# APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.*

HANMANT RA'MCHANDRA, MINOR, BY HIS GUARDIAN, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHIMA'CHA'RYA, (ORIGINAL DEFENDANT), RESPONDENT.*

1887. August 2.

*Hindu law—Adoption during wife's pregnancy—Posthumous son, rights of, in family property—Will limiting legal share of such son.*

The adoption of a son by a childless Hindu is valid, although at the time of adoption his wife is pregnant. The possibility that a son may afterwards be born to him, does not invalidate the adoption.

A posthumous son takes the family property by right of survivorship, on the principle of relation back to the time of the father's death which applies in the analogous case of inheritance and partition, and the rights of such a son stand on the same footing as those of a son *in esse* at the time of the father's death. A father, therefore, can no more interfere by his will with the right of a posthumous son to his share of the family property as fixed by law, than with the right of a son *in esse* at the time of his death. An adopted son stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born.

R. died, leaving him surviving his widow, who was then pregnant, and the defendant whom he had adopted a few days before his death. By his will, R. directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after R.'s death a son (the plaintiff) was born. The present suit was brought by the guardian of the plaintiff to recover the family property from the defendant. It was contended that the adoption of the defendant was invalid, having taken place during the pregnancy of the plaintiff's mother, and that R.'s will, in so far as it was in prejudice of the plaintiff's rights as a son, was also invalid.

*Held*, that the adoption of the defendant by R. was valid, notwithstanding that R.'s wife was pregnant at the time of the adoption.

*Held*, also, that R.'s will was inoperative in so far as it reduced the plaintiff's share to a moiety of the property. On the birth of the plaintiff the defendant, as the adopted son, became by Hindu law entitled only to one-fourth, the plaintiff, as the natural son, taking the other three-fourths.

THIS was an appeal from a decision of Ráv Bahádur G. V. Bhánap, First Class Subordinate Judge of Kárwár.

Rámchandra died in February, 1882, leaving him surviving his widow, who was then pregnant, and the defendant, whom he had adopted three or four days before his death. By his will

*Appeal No. 108 of 1884.

1887.

HANMANT RÁMCHANDRA v. BHIMÁCHÁRYA.

Rámchandra directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after Rámchandra's death the plaintiff was born. The present suit was brought by the guardian of the plaintiff, who was still a minor, to recover possession of the property from the defendant.

It was contended *(inter alia)* for the plaintiff that the defendant's adoption was invalid, having taken place during the pregnancy of Rámchandra's wife, the mother of the plaintiff, and that the will, so far as it purported to dispose of the property to the prejudice of the plaintiff's right, was also invalid.

The Subordinate Judge awarded the plaintiff half of the property as given by the will, and dismissed the remainder of his claim.

The plaintiff appealed to the High Court.

*Pándurang Balibhadra* for the appellant:—Rámchandra had no power to adopt during the pregnancy of his wife—West and Bühler's Hindu Law (3rd ed.), p. 905. Adoption is to be effected only when the possibility of having a son is extinct. The term "children" includes a child in the womb. The membership in a family commences with the conception: see West and Bühler, p. 803; *Jottendromohuni Tágore* v. *Ganendromohun Tágore*[1]. During the pregnancy of the wife even partition is not to be effected: see Strange's Hindu Law, 182; West and Bühler, p. 703. The lower Court was wrong in awarding half of the property to the plaintiff. A father cannot by his will limit the right of his son in existence at the time of his death, and the same rule must apply to a posthumous son. The plaintiff is entitled, under the law, to three-fourths and the defendant to only one-fourth should the adoption of the defendant be held valid.

*Shámráv Vithal* for the respondent:—The document, under which the property has been given to the defendant, is not a will, but it is an absolute gift, possession having completed it. Actual birth is necessary to constitute a son entitling him to the

[1] L. R. Ind. Ap. Supl. Vol., 47.

1887.

HANMANT RÁMCHANDRA v. BHIMÁCHÁRYA.

son's rights. The word *janma* does not carry with it the idea of mere conception, but means actual birth: see West and Bühler, pp. 65 and 67. It is at birth that the son acquires rights to his father's property—*Yekeyamian* v. *Agniswarian*(1). The Hindu law does not prevent a person from adopting during the pregnancy of his wife, and an adoption during the pregnancy has been held valid: see *Nagabhushanam* v. *Sheshammagaru*(2). The defendant's adoption, therefore, was valid, and the decree of the lower Court should be upheld.

SARGENT, C.J.:—This is a suit by the guardian of the posthumous son of one Rámchandra Shesho to recover possession of the family property from the first defendant, Bhimáchárya, who claimed to have been adopted by Rámchandra two days before his death, and to be entitled, under his will, to share equally with the minor plaintiff. The Subordinate Judge has found the adoption proved, and that its validity is unimpeachable.

The *factum* of the adoption has not been disputed before us; but it is contended that it was invalid, owing to the undisputed circumstance of Rámchandra's wife being pregnant at the time it took place. The question raised by this contention was considered by the Madras High Court in *Nagabhushanam* v. *Sesham-magaru*(3), and decided in favour of the validity of an adoption during the pregnancy of the wife. It is pointed out in that case that there is no authority in the Hindu law books for holding that an adoption is only permissible when the adopting party is hopeless of having issue. In the Dattaka Chandrika, sec. 1, pa. 4, it is said "by one destitute of a son," and sec. 2, pa. 1, "by one having no male issue" is a son to be adopted.

It may doubtless be contended that when the wife is in a state of pregnancy there may be a son in the womb at the moment of adoption; but the possibility that the child *in utero* may be a female, would, if the power to adopt were to be deemed suspended by the mere fact of pregnancy, always imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legiti-

(1) 4 Mad. H. C. Rep., 307. (2) I. L. R., 3 Mad., 180.
(3) I. L. R., 3 Mad., 180, at p. 184.

1887.

HANMANT RÁMCHANDRA v. BHIMÁCHÁRYA.

mate son. A man in bad health or on his deathbed, as in the present case, might not live till the child was born; and yet, if the rule be as contended for by the appellant, the suspension must *ipso facto* take place in all cases during pregnancy: for we entirely agree with the Madras High Court that it would be impossible to make the validity of an adoption dependent on knowledge or ignorance of the fact of pregnancy.

The rights of a child in the womb are doubtless much regarded by the law, as in the case of inheritance and partition; but, as pointed out by the Madras Court, if the doctrine of suspension of the power of adoption during pregnancy "be carried to its legitimate conclusions, and the validity of the exercise of the power be made to depend on an event which may not be known, it follows that an element of uncertainty is introduced into an act regarded as highly religious." In Steel's Hindu Customs it is said that the duty to adopt does not arise until the birth of a son becomes very improbable, by which, we think, must be meant, having regard to the religious importance attaching to the act when there is considerable risk of the adopter dying sonless, which is certainly the case when a man is on his deathbed although his wife may be actually pregnant at the time. We think, therefore, that the Subordinate Judge was right in holding that the defendant's adoption was a valid one.

Independently of the question as to the effect of Rámchandra's will, the defendant would, by general Hindu law, have been entitled to only one-fourth of his adoptive father's estate on the birth of the minor plaintiff. By that will the estate was divided equally between the two sons, and it is contended for the defendant that Rámchandra was competent to make this provision by will, because there was no natural son in actual existence at the time of his death. It is doubtless true that it is by actual birth the son acquires, according to the Mitákshara law, a right of co-proprietorship with the father in the ancestral property. But a posthumous son has certain rights by the Hindu law which it is necessary to consider. A child, who is in its mother's womb at the time of its father's death, is, for the purposes of inheritance, deemed to be *in esse*; and, as regards partition, a child, if begotten

1887.

HANMANT RÁMCHANDRA v. BHIMÁCHÁRYA.

at the time, is, as pointed out by Sir Barnes Peacock in *Kallídás Dás* v. *Krishan Chandra Dás*[1], in point of law, in existence at the time of the partition, and entitled to share with the other sons or brothers. This distinction between a son *in utero* at the time of partition and one who is subsequently begotten and who is only entitled to his father's self-acquired property and separated share, is clearly pointed out by Sir T. Strange's Hindu Law, p. 182, and Dr. Jolly's Tágore Lectures, p. 132. The former says: "When pregnancy is apparent at the time, either the partition should wait, or a share be set apart, to abide the event; but that, if it were then neither manifest, nor apprehended, in such case, should a son who was at the time in the womb be born after, he should obtain his share from his brothers by contribution; while a subsequently begotten one shall have recourse only to the remaining property of the father." So far, therefore, a posthumous son has equal rights with a son actually born.

But the present case raises the more difficult question, and which, as far as we can discover, is clear of authority, as to whether his right by survivorship is identical with that of a son *in esse* when in conflict with a testamentary provision by his father. Mr. Mayne in his Hindu Law lays it down as well established by the decisions of all the High Courts that "the right of devise is co-extensive with that of alienation, except when in an undivided family the right of devise conflicts with the law of survivorship, in which case the former gives way." The judgments of this Court in *Narottam Jugjiwan* v. *Narsandás Harikisandás*[2] and *Vásudevbhat* v. *Venkatesh Sanbhav*[3] support this view. The question, therefore, arises whether the right of the posthumous son by survivorship stands on the same footing with regard to the father's testamentary power. It is to be remarked that this is a distinct question from the father's power of alienation during his life as against a son who was only begotten at the time, which is the case in *Musst. Gowra Chowdhrain* v. *Chummun Chowdry*[4] referred to by the Subordinate Judge. The right of the posthumous son by survivorship, on the prin-

(1) 2 Beng. L. R., 103, F. B. Rul.
(2) Bom. H. C. Rep., A. C. J., 6.
(3) 10 Bom. H. C. Rep., 139.
(4) C. W. R. for 1864, p. 340.

1887.

HANMANT RÁMCHANDRA v. BHIMÁCHÁRYA.

ciple of relation back to the time of the father's death, which obtains in the analogous cases of inheritance and partition, would stand on the same footing as that of the son *in esse* at the time of the father's death, and a due regard to the harmony of the law under analogous circumstances justifies, we think, the conclusion that a father can no more interfere by his will with the right of a posthumous son to his share in his family property as fixed by law, than in the case of a son *in esse* at the time of his death, and if this be so between the posthumous and other natural born sons, it must also obtain between the posthumous son and an adopted son who stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born. We have, therefore, come to be conclusion that in the present case Rámchandra's will was inoperative so far as it reduced the plaintiff's share to a moiety.

We must, therefore, vary the decree of the Court below, and direct that the plaintiff do recover three-fourths of Rámchandra's property. As to the bonds forming part of the property, the decree must be varied by directing that a receiver be appointed to get in what is due upon the bonds, the proceeds to be divided as above. The decree is further varied by directing that the costs of defendants 2 and 3 be paid out of the estate before division between the plaintiff and the first defendant. The plaintiff to have half his costs of this appeal.

## ORIGINAL CIVIL.

*Before Mr. Justice Farran.*

1886. *June* 12.

NA'NA'BHA'I GANPATRA'V DHAIRYAVA'N, (PLAINTIFF), *v.* JANA'RDHAN VA'SUDEV AND RAMA'BA'I, (DEFENDANTS).*

*Hindu law—Marriage—Guardianship—Custody—Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.*

The plaintiff and Ramábái, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was Ramábái's father, until the year 1880. In 1877 a daughter Sonábái had

* Suit No. 210 of 1886.