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The result, therefore, is that the *waqf* must be held to be invalid so far as it relates to the landed property of Arab Ali Khan in the pargana of Arail, and the appeal must be allowed to this extent.

[The judgement then proceeded to pass certain orders regarding mesne profits and costs.]

Decree modified.

Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.

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June, 21.

HIRA LAL AND OTHERS (PLAINTIFFS) v. PIARI LAL AND ANOTHER (DEFENDANTS.)*

Hindu law—Adoption—Authority to adopt given by a member of a joint Hindu family.

There is nothing to prevent a Hindu who is a member of a joint family giving a valid authority to his wife to adopt a son to him after his death, and the exercise of such authority is not dependent on her inheriting as a Hindu female owner her husband's estate. Such an authority cannot be considered to be extinguished by reason of the other member or members of the husband's family having succeeded to the estate by survivorship.

Mussumat Bhoobun Moyee Debia v. *Ram Kishore Acharj Chowdhry* (1), *Sivagnanam Servaigar* v. *Ramsawmy Chettiar* (2), *Madana Mohana* v. *Purushothama* (3), *Venkataramier* v. *Gopalan* (4), *Bachoo* v. *Mankorebai* (5) and *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji* (6), referred to.

Bhimabai v. *Tayappa Murarrao* (7), *Adiveva Fakirgowda* v. *Chanmallgowda Ramangowda* (8) and *Chandra* v. *Gojarabai* (9), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

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*First Appeal No. 455 of 1925, from a decree of Ganga Prasad Varma, Subordinate Judge of Bulandshahr, dated the 21st of July, 1925.

(1) (1865) 10 Moo. I.A., 279. (2) (1911) 22 M.L.J., 85.
(3) (1914) I.L.R., 38 Mad., 1105. (4) (1918) 35 M.L.J., 698.
(5) (1907) I.L.R., 31 Bom., 373. (6) (1918) I.L.R., 43 Bom., 778.
(7) (1913) I.L.R., 37 Bom., 598. (8) (1924) 26 Bom., L.R., 360.
(9) (1890) I.L.R, 14 Bom., 463.

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Sir *Tej Bahadur Sapru* and Munshi *Shiva Prasad Sinha*, for the appellants.

Mr. *B. E. O'Conor*, Pandit *Shiam Krishna Dar* and Munshi *Krishna Murari Lal*, for the respondents.

KENDALL and NIAMAT-ULLAH, JJ. :—This appeal arises from a suit brought by several of the members of a joint Hindu family for a declaration that an adoption of defendant respondent No. 1, Piari Lal, by defendant respondent No. 2, Musammat Champa Devi, widow of Durga Prasad, was invalid. Durga Prasad was, as is now admitted, a member of the joint Hindu family to which the plaintiffs belong when he died in August, 1921. A deed of authority to adopt a son was executed in favour of Musammat Champa Devi on the 1st of August, 1921, and registered at the office of the sub-registrar on the same day. But it was claimed that at that time Durga Prasad was delirious and unconscious, and that the deed could not be considered to be legally valid. On the facts the lower court has found that the deed was valid. But before considering this part of the case we propose to deal with the legal point that has been argued at some length before us, viz., that even if it be assumed that Durga Prasad gave authority to his widow to adopt a son, the power to adopt became extinguished on the death of Durga Prasad because his property vested in the plaintiffs by survivorship.

For this proposition, which has been pressed very strongly by Sir *Tej Bahadur Sapru* on behalf of the appellants, no authority of this Court has been cited, nor does it appear that any case raising this particular question of law has ever come before this Court. If the proposition were to be accepted it would follow that a large proportion of the adoptions in this province must

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be held to be invalid. In the well-known case of *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1), it has been laid down by their Lordships of the Privy Council that the estate of a deceased son vested in possession cannot be defeated and divested by the mere gift of power of adoption to a widow, and it has been sought to extend this principle and to argue that because Durga Prasad's share in the joint family property became vested at his death in the remaining members of the family, the widow could not defeat or divest them. There are certain obvious objections to this argument, the first of which is that Durga Prasad was not the owner of a defined estate; he could only be said to be the owner of a fluctuating interest in the joint family property, and it does not therefore appear to be accurate to say that on his death his estate vested in the surviving members. The number of sharers in the joint family property became diminished by one on his death, and the number of co-sharers would be increased by one if the adopted son be held to be validly adopted. But that is not the same thing as to say that the estate of Durga Prasad, which never had any separate existence, became vested in the other members of his family. Sir *Tej Bahadur Sapru* claims that the authority of the Bombay High Court is in favour of his argument, and he has quoted the cases of *Bhimabai* v. *Tayappa Murarrao* (2) and of *Adiveva Fakirgowda* v. *Channallgowda Ramangowda* (3). Both these cases, however, refer to "*vatan*" property and not to joint family property under the Mitakshara law. It was held that on the death of the last male owner the property vested immediately in his heirs, and could not be subsequently divested by an adoption made by his mother. In the case of *Madana Mohana* v. *Purushothama* (4), (the decision of which is

(1) (1865) 10 Moo. I.A., 279.
(2) (1913) I.L.R., 37 Bom., 598.
(3) (1924) 26 Bom., L.R., 360.
(4) (1914) I.L.R., 38 Mad., 1105.

clearly against the present appellants) the learned CHIEF JUSTICE refers to a previous opinion of his own expressed in the case of *Sivagnanam Servaigar* v. *Ramsawmy Chettiar* (1), to the effect that there is no authority to show that the principle of the decision in *Bhoobun Moyee's* case does not apply in the case of a joint family; and this has been quoted in favour of the appellants in the present suit; but the Madras case was concerned with an impartible estate, in which the succession was not by survivorship but by inheritance, and the circumstances of taking in adoption would therefore be entirely different from those of a family in which succession is by survivorship. In the case of *Chandra* v. *Gojarabai* (2), there is no real analogy to the present case, because Nana, as the last surviving member of a joint Hindu family, had become the full owner of the property and his widow could not be divested by the adoption of a son by his brother's widow. Finally, some reliance has been placed on certain sentences in Mayne's Hindu Law, 9th edition, page 153. It is there remarked that although the distinction between the cases of vesting by inheritance and by survivorship had been the basis of a number of decisions in India, it may be doubted whether this distinction can still be maintained in view of the recent decisions of the Privy Council. The conclusion of the commentator, however, is that the only question hereafter will be whether or not the power has become extinguished by reason of circumstances which have arisen since the grant of power to adopt,—if the authority is alive the question of the vesting of an estate whether by inheritance or by survivorship is immaterial.

None of the cases quoted by Sir *Tej Bahadur Sapru* provides us with sufficient authority for giving what would in these provinces be considered a somewhat re-

(1) (1911) 22 M.L.J., 85. (2) (1890) I.L.R., 14 Bom., 463.

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volutionary pronouncement, and we should not be disposed to do so even if there were no decisions on the other side. Before referring briefly to one or two of these decisions, however, we may remark that the commentators agree in holding that a widow in a joint Hindu family may adopt a son if she has authority from her husband. On pages 152 and 153 of Mayne's Hindu Law (9th edition) the author remarks:—"The vesting of the estate in an undivided brother or the son of such brother does not terminate the power of adoption. . . . A widow's power of adoption was held to be extinguished for ever as soon as the estate is vested by inheritance in an heir. . . . . Where, however, the husband to whom the adoption is made was a member of an undivided family and on his death his share devolved by survivorship on the surviving member or members other than a son, the power would be alive and would continue to be alive until the last surviving member died and the estate vested by inheritance in the next heir." It is after this passage that the one on which the appellants have relied occurs. But, as we have pointed out, the whole of the passage taken together by no means conveys the meaning that the appellants would have us give to it. In Sarkar's Hindu Law of Adoption, second edition, the matter is discussed at some length. On page 252 the learned author remarks:—"The joint family being the normal condition of the Hindus, the adoption by widows of its members, with the deceased husband's assent, presents some difficulty; for the undivided interest of the deceased husband passes from the moment of his death to the surviving male members of the family, and an adoption by his widow of a son to him by his assent alone has the effect of divesting his estate from his co-parceners in whom it was already vested; in fact it has the effect of an alienation of the undivided co-parcenary interest in favour of an adopted son,

who may be a perfect stranger, without the concurrence of the other members of the family. . . . . But, however anomalous an adoption by a widow with her deceased husband's assent may be, it is now recognized in all the minor schools of Mitakshara. . . . . Therefore it would appear that, so long as the whole family, or that branch of the family to which the widow's husband belonged, remains joint, there is no bar to the widow's exercising the power of adoption given by her husband."

We have already referred to the case reported in I.L.R., 38 Madras, page 1105, in which the remarks of Mr. Justice SESHAGIRI AYYAR are entirely antagonistic to the contention of the appellants in the present case. Other cases which have been referred to and which favour the respondents are those of *Venkataramier* v. *Gopalan* (1) and *Bachoo* v. *Mankorebai* (2). This last case is of special importance in view of the fact that the appellants' learned counsel claimed the authority of the Bombay High Court as supporting him. He would distinguish that case from the present one on the ground that it is not a genuine case of a joint family property. In this we are unable to agree, but, at any rate, it is not a case that can be quoted in the appellants' favour. In the case of *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji* (3), their Lordships of the Privy Council have held that, unless there is a time limit imposed by the authority which empowers a Hindu widow to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted. Her right to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power even though the property is not vested in her. What circumstance was there in the

(1) (1918) 35 M.L.J., 698. (2) (1907) I.L.R., 31 Bom., 373.
(3) (1918) I.L.R., 43 Bom., 778.

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present case which exhausted the power of Durga Prasad's widow to adopt a son? The only reply to this question on behalf of the appellant is that it was the death of Durga Prasad and the vesting of his estate in the joint family. It certainly cannot have been the intention of Durga Prasad that his death should exhaust his widow's power to adopt. On the contrary, it is only on his death that the authority is to be exercised. If any fresh inference is to be drawn from the latest rulings of the Privy Council it is this, that even if the estate of Durga Prasad did vest in the remaining members of the joint family, that circumstance in itself would not be sufficient to invalidate an adoption by the widow. It may be remarked that in *Bhoobun Moyee's* case their Lordships were guided by other considerations besides the fact that the estate had vested in a third person, and one of those considerations was that the natural son of the adopting widow had grown to man's estate and had been in a position to perform all those duties which an adopted son would have been called upon to perform; and the inference might well be that the power of adoption, which it had been intended to confer on the widow, had been exhausted. There is no such circumstance here, and on a general review of the authorities and of the opinions of the commentators we are satisfied that where a member of a joint Hindu family has been proved to have given his widow power to adopt, that authority is not automatically exhausted by his death.

[Their Lordships then went on to consider the evidence as to the execution of the authority to adopt. They came to the conclusion—agreeing with the trial court—that the deed was duly executed and that there was no reliable evidence to show that at the time of its execution Durga Prasad was not of sound disposing mind. The appeal was accordingly dismissed.]

Appeal dismissed.