APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

MAMI *alias* NAGAPPAN (MINOR) BY NEXT FRIEND PALAYAM SUBBARAYAR (FIRST DEFENDANT), APPELLANT,

1911. October 18 and 19.

v.

SUBBARAYAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption by mother with the assent of a deceased son—Objection by existing sapinda—Invalidity of adoption.

A consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved of or objected to by the persons who are the nearest sapindas at the time the adoption is actually made.

Strange's Hindu Law, [Vol. I, p. 80], and Sircar on Adoption, [p. 255], not followed.

Per curiam. There is a distinction between the case of an adoption in an undivided family and that in a divided family, as regards the persons whose assent is sufficient.

The Collector of Madura v. *Mootoo Ramalinga Sathupathy* [(1868) 12 M.I.A., 396 at p. 442], *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*, [(1876) I.L.R., 1 Mad., 174], and *Subrahmanyam* v. *Venkamma*, [(1903) I.L.R., 26 Mad., 627 at p. 635], referred to.

SECOND APPEAL against the decree of R. D. BROADFOOT, the District Judge of Coimbatore, in Appeal No. 149 of 1909, presented against the decree of M. RAVI VARMA RAJA, the District Munsif of Kollegal in Original Suit No. 113 of 1908.

In this case A, an adopted son, left a will by which he authorized his widowed adoptive mother to adopt his natural younger brother. On the death of her adopted son, the widow adopted the boy which was not expressly consented to by any of the dayadis. Plaintiff, a near dayadi, filed this suit for a declaration of the invalidity of the adoption Both the lower courts declared that the adoption was invalid and set it aside for want of assent of the nearest sapinda to the adoption.

The Hon. the Advocate-General and *T. M. Krishnaswami Ayyar* for the appellant.

* Second Appeal No. 466 of 1910.

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T. R. Ramachandra Iyer and *K. B. Ranganada Iyer* for the respondent.

JUDGMENT.—The question in this case relates to the Hindu Law of Adoption and is not covered by any reported decision or the authority of any text. It is this: whether an adoption which is made by a Hindu widow with the authority of her son granted under a will is valid. The learned Advocate-General who supports the adoption contends that the son, while he was living, was the nearest sapinda of his father, and he having assented to the adoption being made it should be held to be valid, although after the son's death the nearest sapinda at the time objected to the adoption. The only thing in the nature of authority which the Advocate-General is able to cite in favour of his proposition is the opinion of a Pandit of Vizagapatam reported in Sir Thomas Strange's Hindu Law (Vol. I, page 80 and Vol. II, page 95). It does not appear that this opinion formed the basis of decision in any case, and all that Sir Thomas Strange says in connection with it is that it has been thought that adoption under such authority or sanction would be valid according to the principle of the Benares school. The Advocate-General has also drawn our attention to Sircar's Tagore Lectures on the Law of Adoption, page 255, but the learned writer does not carry the matter any further than as resting upon the opinion of the Pundit in question.

On the other hand, all the decided cases brought to our notice, in which an adoption made with the assent of sapindas has been upheld, were cases in which the sapindas, who were competent to express any opinion on the matter and authorized or assented to the adoption were living at the time of the adoption. No case has been brought to our notice in which the authority given by a deceased sapinda who while living was the one most competent to decide upon the propriety or otherwise of the adoption being made was held to be sufficient to authorise an adoption made after his death in disregard of the opinion of the nearest sapindas who were living at the date of adoption and had not joined the deceased sapinda in giving the authority. The question is, should we be justified in extending the rule regarding adoptions with the assent of sapindas to a case like this. It is not quite easy to ascertain the exact principle on which the necessity or sufficiency of the assent of sapindas is based. The leading authority on

the subject is *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(1). In that case their Lordships seem to draw a distinction between the case of an adoption in an undivided family and that in a divided family. In a case of the former class, the judicial committee seem to be of opinion that the undivided male members ought to be consulted both because they are the natural protectors and guardians of the widow, and because their interest in the family property would be affected by the adoption, while in the latter case they seem inclined to lay more emphasis on the presumed incapacity of a widow in the eye of Hindu Law to judge for herself rather than on the fact that the presumptive or reversionary rights of the sapindas would be defeated by the adoption. They have made it clear in that case, as explained in the later case in *Vetcanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(2) that the assent to be given must be in the nature of a decision of a family council on the propriety or expediency of the adoption. Having regard to the difficulty that would arise in the working of the law, if the assent of all the kinsmen, however remote, were deemed to be necessary, it has been held [see *Subrahmanyam* v. *Venkamma*(3)] that the principle of the decisions of the Privy Council would be satisfied if the consent of the nearest sapindas, even if there is only one such, be obtained. But it cannot be said to have been in the contemplation of the learned judges who held so, that the consent of the nearest sapinda would be sufficient, even if at the time of adoption that sapinda is no longer living, and the person who is the nearest sapinda at the time does not consent to the adoption. It must, we think, be conceded that, if a sapinda who has even given his consent withdraws it, afterwards the widow would not be entitled to act upon such consent and it seems to us to be unreasonable to hold that a consent once given should become irrevocable by the death of the sapinda giving the consent, so as to override the opinion of the sapindas who subsequently became entitled to be heard. But it is contended that, if the authority is acted upon within a reasonable time, that ought to be sufficient to obviate the necessity of obtaining the consent of the sapindas living at the date of adoption. No doubt it may not be necessary that the

(1) (1868) 12 M.I.A., 396 at p. 442. (2) (1876) I.L.R., 1 Mad., p. 174.
(3) (1903) I.L.R., 26 Mad., 627 at p. 635.

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consent should be given actually at the time the adoption is made, but it seems to us that at any rate a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made.

We think the decree of the lower courts is correct and dismiss the Second Appeal with costs.

APPELLATE CIVIL.

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

1911. November 2 and 7.

SENGODA GOUNDAN (PLAINTIFF)—APPELLANT,

v.

VARADAPPAN *alias* RASA GOUNDAN AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Tree Patta—Effect of cancellation of, on land-pattadar—No resumption or grant to the latter—Right of tree-pattadar for the trees even after cancellation as against land-pattadar—Possessory right, protection of, as against trespassers.

A person who was in possession until dispossessed by defendants who having no title as owners were mere trespassers is entitled to rely on his possession and succeed in a suit to eject them.

Narayana Rao v. *Dharmachar* (1903) I.L.R., 26 Mad., 514 and *Subbaroya Chetty* v. *Aiyasami Aiyar* (1909) I.L.R., 32 Mad., 86, followed.

In the absence of proof to the contrary, a cancellation of a patta issued by the Government in favour of the plaintiff in respect of trees standing on certain lands for which lands the patta was being issued in favour of defendants does not amount to a resumption of possession of the trees by the Government or to a grant of them by the Government to the defendants. The only effect of cancellation of the patta for the trees was that the Government no longer made any demand on the tree pattadars for revenue in respect of the trees.

The facts that when both pattas were in existence the land-pattadar was credited with whatever revenue was collected from the tree-pattadar, and that on cancellation of the tree patta the whole revenue was payable by the land-pattadar cannot amount to a grant of the trees to the land-pattadar. On the rights of tree-pattadar and land-pattadar. Reference under Section 39 of Madras Forest Act, [(1889) I.L.R., 12 Mad., 203] and *Theivu Pundithan* v. *Secretary of State for India* [(1898) I.L.R., 21 Mad., 433], referred to.

SECOND APPEAL against the decree of W. B. ATLING, the District Judge of Salem, in Appeal No. 188 of 1909, presented against

* Second Appeal No. 726 of 1910.