The question of interest was not seriously contested and there is no reason why the plaintiff should not get it at the rate allowed by the lower Court, when she has been deprived of the use of her dower for such a long time although it has been found to have been payable to her on demand.

For the reasons given I would dismiss the appeal with costs throughout.

A.S.V.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and Mr. Justice Madhavan Nair.

VARADA NARAYANA AYYANGAR (SECOND DEFENDANT), APPELLANT,

v.

VENGU AMMAL AND TWO OTHERS (PLAINTIFF AND DEFENDANTS 3 AND 4), RESPONDENTS.*

1937, September 30.

Hindu Law—Adoption—Testator giving strong directions in his will to his widow to adopt and appointing some executors to be in possession during minority of adopted son—Refusal of widow to adopt—Absence of right to compel her to adopt—Claim by her of estate in the hands of executors—Resistance by executors on the ground that she might change her mind—Illegality of.

A testator by his will directed his widow to adopt his nephew S and stated that if S's father refused to give his son in adoption she should adopt another boy. The will provided that the executors should remain in possession of the property during the minority of the adopted son, but on his attaining majority they should hand over the estate to him. The

* Appeal No. 38 of 1932.

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executors took possession of the properties. The widow refused to exercise the power of adoption and filed a suit against the executors for the recovery of possession of the properties of her husband.

Held: A widow cannot be compelled to follow her husband's wishes in the matter of adopting a son however strong the directions of her husband might have been and she cannot be deprived of her widow's interest in his property because she may at some later stage decide to follow his behest.

Bamundoss Mookerjea v. *Mussamut Tarinee*(1), *Uma Sunduri Dabee* v. *Sourobinee Dabee*(2), *Shamavahoo* v. *Dwarkadas Vasanji*(3) and *Vanama Akkayya* v. *Vanama Lakshmamma*(4) followed.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 22 of 1929.

C. Narasimhachari and *M. E. Rajagopalachari* for appellant.

P. N. Appuswami Ayyar for respondents.

LEACH C.J.

LEACH C.J.—This appeal arises out of a suit filed by the first respondent to recover from the appellant and the second and the third respondents her deceased husband's estate. The first respondent is the widow of one Tirumala Ayyangar, who died on 23rd February 1921 having made a will four days previously. The appellant and the second and third respondents are the executors under the will. By his will the testator directed his widow to adopt his nephew Srinivasan and stated that if Srinivasan's father refused to give his son in adoption she should adopt another boy. The will provided that the executors should remain in possession of the property during the minority of the adopted son, but on

(1) (1858) 7 M.I.A. 169. (2) (1881) I.L.R. 7 Cal. 288.
(3) (1878) I.L.R. 12 Bom. 202. (4) (1927) 27 L.W. 370.

his attaining majority they should hand over the estate to him. The will also directed that Rs. 10 a year should be spent on the expenses of his annual ceremony, Rs. 10 towards the expenses of the annual ceremonies of his two deceased wives, and a sum of Rs. 3 on the annual ceremony of his deceased *guru*. The will was drafted and executed on the assumption that the first respondent would fulfil the testator's direction and adopt his nephew Srinivasan or failing him another boy. The first respondent refused to carry out her husband's wishes. She alleged that the will had been executed while her husband was of unsound mind and was, therefore, invalid. On 4th July 1921 she instituted Original Suit No. 405 of 1921 in the District Munsif's Court of Srivilliputtur for a declaration to this effect and for the recovery of possession of the properties. The District Munsif held that the testator was of sound mind and that the will was a valid one, but he refused to give the first respondent possession of the properties on the ground that the first respondent might change her mind and adopt a son to her deceased husband. In that suit it was alleged by the executors that the testator had in fact adopted Srinivasan before he died, but this was held not to be true. An appeal followed to the Court of the Subordinate Judge of Ramnad, who reversed the decree passed by the District Munsif and ordered the estate properties to be delivered to the first respondent as the widow of the testator. This decision followed a finding that the authority to adopt had been given to the executors and, therefore, was not a valid authority. The learned Subordinate Judge agreed, however, with the

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District Munsif that there had been no adoption of Srinivasan. The matter was carried to this Court (Second Appeal No. 597 of 1926). This Court held that the Subordinate Judge was wrong in holding that the power of adoption had been given to the executors. The power had been given to the widow. The appeal was accordingly allowed and the parties were left to their respective rights on the basis that the will was genuine.

On 29th September 1928 the first respondent filed the present suit in the Subordinate Judge's Court for a declaration that she was entitled to the estate, having refused to adopt a son to her husband, and for possession of the properties with mesne profits. The learned Subordinate Judge held that as she had refused to adopt she was entitled to the estate and that the executors were, therefore, bound to hand the properties over to her. This decision is challenged on three grounds:—(i) that the decision in the previous suit operated as *res judicata*; (ii) that the will created a trust in favour of the executors and they were entitled to remain in possession because the first respondent might change her mind; and (iii) that on a proper construction of the will Srinivasan was entitled to the properties as the legatee.

The plea that the previous litigation operated as *res judicata* cannot be maintained in view of the judgment of this Court in Second Appeal No. 597 of 1926. In the previous appeal there was much argument on the question of what were the rights of the first respondent under the will. The Court, however, did not consider that it was

necessary to go into that question, because the first respondent's claim was against the will and not under it. This having been pointed out by the Court, the learned Advocates agreed that there should be no adjudication of the first respondent's claim under the will. So far as that was concerned the question was left open. There having been no decision on questions arising under the will, the doctrine of *res judicata* can have no application here.

Coming now to the second point, it is quite clear that the will does not create any trust. It directs that the executors shall remain in possession of the properties and the income during the minority of the adopted son, but it is conceded that if a son had been adopted they would be bound under its terms to hand all the properties over to him on his coming of age. It is also conceded that on this event happening the duty of fulfilling the testator's directions with regard to the annual ceremonies would devolve on the adopted son, and the executors would have no further duties to perform. But it is said that because the widow has refused to adopt it does not mean that she will persist in her refusal. She may change her mind, and that, pending this uncertain event, the executors are in law entitled to remain in possession. I might mention here that the executors also happen to be the reversioners. The argument amounts to this. The properties must remain in the hands of the executors until the death of the first respondent, because until the breath has departed from her body she may change her mind. But a widow cannot be compelled to follow her husband's wishes in the

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matter of adopting a son ; *Bamundoss Mookerjea* v. *Mussamut Tarinee*(1). Now, as a Hindu widow cannot be compelled to adopt, however strong the direction of her husband might have been, is she to be deprived of her widow's interest in his property because she may at some later stage decide to follow his behest? The answer to my mind must be in the negative. If she says "I refuse to adopt", she is entitled to be put in possession of her deceased husband's estate and it was decided so in a case which resembles in many respects this case; *Uma Sunduri Dabee* v. *Sourobinee Dabee*(2). In that case the husband directed by his will that if his wife (who was *enciente* at the time the will was made) did not give birth to a son, or if she did and the son died, she was to adopt a son. She refused to comply with his direction. It was held that she was entitled to do so and the fact that she did refuse made the direction under the will for all legal purposes non-existent. CUNNINGHAM J. observed :

"We think, however, that the observations of the Sadr Court must be accepted as favouring the proposition that such a legal obligation cannot be created; and the remarks of PEACOCK C.J. in *Prasannamayi Dasi* v. *Kadambini Dasi*(3) are an authority for the view that the widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.

We cannot therefore regard the language of the testator as having created a trust which the widow is legally bound to carry out. She is at liberty to comply with her husband's directions or not as she pleases; and her omission or refusal to do so is no bar to her rights of inheritance. Accordingly the contingency for which the will provides not having occurred,

(1) (1858) 7 M.I.A. 169. (2) (1881) I.L.R. 7 Cal. 288.
(3) (1868) 3 Ben. L.R. (O.J.) 85, 90.

and there being no gift over, the testator must be regarded as intestate and his widow as heiress-at-law entitled to succeed ".

In the case before us there is no gift over. A similar decision was given by SARGENT J. in *Shamavahoo* v. *Dwarkadas Vasanji*(1) and by DEVADOSS J. in *Vanama Akkayya* v. *Vanama Lakshmamma*(2). There is, therefore, ample authority in support of the decision of the trial Court. As I have mentioned, the will was drawn up and executed on the basis that she would adopt. She has refused to adopt, and therefore she is entitled to receive the properties as on intestacy.

The argument that the testator did use words in his will which warrant the Court holding that Srinivasan was named as his heir is based on this passage:

> " In accordance therewith, I have hereby authorised the said executors to have the said Srinivasan, son of Govindam Ayyangar, adopted after my lifetime and to have my funeral rites performed by him."

There is here, however, nothing to support the argument and the matter is put beyond all doubt by the next passage which is as follows:

> " In case the said Govindam Ayyangar raises any objection to give his son in adoption in the said manner, the executors are authorised to seek for a proper son elsewhere and to get him adopted."

Srinivasan got nothing under the will unless the adoption took place, and the appellant's third argument must therefore fall to the ground.

A further point has been taken which has nothing to do with the other arguments, namely, that the learned trial Judge was wrong in only allowing the executors a sum of Rs. 516-10-0 as costs of the previous litigation. The executors

(1) (1878) I.L.R. 12 Bom. 202. (2) (1927) 27 L.W. 370.

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say that they should be allowed a sum of Rs. 1,085-5-0, which is the amount actually spent by them in this litigation. The learned Subordinate Judge has given very good reasons why he did not allow the full claim. In the previous suit the executors, as I have indicated, set up a case that Srinivasan had, in fact, been adopted by the testator before his death. This was found to be untrue, and as they had put forward a false plea, the learned Subordinate Judge held that they were not entitled to all that they had spent in the litigation. I consider that this is a proper decision. The objection to the decree in this respect must, therefore, also be dismissed.

As the appeal fails it must be dismissed with costs in favour of the first respondent.

MADHAVAN NAIR J.

MADHAVAN NAIR J.—I entirely agree, but as the point of Hindu law argued before us is of some importance and as there has been no express decision by any Bench of this Court I wish to add a few words. Adoption by a Hindu widow is a power which she exercises in her own right, but she exercises that power under direction from her husband or by obtaining the consent of the nearest sapindas. But this power she cannot be compelled to execute. The fact that a boy to be adopted is mentioned in the will of her husband does not, in my opinion, affect the question. In this connection a passage from Mayne's Hindu Law may be usefully referred to. The learned author says :

> "It is no doubt upon the same principle that an express authority, or even direction, by a husband, to his widow to adopt is, for all legal purposes, absolutely non-existent until it is acted upon."

I think it may now be taken that the law is well settled that a Hindu widow cannot be compelled to adopt, nor will a suit lie to enforce her to do so. The reason is obvious. Adoption is not a compulsory religious obligation whatever the moral obligation on the widow may be. This being the position, what would be the result if a Hindu widow who was enjoined by her husband to adopt refused to adopt? The texts of Hindu law are silent on this point; but there are a few decisions on the question and as these have been referred to by my Lord in his judgment, it is not necessary for me to refer to them again. Of course, the position would be different if a trust had been created by the husband in his will. There is no foundation for the argument put forward in this case that a trust has been created under the will. The chief argument urged in favour of the view that the widow is not entitled to get the properties from the executors is, what will happen if the widow adopts at some later stage? The answer is, if she adopts she will then be deprived of the properties and they will vest in the adopted son. The purpose for which the will has been executed by the husband has not been found to be enforceable. In my opinion the property would, on the refusal of the widow to adopt, vest in her. I agree with the order passed by my Lord the CHIEF JUSTICE. On the subsidiary points also I entirely agree with him and have nothing to add.

G.R.