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for mesne profits for more than three years prior to the suit was barred by time.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

1927 *February*, 9.

DURGI (DEFENDANT) *v.* KANHAIYA LAL (PLAINTIFF).*

Hindu law—Hindu widow—Will—Widow given an absolute estate by the will of her deceased husband—Subsequent adoption—Adoption subject to provisions of will.

A childless Hindu, the owner of property which had come to him by partition with his adoptive father, made a will leaving everything to his wife. The will provided that "she should be absolute owner of his entire estate, the adopted boy having no power of interference during her lifetime." The widow, in exercise of a power of adoption conferred on her by this will, adopted a son. The deed of adoption stated that the adopted boy "shall be heir to the estate left by my husband and myself." At the date of the adoption the widow was a minor and there were no indications of any intention on her part to divest herself of the estate. *Held*, that the will of the husband prevailed, and the adopted son had no right to possession of the estate so long as his adoptive mother was alive.

Lakshmi v. *Subramanya* (1), followed, and *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (2), *Narayanasami* v. *Ramasami* (3), *Ganapati Ayyan* v. *Savithri Ammal* (4), *Visalakshi Ammal* v. *Sivaramien* (5) and *Venkatanarasimha Rao* v. *Subba Rao* (6), referred to.

THIS was an appeal arising out of a suit by a minor, Kanhaiya Lal, for a declaration that he was the rightful adopted son of Durga Prasad deceased and was the owner of the property described in the

* First Appeal No. 502 of 1925, from a decree of Kashi Nath, Second Additional Subordinate Judge of Cawnpore, dated the 26th of October, 1925.

(1) (1889) I.L.R., 12 Mad., 490.
(2) (1869) 6 Bom. H.C.R., 224.
(3) (1890) I.L.R., 14 Mad., 172.
(4) (1897) I.L.R., 21 Mad., 10.
(5) (1904) I.L.R., 27 Mad., 577.
(6) (1922) I.L.R., 46 Mad., 300.

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schedules attached to the plaint, and that the defendant, Musammat Durgi, the widow of the deceased, had no right or share in the property. The plaintiff's case was that Lala Durga Prasad had, under a will, given authority to his wife to adopt a son after his death and in pursuance of that authority the widow adopted the plaintiff in December, 1918, that subsequently the plaintiff was treated as the adopted son by the defendant, but shortly before the suit she denied the factum of adoption and repudiated his status. The contesting defendant, in her written statement, denied the fact of adoption as well as its validity. She further pleaded that under his will, dated the 1st of November, 1917, her deceased husband made her in every way the exclusive owner of the entire property left by him and, even if the plaintiff's adoption were proved, he would have no right to the property as against her. The trial court found that the plaintiff was duly adopted by the defendant under the authority given to her by her deceased husband and that there was no legal defect so far as the adoption was concerned. It came to the conclusion that, although the defendant had not perhaps attained the age of 18 years, she was about 17 years at the time of adoption and had attained puberty and discretion, and was of age so far as the Hindu law is concerned, and that, therefore, the adoption made by her was perfectly valid and binding. It found, however, that the directions given in the will of Durga Prasad were in no way binding on the plaintiff, inasmuch as by virtue of his adoption the plaintiff became entitled to the property and his adoptive father could not have disposed of any part of that property by will. He further found that, even if there was a valid disposition, the defendant had divested herself of all rights in her husband's property on the execution of

the deed of adoption. The Subordinate Judge accordingly decreed the claim in its entirety, with the exception of certain jewels and ornaments that personally belonged to the defendant. The defendant appealed.

Dr. *M. L. Agarwala* and Pandit *Rama Kant Malaviya*, for the appellant.

Sir *Tej Bahadur Sapru*, Dr. *Kailas Nath Katju*, Babu *Saila Nath Mukerji* and Mr. *P. N. Sapru*, for the respondent.

THE judgement of the Court (LINDSAY and SULAIMAN, JJ.), after setting forth the facts as above, thus continued :—

The defendant has come up in appeal and on her behalf some of the findings of the court below are challenged. We may say at the outset that the property in dispute had been acquired by Lala Durga Prasad apparently with the money which he had obtained on partition from his adoptive father. It was assumed by the court below that the property so acquired was the ancestral property of the deceased, and there was no issue framed on the question as to whether it was the self-acquired property of Durga Prasad. The learned Subordinate Judge has distinctly found that the property is ancestral. No ground is taken in the memorandum of appeal to the effect that it is not so. We have, therefore, assumed that the property in dispute was the ancestral property of Durga Prasad over which he would have had no power of disposal by a will if a natural born son had been alive in his life time.

We may mention that the evidence as regards the factum of adoption is overwhelming and that fact cannot be seriously disputed.

The main point that arises in the case is the one raised on behalf of the defendant, namely, that under

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the will Lala Durga Prasad had created an estate in her favour which is binding on the plaintiff. The learned Subordinate Judge, as stated above, has overruled this contention on the ground of want of power in Durga Prasad to make a bequest and also on the ground that the lady subsequently has surrendered her rights. The learned advocate on behalf of the respondent has not tried to support the finding of the court below that there has been a valid surrender of the estate by the widow after her husband's death. As a matter of fact, in view of the finding that she had not even attained the age of 18 years and was in the eye of the law a minor, the alleged surrender by her of her estate cannot be held to be binding on her. Furthermore we are of opinion that the deed of adoption on which reliance is placed does not contain any such words which would justify the inference that she intended to give up any estate which had been given to her by her deceased husband. There is in the deed of adoption a reference to the will of her husband that the adoption took place in pursuance of the authority given by it, and this deed of adoption winds up by saying "this adopted boy shall be heir to the estate left by my husband and *myself*." Obviously she was not intending that as soon as the adoption took place she would lose all interest in the property bequeathed to her by her husband. On the other hand, she specifically said that the boy would be the heir to the estate left by herself. In the absence of any clear and express provision which would imply that she gave up all her rights in the estate we are not prepared to hold that any such surrender was made by her.

The crucial point that remains for consideration is whether Durga Prasad had power to make a bequest of this nature. As some arguments have been

addressed to us on the actual interpretation of the will and as it has been contended before us that the document does not amount to a will but simply creates an estate in favour of the wife over and above an ordinary Hindu widow's estate, it is necessary to quote a few of the provisions in the will. The testator, after saying that during his lifetime he should be the owner of the property, went on to provide that " after his death his widow Musammat Durgi should be the absolute owner of the estate left after defraying his funeral expenses and should have power, like himself, to continue or discontinue the whole business, the shops and the commission agency with the advice and consent of his family, that she should have power to spend the whole of his money with the advice and consent of his family, and that she should have power to make a sale or gift, etc., with the advice and consent of his family." The will then provided that in order to perpetuate the name of the testator, he empowered his wife to adopt with the advice and consent of his family a son of any person she liked, and that, after her death, the adopted boy could become the owner, but the said adopted boy should have no power in the estate left by him in the lifetime of the said " Musammat." The testator then stated that in case he himself adopted a boy during his lifetime, he would make the necessary alterations in the will. The document is called a will by the testator himself. We have no doubt in our mind that it was not merely an ordinary Hindu widow's estate that was intended to be conferred on Musammat Durgi. On the other hand, the testator expressly stated that she should be the absolute owner of the entire estate left by him and that she should have power to spend the whole of the money, that is to say, the capital, with the consent of his family and also she should

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have power to make a sale or gift with the consent of his family. Obviously these are not powers which can be ordinarily exercised by a Hindu widow, who has no power to alienate the estate without legal necessity. Then the further provision that during her lifetime the adopted boy should have no power in the estate, was undoubtedly intended to confer on the widow an interest which is not enjoyed by an ordinary Hindu widow. In our opinion the testator had intended to confer on her an absolute estate, with this condition that in case she exercised the power to adopt a boy her interest would be cut down to a life-interest with remainder over to the adopted son. This undoubtedly was the intention of the testator. Under this will, therefore. a life-estate at least was intended to be created in favour of the widow.

The question then remains whether such an estate was within the competence of Durga Prasad to create?

It is no doubt true that a member of a joint Hindu family has no power to make a bequest of joint family property at a time when he has got a minor son alive. It also cannot be disputed that a deed of alienation made by him *inter vivos* before the birth of a son is binding on the son. That there is no power to make a will of joint family property when there are other co-parceners alive is well established by the Full Bench case of this Court—*Lalta Prasad* v. *Sri Mahadeoji Birajman Temple* (1). The learned advocate for the plaintiff has argued that the position of an adopted son is exactly similar to that of a posthumous son, and that his adoption relates back to the death of the father. The contention. therefore, is that it must be assumed that the adopted son was a member of the family at the time when the

(1) (1920) I.L.R., 42 All., 461.

father died and that, therefore, no bequest made by the father, which must of necessity operate from the time of his death, came into effect at the time when the adopted son is deemed to have been in existence. It is, therefore, argued that such a bequest is outside the power of the father and is defeated by the right of survivorship. The contention is that on the one hand there is the power of a father to dispose of the property when there is no other member of the joint family alive; on the other hand, there is the right of an adopted son to claim the joint property by survivorship. It is said that when the bequest comes into conflict with the right of survivorship the latter prevails and the bequest is null and void. In our opinion this argument must proceed on the assumption that an adopted son is deemed to be alive before the father dies, so that he becomes a member of the joint Hindu family with his father and, on his death, succeeds to the estate by right of survivorship. We think it is impossible to extend the fiction of his previous existence to such a degree. Great reliance is placed on the remarks of their Lordships of the Privy Council in the case of *Pratapsingh Shivsingh* v. *Agarsingji Rajasanaji* (1), that—

"an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line."

That was a case where it was held that no reversion to the original grantor could take place when a son was actually adopted, inasmuch as there was no break in the continuity of the line. But to say that there is no break in the continuity of the line is one thing and so say that the adopted son must be deemed to be a member of the joint Hindu family with the

(1) (1918) I.L.R., 43 Bom., 778.

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deceased father, so as to acquire the property by right of survivorship, is quite another. This latter view has not been accepted in a number of cases by the Madras High Court which has allowed a disposition by the father to be upheld as against the claim of a subsequently adopted son. In the case of *Lakshmi* v. *Subramanya* (1), adoption had taken place subject to a will which had been made by the adoptive father with the consent of the natural father of the son. The Madras High Court, following an earlier case of the Bombay High Court, *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (2), held that such an arrangement was binding on the adopted son. Similarly, in the case of *Narayanasami* v. *Ramasami* (3), there was a will by the adoptive father before the adoption. The adoption took place by the father before his death and the natural father consented to the disposition under the will. It was held that the adopted son was bound by that bequest. Again, in the case of *Ganapati Ayyan* v. *Savithri Ammal* (4), there was a will with a power to the wife to adopt and after the death of the father there was an adoption with full knowledge of the existence of the will. It was held by the learned Judges of the Madras High Court that the adopted boy could not repudiate the bequest. SUBRAMANIA AYYAR, J., in repelling the contention on behalf of the adopted son, pointed out that—

"Even if it be supposed that the rights of the adopted son to challenge a disposition of his father arise from the time of his father's death, his case cannot possibly be put on a higher footing than if he had been adopted at the moment of the adoptive father's death. Even in that case the direction as to the allotment of the property to the charity was an oral devise which became operative the moment the testator died and, as *ex hypothesi*, the adopted son's title to his

(1) (1889) I.L.R., 12 Mad., 490.
(2) (1869) 6 Bom. H.C.R., 224.
(3) (1890) I.L.R., 14 Mad., 172.
(4) (1897) I.L.R., 21 Mad., 10.

adoptive father's estate accrued then and not earlier, it is difficult to see how on principle the defendant could be entitled to question the alienation. For, unlike the case where the adoption takes place before the will comes into force, the adopted son's right, according to the supposition, comes into existence simultaneously with the right of the charity. How then can the former derogate from the latter right?"

The learned Judge adhered to the same view in his order of reference in the case of *Visalakshi Ammal* v. *Sivaramien* (1). We quote the following passage from that order:—

"In cases of adoption after the death of the adoptive father by his widow under his authority, every lawful disposition of his property made by him, even by a will, would be binding on the adopted son, for the obvious reason that those dispositions became operative from the moment of the death of the testator, while the adoption must necessarily take place at some time subsequent to the death, and the rights accruing by virtue of such adoption are only in that part of the estate which remains undisposed of at the moment of the adoption."

In our opinion this is a correct statement of the true position. It cannot be said that the rights of the adopted son came into force before the death of the father. If it is not so, then he can only succeed to the estate which remains at the time of the father's death. If during his life time the father had made a bequest which came into effect as soon as he died, it is obvious that his son can only take the estate subject to the bequest. This view has been followed subsequently by the Madras High Court in the case of *Venkatanarasimha Rao* v. *Subba Rao* (2). The learned Judges in that case, while upholding the provisions of a will, remarked—

(1) (1904) I.L.R., 27 Mad., 577. (2) (1922) I.L.R., 46 Mad., 300.

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"The adopted son could not, while approbating the provision of the will under which his adoption was made, reprobate other provisions of the same will and repudiate the bequest to charity."

It is, however, pointed out by the learned counsel for the respondent that the adopted son is not necessarily approbating the will, for he derives his title from the fact of his adoption and not under the will and that the authority to adopt could have been given orally and independently of the will.

The case before us is very similar, even on facts, to that before the Calcutta High Court—*Harendra Nath Avasti* v. *Shibo Sundari Debi Chowdhurani* (1). The parties in that case were governed by the Mitakshara law and the father, who was the sole member of his family, made a will under which he gave authority to his wife to adopt a son after his death and provided that she should have a right to remain in possession of the entire estate for her life and that the adopted son would have no right of interference during her lifetime. Some years after the death of the father the widow adopted a boy as her son. The learned Judges of the Calcutta High Court held that the provisions of the will from which the authority to adopt was derived, should be upheld when the natural father admitted and accepted the validity of those provisions. They relied on the authority of the Madras case referred to above and also on some cases of the Bombay High Court. In fact some of the cases have gone further and laid down that when a Hindu makes a disposition of his property even by a will, as part of the same transaction as adoption, which is well known to the natural father, such disposition is good against the son. *A fortiori* adoption after the death of the father, when his disposition has come into effect, must be subject

(1) (1909) 3 Indian Cases, 378.

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to such disposition. Another case which came up before the Calcutta High Court, *Surendra Nath Ghose* v. *Kala Chand Banerjee* (1), was, however, a case under the Dayabhaga law under which different considerations arise.

The learned advocate for the respondent has relied strongly on two cases of their Lordships of the Privy Council, *Nagindas Bhagwandas* v. *Bachoo Hurkissondas* (2) and *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji* (3), as well as the Full Bench case of *Visalakshi Ammal* v. *Sivaramien* (4), and an earlier case of the Privy Council, *Bhasba Rabidat Singh* v. *Indar Kunwar* (5). We have already referred to the Privy Council case in I. L. R., 43 Bom., 778. As to the earlier case reported in I. L. R., 40 Bom., 270, we find that there the main question was one of competition between an adopted son and a subsequently born natural son of the same family, and the question was "whether the rights of an adopted son are to be cut down only when he is the son of the same father as the natural born son or whether they are also to be cut down when they belong to the same family." It was held by their Lordships that the adopted son was entitled to an equal share with the natural born son of another brother. We do not think that that case has in any way decided the point which arises before us in the present case.

The case of *Bhasba Rabidat Singh* v. *Indar Kunwar* (5), is also different inasmuch as there the widow had entered into a contract with the natural father of the boy for retaining possession of the entire estate during her life time. The only question that came up for consideration was as regards the validity of the adoption itself and not that of the agreement. Their

(1) (1907) 12 C.W.N., 663. (2) (1915) I.L.R., 40 Bom., 270.
(3) (1918) I.L.R., 43 Bom., 778. (4) (1904) I.L.R., 27 Mad., 577.
(5) (1888) I.L.R., 16 Calc., 556.

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Lordships, however, did remark that it was possible that such an agreement was void. We think that there is no analogy between a case where a Hindu widow tries to secure an unfair advantage before the exercise of her power to adopt and the case where the father who has the full disposing power in his life time, makes provisions intending that they should be binding on the son when adopted in future. The case of *Visalakshi Ammal* v. *Sivaramien* (1), is similarly distinguishable on the ground that there an agreement was entered into between the widow and the natural father at the time of the adoption, and it was held that the agreement, if fair and reasonable, would be binding on the adopted son. This case has, in our opinion, no bearing on the case before us.

Although it is true that in certain respects the adoption relates back to the death of the father, it is equally true that it is not so in all respects. It is well known that an alienation made by a Hindu widow for legal necessity after the death of her husband and before the adoption cannot be ignored by the adopted son merely on the ground that by virtue of his adoption he must be deemed to have been in existence at the time when his father died and that, therefore, his adoptive mother had no power to alienate his property. Similarly, in cases where succession to a collateral opened before the adoption took place, the adopted son cannot get back the property from the heir in whom it has become vested on the ground of his supposed existence at the time when his father died. There are also cases where bequests in favour of various persons had come into effect long before the adoption. In all such cases it is very difficult to extend the fiction of his existence at the time of his father's death. It is thus obvious that such a supposition cannot be made

(1) (1904) I.L.R., 27 Mad., 577.

in all cases and there is no such rule of universal application. So far as the point before us is concerned the great preponderance of authority is in favour of upholding the power of the father to make provisions which would be binding on his subsequently adopted son. We, therefore, think that the view taken by the learned Subordinate Judge that the disposition made by Durga Prasad was null and void and in no way binding on the plaintiff was not correct.

We accordingly allow this appeal, and setting aside the decree of the court below, grant the plaintiff a declaration that he is the validly adopted son of Durga Prasad but that the estate created under the will, dated the 1st of November, 1917, in favour of Musammat Durgi holds good and the plaintiff will have no right to obtain possession of the estate of the deceased during her life time. The plaintiff's claim for possession is, therefore, dismissed. The defendant's claim that all the articles mentioned in list No. 2 of the plaint are her *stridhan* has not been made out. They will be treated as part of the estate left by the deceased with the exception of the personal ornaments, wearing apparel and clothes mentioned in the concluding portion of the lower court's judgement. In view of the fact that the defendant denied even the factum of adoption we are of opinion that the parties should bear their own costs in both courts.

Appeal allowed.