case that a gift by will to the testator's reversionary heirs, whoever they might be after the death of his widow would be void. But it is no authority for the position that an estate known to and sanctioned by the Hindu law cannot be granted in favour of a Hindu female simply because the succession would pass on her death by law to her husband's heirs and not to the heirs to her *stridhanam* property. The heirs in such a case do not take under the grant itself but under the rules of law determining the line of inheritance to a particular kind of property held by the female owner. It has been decided that in the case of followers of the Marumakathayam law, a conveyance may be made to a woman with the incidents of tarward property so as to give a right to her unborn children. See *Kunhacha Umma* v. *Kutti Mammi Hajee*(3), *Kunhamina* v. *Kunhambi*(4) and *Katankandi Koma* v. *Sivasankaran*(5). The Advocate-General's agreement is really answered by the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6). There a Hindu executed a deed of gift of property in favour of his grandson and his brothers "who may be born hereafter." This gift was impeached as void on the ground that it was a gift to a class of persons some of whom were not born at the time of the gift. After deciding that the gift would take effect in favour of the grandson actually then existing, their Lordships observe as follows :—

"Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, Chapter vii, sections 10, 11 and 12, which is a Bengal authority, but it refers

(1) (1903) I.L.R., 30 Calc., 369.
(2) (1906) I.L.R., 33 Calc., 180 (P. C.).
(3) (1893) I.L.R., 16 Mad., 201.
(4) (1909) I.L.R., 32 Mad., 315.
(5) (1910) 20 M.L.J., 134.
(6) (1883) L.R., 11 I.A., 164 at p. 179.

to Vishnu and Yajnyavalkya authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely, but more closely, insisted on by the *Benares* school than by the *Bengal* school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between Satrujit's heirs on the one hand, and his brothers, if any should be born, on the other. They are only showing that the notions present to the mind of the head of a Hindu joint family who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

It has moreover been held that a Hindu female may by prescription acquire property impressed with the character of a widow's estate if the title she asserted during the time of prescription was that of a widow holding as representative of her husband. See *Bupanayya* v. *Peddichalamaiya*(1) and *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu*(2). It is unnecessary to consider whether a mere stranger can give property to a Hindu widow with the incidents of a widow's estate descendible to her husband's heirs. We think there can be no doubt that in circumstances like the present such an estate could be created. It amounts practically to nothing more than an allotment to Lakshmakka of a large share of the family property amounting to what her husband would have got at a partition instead of giving her a smaller portion which would be sufficient for her maintenance. We therefore hold that plaintiff is entitled to the properties of Lakshmakka.

The Lower Court has recorded no finding on the fifth issue. It will be requested to do so now after recording the evidence that the parties may adduce. The finding should be submitted within two months. Ten days will be allowed for objections.

In compliance with the order contained in the above judgment, the District Judge of Cuddapah submitted a finding. And on this Appeal coming on for final hearing after the return thereof the decree of the Lower Court was reversed with proportionate costs.

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(1) (1899) 9 M.L.J., 33. (2) (1897) I.L.R., 20 Mad., 256.