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out that they have been in any way prejudiced, nor have they taken any steps to set aside or vary the decree.

We have ascertained that the defendant in *Vishrám* v. *Gann*(1) (the case which the lower Court has followed) had died before the argument; and the cases cited by Mr. Branson—*Roop Narain* v. *Ramayee*(2), *The Representatives of Girendronáth Tágore* v. *Huronáth Roy*(3), *Monee Lall* v. *Kazee Fuzul*(4), *Imdád Ali* v. *Jagan Lal*(5)—were similar in their circumstances. They are not, therefore, at variance with the decision in *Narna* v. *Manager Parambhatta*(6). We shall allow the appeal, and setting aside the order of the Subordinate Judge, First Class, direct him to proceed with the execution of the decree. The respondents have no merits. They must pay the costs of the appellants both here and in the Court below.

Order reversed.

(1) P. J. for 1883, p. 5.
(2) 3 Cal. L. R., 192.
(3) 10 Cal. W. R., p. 455.
(4) 14 Cal. W. R., p. 337.
(5) I. L. R., 17 All., 478.
(6) P. J. for 1894 p. 403.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

BA'BU AŃA'JI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* RATNOJI KRISHNARA'V (ORIGINAL PLAINTIFF), RESPONDENT.*

1895. *December* 9.

Hindu law—Reversioner—Interest of reversioner expectant on widow's death does not pass on insolvency to official assignee—Adoption—Adoption by widow relates back to her husband's death—Succession of a brother to a deceased brother's estate—Subsequent adoption by deceased's widow divests estate—Conditional vesting of estate in heir—Inheritance.

Balvant and Mahádev were brothers. Mahádev was adopted by his cousin's widow and as adopted son had succeeded to property. He died childless in 1870 or 1872, leaving his widow Mathurábái as his heir. His brother Balvant was next reversionary heir after Mathurábái, and in 1880 he (Balvant) became insolvent, and his estate vested in the official assignee, who sold to the plaintiff his interest in certain mortgaged property which had belonged to Mahádev and was then in the possession of Mathurábái as his heir. Mathurábái died in 1886 and after her death the plaintiff sued to redeem the property from the mortgage.

Held that at the date of h's insolvency, Mathurábái being then alive, the interest of Balvant as reversionary heir in the said property was only a *spes successionis* which

* Second Appeal, No. 403 of 1894.

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could not vest in the official assignee. The plaintiff, therefore, took no interest in the property by his purchase from the official assignee.

Atmárám and Sakhárám were two divided brothers. Atmárám died leaving his brother Sakhárám and a daughter-in-law Gangábái (the widow of his predeceased son Govind) him surviving. On Atmárám's death Sakhárám inherited his property as his heir, but shortly afterwards Sakhárám gave his son Mahádev in adoption to Gangábái, who duly adopted him as son to her deceased husband Govind.

Held, that Mahádev on his adoption became not only the son of Govind, but also the grandson and heir of Atmárám. Having been adopted with the assent of Sakhárám, he as the adopted grandson of Atmáram divested the estate in Atmárám's property which had vested in Sakhárám. Sakhárám by giving Mahádev in adoption to Gangábái while divesting Mahádev of the right to inherit as his heir invested him with the right to inherit Atmárám's estate.

For the purposes of inheritance an adoption may be considered as relating back to the death of the adoptive father divesting all estates which have during the intermediate period become vested as it were conditionally in another.

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnágiri, reversing the decree of Ráo Sáheb S. M. Karandikar, Subordinate Judge of Devgad.

Suit for redemption. The land in question had been mortgaged by one Atmárám in 1863 to the father of the defendants. Atmárám died in 1865, leaving a divided brother Sakhárám and a daughter-in-law Gangábái (widow of his predeceased son Govind) him surviving. Sakhárám had two sons named Balvant and Mahádev, and soon after Atmárám's death in 1865 he gave Mahádev in adoption to Gangábái (daughter-in-law of Atmárám), who duly adopted him as son to her deceased husband Govind. Mahádev married Mathurábái. He died childless in 1870 or 1872, leaving her as his heir. She survived till 1886.

Sakhárám died prior to 1880, and in that year his son Balvant became insolvent and his estate vested in the official assignee. He was then next reversionary heir to Mahádev after Mathurábái. The official assignee sold Balvant's interest in the property to the plaintiff.

After the death of Mathurábái in 1886 the plaintiff filed this suit to redeem the property.

The Subordinate Judge dismissed the suit.

On appeal by the plaintiff the Judge reversed the decree, holding that Mathurábái held the property for her life and that

according to the ruling in *Jamiyatrám* v. *Bái Jamna*[1], Balvant had a right in remainder which became vested in the official assignee, who sold it to the plaintiff, and that the plaintiff had a right to redeem it.

The defendants preferred a second appeal.

Mánekshán J. Taleyárkhán appeared for the appellants (defendants):—The decision in *Jamiyatrám* v. *Bái Jamna* [1] which was relied on by the Judge, has been over-ruled in *Lakshmibái* v. *Ganpat Moroba*[2]. Balvant had no right to the property when it was sold by the official assignee to the plaintiff. Máthurábái was then alive. It is after the death of a widow that the next of kin becomes an heir and not before. Balvant had no right during Mathurábái's lifetime—*Rupachand* v. *Rakhmábái*[3]. The last ruling was followed in First Appeal No. 129 of 1893 which was decided on the 18th September, 1895.

Section 266 (*k*) of the Civil Procedure Code has prohibited sale of expectancy of succession by survivorship or other contingent rights.

Dáji A. Khare with *Mahádeo V. Bhat* appeared for the respondent (plaintiff):—When Atmárám died, his property vested in Sakhárám as heir. On Sakhárám's death Balvant became his heir and we claim under Balvant. Govind having predeceased his father Atmárám, he did not inherit the property; consequently his widow Gangábai could not by adopting Mahádev with Sakhárám's consent prejudice Balvant. The Subordinate Judge has in his judgment relied on the decision in *Rámji* v. *Ghamau*[4]. But that decision is not applicable to the present case, because in that case the adoption was in a joint family. In the present case Sakhárám and Atmárám were not joint. Their families were separate. Sakhárám's consent to the adoption would make it valid, but it cannot deprive other persons of the property which was vested in them.

FARRAN, C. J.:—This was a suit filed in the Court of the Subordinate Judge at Devgad in the Ratnágiri District. The plaintiff

(1) 2 Bom. H. C. Rep., 11.
(2) 5 Bom. H. C. Rep., O. C. J., 128.
(3) 8 Bom. H. C. Rep., A. C. J., 114.
(4) I. L. R., 6 Bom., 498.

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claiming title through the official assignee and assignee of the estate of one Balvant Sakhárám sought to redeem a mortgage executed in favour of Anáji, the father of the defendants Nos. 1—3, by one Atmárám Govind on the 28th May, 1863. The question for determination is in whom the equity of redemption is vested.

The facts as found by the lower Courts, though there is a mistake, probably clerical, in the statement of them by the Assistant Judge, are these:—Sakhárám and Atmárám Govind were divided brothers. The property in question belonged to Atmárám, who, as above stated, mortgaged it to Anáji with possession in 1863. Atmárám had a son Govind, who died before his father without issue, leaving a widow Gangábái. Atmárám died in 1865, leaving his daughter-in-law Gangábái and his separated brother Sakhárám surviving him. Sakhárám had at that time two sons, Balvant and Mahádev. The exact date does not appear, but very soon after the death of Atmárám, Sakhárám gave his son Mahádev in adoption to Gangábái, and the latter duly adopted him. It is beyond doubt that Gangábái adopted Mahádev to continue the line of Atmárám through her husband Govind.

A suit in which Sakhárám was the plaintiff and Atmárám was a defendant was pending at Atmárám's death (Suit No. 275 of 1865). Gangábái was placed upon the record of it as a defendant in his place. She died soon afterwards, and Sakhárám on the 16th December, 1865, informed the Court of her death and had Mahádev Govind put upon the record to represent Atmárám. The Subordinate Judge thus deals with this part of the case:

"According to the established rule of inheritance of the Hindu law in force in this Presidency the daughter-in-law does not succeed to the estate of her father-in-law in preference to the enumerated heirs. She comes as heir as a *sapinda*, and her position will have to be determined in each case. Here Sakhárám being one of the enumerated heirs was the heir of Atmárám in preference to Gangábái. Atmárám's estate vested in Sakhárám at Atmárám's death. Sakhárám's son Mahádev, younger than the defendant Balvant, it is said was adopted by Gangábái for her husband. This adoption unless it was made by Sakhárám's consent would have been void * * * Sakhárám's consent to the adoption of Mahádev by Gangábái cannot under the circumstances detailed now be disputed, and by his consent and sole consent, because

he thereby divested himself of the estate already vested in him, the adoption became valid—*Rámji* v. *Ghaman*(1). Mahádev Govind thus succeeded to the estate of Atmáram."

This view of the law was assailed before us by the pleader for the respondent. It was, however, adopted by the Assistant Judge, and we think rightly so. We continue the statement of facts before giving our reasons for this conclusion.

Máhadev married Mathurábái. He died childless in 1870 or 1872, leaving her as his heir. She survived until 1886. Sakhárám died prior to 1880, and in that year Balvant filed his petition and schedule in the Insolvent Court of Bombay when his estate vested in the official assignee. He was then the next reversionary heir to Mahádev after Mathurábái. The official assignee sold Balvant's interest in the property in question to the plaintiff, who after the death of Mathurábái filed the present suit to redeem it from the defendants.

The Assistant Judge relying upon the decision in *Jamiyatrám* v. *Bái Jamna*(2) differing from the Subordinate Judge has held that Balvant had at the time of his insolvency an estate vested in remainder upon the death of Mathurábái. That decision, however, rested upon a misapprehension of Hindu law and has since been overruled by *Lakshmibái* v. *Ganpat Moroba*(3) and cannot now be accepted as law. At the date of his insolvency Balvant had only a *spes successionis* which could not vest in the official assignee, and the plaintiff took no interest in the property in suit under his purchase from the official assignee. This was indeed conceded by the learned pleader for the respondent. He, however, contended that the property had never been vested in either Mahádev or Mathurábái and was, in fact, Balvant's property at the time of his insolvency. He argued that it vested in Sakhárám on the death of Atmárám, and that the adoption of Mahádev by Gangábái, though it might be valid for other purposes, could not operate to divest the property which had already vested in Sakhárám. He distinguished the case of *Rámji* v. *Ghaman*(1) on the ground that there the adoption was into a joint family and not by a widow in a separated

(1) I. L. R., 6 Bom., 498. (2) 2 Bom. H. C. Rep., 11.
(3) 5 Bom. H. C. Rep., 128, at pp. 139 and 140.

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branch. The adoption in that case was held to be invalid for want of the assent of the co-parceners in whom the estate was vested, and so cannot be said to be an authority upon the question, though the Court doubtless assumed that, if the adoption had been with consent, the adopted son would as regards the family estate have stood in the shoes of the father to whom he was adopted. More directly in point are the decision in *Sri Raghunadha* v. *Sri Brozo Kishoro*(1) and *Rupchand* v. *Rakhmábái*(2). In the latter it was held that the adoption of Badridás by Sarjábái, the widow of Anandrám, who had predeceased his brother Sobhárám, had the effect of divesting the estate which had then vested in Rakhmábái, the widow of the latter, and making Badridás the heir to the property of both Anandrám and Sobhárám. The adoption was with the assent of Rakhmábái. This authority was followed in *Venkáji* v. *Datto*(3) by the present Bench. The facts in the Privy Council case above referred to are still stronger. The person whose estate was there divested was a male full owner.

We are unable upon principle to distinguish these decisions from the case before us. The effect of an adoption by a widow must always, whether the adoption take place in a united or separated family, operate to divest to some extent an estate vested elsewhere. That is, therefore, on principle no objection to the giving to the adoption by a widow its full effect. That effect is more striking when the estate has passed out of the immediate family of the adopting widow and has vested in a member of another family; but the principle is, we think, in each case the same.

The case before us differs in some respects from those which we have referred to, in that the estate never vested in Govind by reason of his not having survived his father, but was vested in Atmárám when he died. That, however, in our opinion does not affect the conclusion. The father's line is, we think, continued in the person of the boy adopted (with the assent of those capable of giving the validating assent) by his son's widow to her husband, just as though the latter had left a natural son born in his life-

(1) L. R., 3 I. A., 154. (2) 8 Bom. H. C. Rep., A. C. J., 114 at p. 117.

(3) Reg. Ap. 129 of 1893 decided on the 18th of September 1895.

time or a posthumous son. The adoption when made enures for the benefit not of the adoptive father alone. It benefits also the immediate ancestors of the adoptive father. For the purposes of inheritance the adoption may be considered as relating back to the death of the adoptive father divesting all estates which have during the intermediate period become vested as it were conditionally in another. See *Raje Vyankatráv* v. *Jayavantráv*[1] ; Mayne's Hindu Law, pl. 171. Mahádev on his adoption became, we think, not only the son of Govind, but also the grandson and heir of Atmárám. Having been adopted with the assent of Sakhárám, the adopted grandson of Atmárám divested the estate in Atmárám's property which had vested in Sakhárám. Sakhárám by giving Mahádev in adoption to Gangábái while divesting Mahádev of the right to inherit as his heir invested him with the right to inherit Atmárám's estate.

We must, therefore, reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with costs both of this and of the lower appellate Court on the respondent.

Decree reversed.

(1) 4 Bom. H. C. Rep., A. C. J., 191.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Strachey.

VISHNU RA'MCHANDRA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANESH A'PPA'JI CHAUDHARI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1895. *December 9.*

Practice—Procedure—Wrong issue framed by lower Court—Finding on the point raised by correct issue clear from judgment—No remand—Second appeal—Limitation Act (XV of 1877), Sch. II, Art. 127—Partition suit—Limitation.

Where the lower appellate Court framed a wrong issue for decision, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court in second appeal refused to remand the case for a new finding on that issue.

The fact that the plaintiffs were not excluded from their share in part of the joint property does not prevent article 127, schedule II of the Limitation Act (XV of 1877 from operating in respect of another part from which they had been excluded to their knowledge.

* Second Appeal, No. 596 of 1894.