of trading profits for the year 1926–27 registration ought not to have been refused as four months of that trading year were before the expiration of the deed of the 31st of August 1923. We cannot accede to this contention. What we have to look to is the year of assessment; and had the application of the 21st of July 1927 been granted, it would still in our opinion only apply to the financial year 1927–28. On these grounds, we think that the Commissioner was right in rejecting the application for registration and that we must so answer the question submitted to us and order the assessee to pay the Government Rs. 250 as the cost of this reference.

My learned brothers have seen this Judgment and agree with it.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice, and Mr. Justice Srinivasa Ayyangar,*
(and afterwards)
before Mr. Justice Srinivasa Ayyangar and Mr. Justice Reilly.

TIRUVENGALAM AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

KODALI BUTCHAYYA (PLAINTIFF), RESPONDENT.*

1927, August 1.

Hindu Law—Authority to adopt given to two widows—Participation of both widows in adoption—Validity of adoption—Trusteeship of charity—Adopted son's right to trusteeship vested in adoptive father.

Where a Hindu died leaving two widows to both of whom he gave a joint authority to adopt, an adoption made by them jointly is not invalid, though the son adopted would in law be the son only of the senior widow who alone has the preferential

* Appeal No. 402 of 1923.

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right to adopt, the junior widow being considered only as his step-mother.

In the absence of any rule regulating the succession to the office of trusteeship of a charity held by a person, the office descends to his heirs just like his private property, and when an adoption is made to him by his widow, the son on adoption divests her not only of her husband's private properties but also of the trusteeship which she was having as his widow.

APPEAL against the decree of the Court of the Subordinate Judge of Bapatla in Original Suit No. 56 of 1919.

In this case, one Butchayya died leaving two widows, Pullamma and Lakshmamma, to both of whom he gave authority to adopt by means of his will (Exhibit A). The two widows jointly adopted the plaintiff, who then brought this suit to recover the office of trusteeship of a charity, which the deceased testator was exercising along with his brother, the first defendant. The defendants contended *inter alia*, (*a*) that, on the construction of the will, the plaintiff was not the person designated by the testator for adoption, (*b*) that an adoption by both the widows was invalid in law and, (*c*) that at any rate the trusteeship would not in law pass to the plaintiff on adoption. Overruling all these contentions, the Subordinate Judge gave a decree to the plaintiff as prayed for. Further facts appear from the judgment.

The defendants preferred this appeal.

T. V. Venkatarama Ayyar (with *T. V. Ramanathan*) for appellants.—An adoption by two widows is invalid in law; see the dictum of the Privy Council in *Narasimha* v. *Parthasarathy*(1). A trusteeship for life which the widow was having cannot be inherited by the adopted son; see Ganapathy Ayyar's Religious Endowments, second edition, page 477; *Mallikarjuna* v. *Sridevamma*(2). Reference was also made to *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*(3), *Thandavaroya Pillai* v. *Shunmugam Pillai*(4) and *Kunjamani Dasi* v. *Nikunja Behari* (5).

(1) (1913) I.L.R., 37 Mad., 199 at 220 (P.C.).
(2) (1897) I.L.R., 20 Mad., 162 (P.C.)
(3) (1897) I.L.R., 19 All., 428.
(4) (1908) I.L.R., 32 Mad., 167.
(5) (1915) 22 C.L.J., 404.

A. Krishnaswami Ayyar (with *Ch. Raghava Rao*) for respondent.—Courts should put such a construction on the power to adopt as would make it valid. The dictum in *Narasimha* v. *Parthasarathy* is only *obiter*. The adoption, in which both the widows participated, must be considered as having been made only by the senior widow, in which the junior widow acquiesced. In law, the adopted son stands in the same position as a natural son and like him inherits to all that the adoptive father owned; the adoption, when made, is deemed to date back to the death of the adoptive father and he divests the adoptive mother of her estate. See *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji*(1). In the absence of any rule prescribing a mode of succession to the trusteeship, the office descends to the heirs like any other private property. *Mallikarjuna* v. *Sridevamma*(2) does not bear out the statement made in Ganapathy Ayyar's book.

The JUDGMENT of the Court on the first occasion (COUTTS TROTTER, C.J., and SRINIVASA AYYANGAR, J.) was delivered by

SRINIVASA AYYANGAR, J.—The question that arises for determination in this appeal is of considerable difficulty and great interest in the Hindu Law of adoption, though it is not likely to arise frequently. It is no doubt in connection with the office of trusteeship of a temple claimed by the plaintiff jointly with the first defendant that the question has risen, but the main point raised and discussed in appeal before us related to the validity of the adoption on which the plaintiff has based his right.

The learned Subordinate Judge in the Court below found in favour of the adoption and upheld the plaintiff's claim and granted a decree. The defendants have appealed.

Two points have now been argued on behalf of the appellants in this appeal and one of them is comparatively a small one and may be disposed of immediately.

(1) (1918) I.L.R., 43 Bom., 778 (P.C.). (2) (1897) I.L.R., 20 Mad., 162 (P.C.).

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Exhibit A is the will of the deceased Buchayya by which he gave authority to his two widows, Pullamma and Lakshmamma, to make an adoption. The portion of the will referring to the adoption has been translated thus:

> "If my younger brother Tiruvengalam should beget sons, you should take in adoption any of these children, or the children of any other persons, if you are desirous of doing so, and at a time when you wish to do it."

The contention put forward with regard to this clause in the will is that the adoption made by the widows not having been of a son of the first defendant, cannot be regarded as valid. The argument was that in this clause the testator has given a direction that in making the adoption preference should be given by the widows to a son of his brother Tiruvengalam. The learned Subordinate Judge has found against this construction of the will. We are satisfied that the construction placed on the will by the learned Subordinate Judge is correct. In fact, there is a great deal to be said in favour of the view adopted by the lower Court that it was only in the event of the first defendant having more than one son that the testator intended that his widows may, if they should have no objection, adopt one of his sons. It is quite possible that the testator did not contemplate his brother being deprived of his only son by adoption in the event of the brother not having more than one son. Further, it is only if the widows should be desirous of doing so, it is stated, that they should take in adoption one of the sons of the brother. We have therefore very little hesitation in repelling the contention. The other question, however, is more difficult of solution. In making the adoption it is admitted that both the said widows of the deceased testator participated. On this, it has been argued that under the Hindu Law the

adoption to a deceased husband can be made only by one of the two widows duly authorized and that the adoption made by both the widows must be regarded as invalid. For this purpose Mr. T. V. Venkatarama Ayyar, the learned vakil for the appellants, strongly relied upon the observations of their Lordships of the Judicial Committee in the case of *Narasimha* v. *Parthasarathy*(1). No doubt at page 220 of the report, Lord MOULTON delivering the judgment of their Lordships observes as follows :—

"In the next place, only one wife can receive a child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grand-parents of the child. To hold that a child can bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance."

But it must be observed that, having made these observations, their Lordships proceed to state that—

"It is not necessary that those points should be decided and they desire to express no opinion upon them and will assume for the purposes of their position that the respondents are right in their contention that such a joint power of adoption to two widows was, if properly interpreted, a valid power and that, if they had agreed to a person to be chosen for such adoption, they could have validly executed the power."

Thereupon their Lordships proceed to construe the power in question in that case having regard to the surrounding circumstances and contemporaneous documents put in evidence and state that according to the true intention of the donor, the power given was a joint power to both the widows and came to the conclusion that as it was a joint power, it could not

(1) (1913) I.L.R., 37 Mad., 199 at 220 (P.C.).

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validly be exercised, after the death of one of the donees of the power by the survivor as *persona designata*.

Special reference may also be made in this connexion to the following observations in the judgment of their Lordships at the bottom of page 220:

> "But it does not follow as a matter of necessity from these considerations that a power given to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships, there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife."

From the fact that both the widows are the donees of the power to adopt, it follows that the power must be exercised by both or with the concurrence of both, and any adoption made by only one of the widows is open to the obvious objection that an adoption made by the exercise of the power only by one of the donees is invalid.

The question thus resolves itself into whether by the mere concurrence in making the adoption of both the widows, there is anything in Hindu Law to make the adoption itself invalid. Though the observations of their Lordships of the Judicial Committee above cited are very strong with regard to the invalidity of an adoption made to two widows at the same time, those observations were not, it must be noted, required for the decision of the case before them. It may also be observed that, after all, an adoption in Hindu Law is based on what is essentially a fiction, and there must be obvious limits to the extension of such a fiction and if the fiction should be regarded as substituting adoption in the place of the natural birth of the son, it must follow that a bachelor cannot validly adopt, and this is certainly not the law as recognized.

If it be merely regarded as a fiction, there must be no difficulty whatever in a person bearing the same relationship to two or more persons. However, it seems to us that, having regard to the genius of the Hindu Law and what may be regarded as the custom and consciousness of the community at large at any rate in South India, it will be more in accordance with the reason of the thing, the principle applicable and the observations of their Lordships of the Judicial Committee, to regard the adoption in this case as having been made by and to the senior widow Pullamma, though with the concurrence of the other widow.

Apart from the observations of the Judicial Committee referring to the possibility of an adoption made in those circumstances being so regarded, there is clear authority in this Court in favour of such a view. In the decision in *Rajah Venkatappa Nayanim Bahadur* v. *Ranga Rao*(1), to which one of us was a party, it was held by the learned Chief Justice that an adoption made by a junior widow with the consent of the sapindas but without the consent of the senior widow was invalid in law. The decision in that case clearly proceeds on the recognition of the preferential rights of the senior widow as regards religious rites. The learned Chief Justice has referred to various Hindu Law texts in support of that view. In the same case, the decision of this Court by SANKARAN NAYAR and SPENCER, JJ., in the case of *Kakerla Chukkamma* v. *Kakerla Punnamma*(2), where it was held that the senior widow had a preferential right to adopt and that, so long as that preferential right subsisted, the junior widow had no right to adopt, was cited with approval and it was also indicated that any other view might have the effect

(1) (1915) I.L.R., 39 Mad., 772. (2) (1915) 28 M.L.J., 72.

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of tending to unsettle the former decisions of this Court and give encouragement to its being challenged in other cases.

We may also in this connexion refer to the text of Kathyayana where the first and senior wife is said to be the *Dharma pathni*, that is to say, the wife wed for the purpose of performing religious rites and duties and the second and succeeding wives spoken of as merely for the purpose of love or lust. Again, in the Chapter treating of Vivaha-Samskara, it is stated in the commentary that after the sacrificial fire is created along with one wife, the wives afterwards taken do not acquire equal rights with the first wife in respect of the oblations, unless both the wives together again officiate in creating a new sacrificial fire. In the shastras are to be found scattered about many texts which give prominence to and recognize the superiority of the first wife or the *Dharma pathni*.

There is also a well-established rule that when the husband dies sonless, the funeral ceremonies should be performed only by the first and senior wife. Again, as in the making of Dattahomam, only one person can at a time perform the Homam, it cannot be performed by both or on behalf of both simultaneously. Hence also it is deducible that, though both may be present and participate in the performance of the Homam, it is shastraically performed only by the senior and deemed to have been performed only by her.

Having regard to all these and other similar texts and considerations recognized by several decisions in this Court, it is clear that even though both the widows might have concurred in making the adoption, the act of adoption should be deemed to have been made only by the senior widow and to herself as mother. In that case it is pointed out by their Lordships of the Judicial

Committee that the other wife who participates becomes only a step-mother. Assuming therefore that the authority in this case given by the husband to his two widows to adopt should be construed only as a joint power, that is, a power to be exercised by both of them, that condition has been fulfilled in this case, because admittedly both the widows participated in the ceremony. But there is no necessity to regard the adoption as having been made to both the mothers, more especially if it is to be supposed that there can be no valid or legal adoption to two mothers at the same time. We must assume that a Hindu husband who for the purpose of continuing his line and providing for the performance of religious ceremonies for the salvation of his soul authorizes an adoption to be made, did not authorize an invalid adoption. The reasonable construction to be placed on the terms of the will is that the direction was merely to the effect that, unless both the wives should be willing, no adoption should be made and that the boy to be adopted should be chosen by both. On the adoption being made, the appropriation of the son to the senior wife would almost seem to be by process of shastraic reasoning.

No question in this case arises with regard to the adoption made to the husband having been either to the one or the other wife as mother. Having regard to the nature of the rights claimed, the only question is whether it has been a valid adoption to the deceased testator. If therefore we find that there was a joint power to adopt and that in the exercise of that power there has been a valid adoption, it follows that, so far as that question is concerned, the plaintiff's right must be upheld. The plaintiff has in this suit claimed only as trustee in succession to his adoptive mother.

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At this stage, it is intimated on behalf of the appellants that, in the view taken by us with regard to this question, there are other questions raised on behalf of the appellants, which would require to be considered and decided. For this purpose the case will be posted for hearing after the long vacation before any bench hearing first appeals. Costs reserved.

The appeal coming on for hearing again, the Court (SRINIVASA AYYANGAR and REILLY, JJ. delivered the following

JUDGMENT.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—This case came up originally for disposal before the learned Chief Justice and myself, when two points of a preliminary character were argued for the appellants by their learned Vakil. Now, after the judgment has been delivered with regard to those two points, he intimated that there were other questions which he wished to raise on behalf of the appellants and it was necessary that those points should also be considered and disposed of.

Mr. Venkatarama Ayyar, the learned Vakil, has now raised a very ingenious contention. The plaintiff in this action having sued for joint possession of the office of trusteeship along with the first defendant, it has been contended by Mr. Venkatarama Ayyar that the office of trusteeship was not on the date of the suit, and is not even now, vested in the plaintiff in such a manner as to entitle him to any such relief or possession, because on the death of the adoptive father of the plaintiff his two widows succeeded to the office of trusteeship. Those two widows are still alive. They must still be regarded as having vested in them the trusteeship. Though the plaintiff might, having regard to the judgment of this Court, be regarded as having been validly adopted to the deceased, still such an

adoption could only have the effect of divesting the widows only with regard to the private family property which has become vested in them as the legal representatives of their husband and must be limited to the property in which the deceased had a beneficial interest. There is no principle of law on which it can be held that the adoption by a widow of a person to her deceased husband has not the effect of divesting not merely the personal estate which she has inherited from her husband but also any office, such as the office of a trusteeship which she might have inherited from him. I think it might be conceded that there is no direct authority for the position that the adoption by a widow has the effect of divesting her of the office. It may be that there is no such decision, because no one ever thought of raising any such contention. Practically, therefore, this question has to be considered and disposed of merely on the general principles of Hindu Law applicable to the point. The only case, on which Mr. Venkatarama Ayyar placed great reliance for the purpose of supporting his contention, was *Mallikarjuna* v. *Sridevamma*(1). That was a case of a promissory note. The suit was instituted by the widow who had succeeded as trustee in respect of certain choultry charities to her husband. In the High Court the adopted son was made a party and the defendant against whom the decree was passed appealed to the Privy Council and their Lordships in their judgment have dealt only with two pleas and contentions argued on behalf of the defendants-appellants. It was not contended in that case that the plaintiff who was suing on the note as representing the charity did not fill that character and no issue arose as to whether the trusteeship had then become vested in some other

(1) (1897) I.L.R., 20 Mad., 162 (P.C.).

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person. In fact Mr. Venkatarama Ayyar, while conceding that there was no plea of that character in that case and therefore no discussion of the question, merely argued that, if such contention was open, it was unlikely that the same would not have been put forward by the very learned counsel before their Lordships. However, having regard to the decision, it is perfectly clear that there are no statements in it and it is not a decision for any point that arises in this case. On the finding of their Lordships that the plaintiff filled in that case the character of the trustee of the charities on behalf of which she was suing to recover the amount of the promissory note, it became clear that none of the questions that are argued here could have arisen. Then what is the principle on which the succession to the office of trusteeship depends? Primarily, as argued by Mr. Venkatarama Ayyar himself, it depends upon the original terms of the foundation of the trust. If according to those terms a line of succession was prescribed, that would have to be followed. If not, it is clear that the trustee, that is appointed, will take the office and will transmit the office to his heirs in succession, if the true intention of the maker of the trust was that the office should be hereditary in the trustee. If not, there is also authority for holding that the trusteeship will revert to the family of the founder. In this case the curious point to be observed is that in the written statement filed on behalf of the defendants the office of trusteeship is clearly regarded, dealt with and contended to be just like all the other property of the family passing by survivorship and by succession. There was no plea put forward in the lower Court that the line of succession according to the rule of this institution was anything but hereditary. In fact it may be observed that the fact that the trusteeship is hereditary

is the common foundation of the case of both the parties. In such a case, what is to be observed is that the trusteeship, whether it is in the family of the trustee or in the family of the founder, must be held to vest in all persons who at the particular moment constitute the family, or, in other words, represent the family. There is no question of partition at all. Mr. Venkatarama Ayyar referred to the case in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*(1), and other cases where it was held that the office of trusteeship cannot be made the subject of a partition by a Court of Law. There is no question of partition at all in this case. It is only an instance of the office coming to be held by a number of persons at the same time as joint possessors of the office. The prayer in the plaint in this case is only for that purpose. If, according to the contentions which were common to both parties in this case, the office of trusteeship was hereditary in this family, then the simple question is, who at the time of the institution of this suit should be regarded as representing the members of this family. Undoubtedly, the plaintiff and the defendants. No doubt, before the adoption, the two widows represented their deceased husband, but their representative character continued and must be deemed to have continued until a valid adoption was made to their deceased husband. From the moment of that adoption, they ceased to represent their husband, the family and the family estate and such representation became vested only in the adopted son. Therefore it follows that, according to the assumed intention of the founder or according to the admitted rule of this institution, the trusteeship should be regarded as hereditary in this family and it follows from the adoption of the plaintiff that the right to the office became vested in him.

(1) (1897) I.L.R., 19 All., 428.

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The matter may be put also in a slightly different manner. If, as admitted, in the absence of any special provision with regard to succession to the office of trusteeship, the ordinary rule of inheritance should be followed, it is clear that the ordinary rule of inheritance being that the widow's estate becomes divested on a valid adoption being made and the office being property like other properties, it follows that this office which the widow is divested of, becomes vested in the adopted son. In fact, in the case of *Thandavaroya Pillai* v. *Shunmugam Pillai*(1), it was held by the learned Judge that when a trusteeship is vested in a family and the members of the family remain undivided, the senior member of the family is entitled to manage the family properties and also exercise the right of management vested in the family on behalf of the trust. They say at page 169:

> "But until partition no junior member is entitled to management of the trust in rotation any more than he is entitled to such possession or management of any family property."

The decision in this case seems clearly to point to the view of the learned Judges that there was no difference in this matter between the office of trusteeship and the estate of the family. Another case also cited by the learned vakil for the appellants is *Kunjamani Dasi* v. *Nikunja Behari*(2). In this case the learned Judges say that, when the office has become vested in persons who at the time constitute the heirs of the founder, upon the death of each member of the group, it passes by succession to his heir. That also makes it abundantly clear that, when the office is held by a number of persons jointly, the right to the office on the death of any of the joint holders passes to his personal heirs, i.e., to those who would be his heirs in

(1) (1908) I.L.R., 32 Mad., 167. (2) (1915) 22 C.L.J., 404.

respect of his separate property. If so, it is difficult to see how, on a widow making a valid adoption to her deceased husband and all the estate, right, title and interest of her husband becoming immediately vested in the adopted son, only the office of trusteeship continues to remain vested in her. It is unnecessary to refer at great length to all those decisions, many of them by their Lordships of the Judicial Committee, where effect has been given to the theory of the Hindu Law that the adopted son must for most purposes be regarded as having been born at the time of the death of the person to whom he is adopted. If the adopted son had been in existence, it cannot be denied that the office would have passed on to him and reference need not also be made to cases where it has been held that the vesting of the estate in the widow who has had from her husband authority to adopt is a sort of suspended vesting and liable at any time to be divested on the exercise of the power. In fact the effect of divesting has been extended even to collaterals as has been justly pointed out by Mr. Alladi Krishnaswami Ayyar. We are therefore of opinion that there is no point in the contention that the plaintiff did not succeed to the office of trusteeship on his being validly adopted, as has been found by this Court already.

None of the other points which were raised in the Court below have been argued before us. It follows that the appeal fails and must be dismissed with costs.

The memorandum of objections is dismissed with costs, but any claim therein may be made the subject-matter of a separate suit.

REILLY, J.—I agree.

N.R.