FULL BENCH.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Ranade, Mr. Justice Fulton and Mr. Justice Hosking.

1896. *November* 18.

VASUDEO VISHNU MANOHAR (ORIGINAL DEFENDANT), APPELLANT, *v.* RAMCHANDRA VINAYAK MODAK (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption—Adoption by widow of a predeceased son of owner after the estate had vested in the daughters of the deceased owner—Assent of a minor daughter in whom the estate had vested to the adoption—Ratification by the minor on attaining years of discretion—Adoption invalid—Acquiescence not equivalent to consent.

On the death of one Vishnu his estate vested in his two daughters, one of whom was a minor. Six months after Vishnu's death his daughter-in-law Savitri (widow of his predeceased son) adopted the plaintiff. It was alleged that the daughters consented to the adoption.

Held, that the adoption was invalid, as the minor daughter could not give such a consent to it as would operate to divest her of her estate.

Per FULTON and HOSKING, JJ.:—Subsequent assent to an adoption cannot give it validity if it was invalid when made.

Per RANADE, J.:—The adoption of the plaintiff was invalid for the double reason that Savitri had no power to adopt, as she was not the widow of the last male holder, and the nearest heirs, the daughters of the deceased Vishnu, were not proved to have given their consent to the divesting of the estate which had come to them by inheritance, in favour of Savitri or the plaintiff.

Mere presence at the ceremony and the absence of any objection might imply an acquiescence, but mere acquiescence is not equivalent to consent.

APPEAL under section 15 of the Amended Letters Patent against the decision of the Division Bench confirming the decree of T. Walker, Assistant Judge of Ratnágiri.

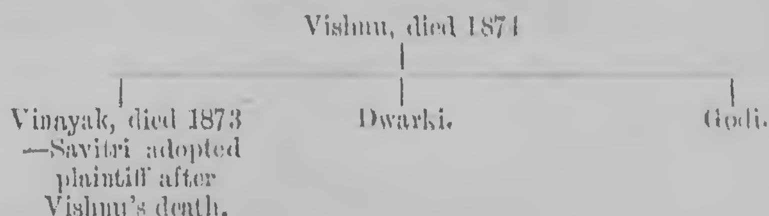
The plaintiff claimed to recover certain property which originally belonged to one Vishnu Modak, who died in 1874. He alleged that he had been validly adopted by Savitri, the widow of Vishnu's predeceased son, and in virtue of that adoption he claimed the property.

* Appeal No. 37 of 1896 under the Letters Patent.

1896.

VASUDEO v. RAMCHANDRA.

The facts appear from the following table:—



Vishnu at his death in 1874 left only two daughters, Dwarki and Godi (a minor), and a daughter-in-law, Savitri, the widow of his predeceased son Vinayak. The plaintiff was adopted by Savitri after Vishnu's death.

The defendant pleaded that the adoption was invalid, having been made by an untonsured widow without the consent of the other members of the family, and that the right to the property in suit had passed to, and was vested in, other persons prior to the plaintiff's adoption.

The Subordinate Judge rejected the claim.

On appeal by the plaintiff, the Assistant Judge of Ratnágiri found that the plaintiff was Vinayak's adopted son and succeeded both to his property and to Vishnu's. He, therefore, reversed the decree and allowed the claim.

The defendant having preferred a second appeal, the High Court after hearing arguments sent down the following issue for a finding:—

"Is plaintiff the adopted son of Vinayak and entitled, as such, to inherit the property of Vishnu?"

The Judge (M. P. Khareghat) found that the plaintiff was the adopted son of Vinayak and that he was entitled to inherit the property of Vishnu. He further held that the adoption took place with the consent of Dwarki and Godi, the latter of whom ratified her act after she attained majority.

The above finding having been certified, the case came on for argument before the Division Bench consisting of Parsons and Candy, JJ.

Daji A. Khare appeared for the appellant (defendant).

Ganesh K. Deshmukh appeared for the respondent (plaintiff).

1896.

VASUDEO
v.
RAMCHANDRA.

PARSONS, J.:—I accept the finding of the lower Court that Dwarki and Godi consented to the adoption. It is one of fact, and no illegality has been shown to justify interference.

As the widow had not attained puberty, tonsure would not be required.

The only other objection raised to the validity of the adoption rests on the proposition that Savitri, as the widow of Vinayak, the predeceased son of Vishnu, had no power to adopt after the death of Vishnu and the vesting of the estate in Dwarki and Godi. As, however, Dwarki and Godi consented to the adoption and to the divesting of their inheritance, I consider that objection unsound. It is directly contrary to our recent decision in *Babu Anaji* v. *Ratnoji* (1). As my colleague differs, the decree appealed from is confirmed under section 575 of the Code with costs.

CANDY, J.:—The question is whether plaintiff's adoption was valid. In my opinion it was not.

At Vishnu's death the estate had vested *by inheritance* in Dwarki and Godi. Vinayak was not the last male holder. The adoption was not made by the widow of any previous holder. Vinayak was not a holder at all. "Under no other circumstances will an adoption made to one person devest the estate of any one who has taken that estate as heir of another person"—Mayne's Hindu Law, section 179, page 210 (5th Ed.). This is the principle on which the decision of this Court was given in *Krishnarav* v. *Shankarrav*(2) and in *Shri Dharnidhar* v. *Chinto*(3). In *Babu Anaji* v. *Ratnoji*(1) a contrary decision would appear to have been given. In that case the learned Judges ruled that "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 Vyankatrav* v. *Jayavantrav*(4); Mayne's Hindu Law, S. 171." I cannot find the words underlined in the case quoted. Mr. Mayne's remarks in section 171 must be read with those in the subsequent paragraphs.

(1) I. L. R., 21 Bom., 319.
(2) I. L. R., 17 Bom., 164.
(3) I. L. R., 20 Bom., 250.
(4) 4 Bom. H. C. Rep., A. C. J., 191.

1896.

VASUDEO v. RAMCHANDRA.

With regard to "the assent of those capable of giving the validating assent" it must be remembered that the need of the kinsmen's sanction does not arise from their right in the property, but from their family relations to the widow (see the authorities collected at p. 128 of I. L. R., 15 Bom.). Here the assent of the two girls Dwarki and Godi would not confer validity on an adoption which was otherwise invalid. From the moment that Vishnu died, and his estate was vested in his daughters, the right of his daughter-in-law, Savitri, to adopt for the purposes of inheritance was *at an end*. See judgment of West, J., in *Keshav* v. *Govind*(1) and *Shri Dharnidhar* v. *Chinto* quoted above. What would have been the position of the parties had Savitri adopted plaintiff before Vishnu's death and with his assent as head of the family, it is unnecessary to enquire. I cannot hold the adoption of the plaintiff to be valid without going contrary to the decisions in *Krishnarav* v. *Shankarrav*(2) and *Shri Dharnidhar* v. *Chinto*(3) and the numerous authorities quoted in those two cases. As my learned colleague holds that the adoption was valid, and would accordingly confirm the decree of the lower appellate Court, that decree will stand.

The Judges having thus differed, and the decree of the Assistant Judge having been confirmed under section 575 of the Civil Procedure Code (Act XIV of 1882), the defendant appealed under section 15 of the Amended Letters Patent.

Daji A. Khare for the appellant (defendant) :—The adoption was invalid *ab initio*, because the authority of Vinayak's widow to adopt came to an end after Vishnu's death, and the daughters could not by their consent give authority to adopt. After Vishnu's death the estate vested in his daughters, and when the estate vests in another person, the power of a widow to adopt comes to an end.

Ganesh K. Deshmukh for the respondent (plaintiff) :—The finding of the Judge as to the consent of Dwarki and Godi to our adoption is a finding of fact. Godi was at the time of the adoption a minor, but she never disputed the adoption after attaining majority. Estoppel applies to minors. An estate

(1) I. L. R., 9 Bom., 94. (2) I. L. R., 17 Bom., 164. (3) I. L. R., 10 Bom., 250.

1896.

VASUDEO v. RAMCHANDRA.

although vested can be divested in three ways. See Mayne's Hindu Law, para. 179.

The cases referred to in the following judgments were cited and discussed during the argument.

FARRAN, C. J.:—I am of opinion that the adoption of the plaintiff by Savitri in this case was invalid upon the ground that Godi, in whom jointly with Dwarki the estate was vested, was a minor at its date and could not for that reason give such a consent to it as would operate to divest her of her estate or as a waiver of it in favour of the boy adopted by Savitri. Such a consent, whatever view of the law upon this subject may be taken, was, I think, clearly necessary to validate the adoption. The Acting District Judge was of opinion that though Godi could not by reason of her minority validly consent to the adoption, yet she subsequently ratified it by her conduct; but the adoption must, in my opinion, have been either valid or invalid at the time when it took place, and its validity cannot depend upon the subsequent action of Godi: see West and Bühler, page 1099.

In this view it becomes unnecessary for me to express an opinion in this appeal between the conflicting views, which the learned Judges in the Division Court expressed, upon the effect which the consent of the person, in whom the estate is vested in the case of a divided family, has in validating what would otherwise be an invalid adoption, or as to whether the case of *Babu Anaji* v. *Ratnoji*[1] following *Rupchand* v. *Rakhmabai*[2] was rightly decided. When that decision was arrived at, the case of *Annammah* v. *Mabbu*[3] was not brought to our notice, nor was I aware of the *dictum* of the Court in *Shri Dharnidhar* v. *Chinto*[4]. I shall, therefore, feel at liberty to consider the principle of that decision when it again arises and calls for determination. I cannot, however, as at present advised, bring myself to consider that the question involved in it has been impliedly decided by the Privy Council, or that the decision in *Babu Anaji* v. *Ratnoji* (*supra*) is at variance with any judgment of their Lordships. So far as I am aware, their

(1) I. L. R., 21 Bom., 319.
(2) 8 Bom. H. C. Rep., 114, A. C. J.
(3) 8 Mad. H. C. Rep., 108.
(4) I. L. R., 20 Bom., 250.

1896.

VASUDEO v. RAMCHANDRA.

Lordships have not considered or expressed an opinion upon the question: see *Kally Prosonno* v. *Gocool Chunder*[1]. The result, however, is that in my opinion the appeal in this case should be allowed, the decree of the lower appellate Court reversed, and the plaintiff's suit dismissed with costs throughout on the plaintiff.

RANADE, J.:—I agree with Mr. Justice Candy in holding that the adoption of the respondent plaintiff is invalid for the double reason that Savitri had no power to adopt, as she was not the widow of the last male holder, and the nearest heirs, the daughters of the deceased Vishnu, are not proved to have given their consent to the divesting of the estate which had come to them by inheritance in favour of Savitri or the respondent. Savitri, as the widow of a predeceased son of Vishnu, had no right to the property of Vishnu, which devolved on Vishnu's daughters as his only heirs. At the time when the adoption took place six months after Vishnu's death, his property had become vested in his daughters as his sole heirs, and Savitri had only a right to maintenance. Her adoption of the respondent-plaintiff could not, therefore, confer on the plaintiff any right to the property of the last male holder. The principle of this decision was laid down by their Lordships of the Privy Council in *Mussamut Bhoobun Moyee Debia* v. *Ram Kishore*[2] and has been affirmed by their Lordships in *Padmakumari Debi* v. *Court of Wards*[3] and *Thayammmal* v. *Venkataramu*[4]. The Madras High Court followed this same principle in *Annammah* v. *Mabbu*[5]. In our own Presidency, this same view has been given effect to by a series of rulings commencing with *Rupchand* v. *Rakhmabai*[6]; *Ramji* v. *Ghamau*[7]; *Kheshav* v. *Govind*[8]; *Chandra* v. *Gojarabai*[9]; *Krishnarav* v. *Shankarrav*[10].

The facts of the case reported in *Gayabai* v. *Shridharacharya*[11] are exactly in point, for there, as here, it was held that if the

(1) I. L. R., 2 Cal., 295 at p. 297.
(2) 10 M. I. A., 279.
(3) I. L. R., 8 Cal., 302.
(4) I. L. R., 10 Mad., 205.
(5) 8 Mad. H. C. Rep., 108.
(6) 8 Bom. H. C. Rep., 114, A. C. J.
(7) I. L. R., 6 Bom., 498.
(8) I. L. R., 9 Bom., 94.
(9) I. L. R., 14 Bom., 463.
(10) I. L. R., 17 Bom., 164.
(11) P. J. for 1881, p. 115.

last male holder was separated from his brothers, his daughters would succeed as heirs, and the widow of a predeceased son of the last male holder could not make a valid adoption without the consent of the daughters.

This brings us to the consideration of the second question, whether the daughters Dwarki and Godi gave their consent in the present case. One of the daughters was only twelve years old, and the other twenty-five, and they were present on the occasion of the adoption. The Court of first instance held that such presence would not amount to consent. The lower Court of appeal at first refused to go into this question, as the original defendants were strangers, and did not claim under any of the alleged heirs. On remand from this Court, it inquired into this issue, and found that though their consent was never personally taken at any time, yet as they did not object at any time, and are shown to have taken part in the ceremony, this was proof of their substantial consent to the adoption. The District Judge has relied chiefly on the authority of the ruling in *Rupchand* v. *Rakhmabai*(1), where consent was held to be proved. The party giving her consent was a major, and had herself taken part in celebrating and proclaiming the adoption. This can hardly be asserted of the two daughters in the present case, one of whom was admittedly a child twelve years old. Mere presence at the ceremony, and the absence of any objection, might imply an acquiescence, but it has been ruled that mere acquiescence is not equivalent to consent—*Ramamani Ammal* v. *Kulanthai Natchear*(2) and *Rungama* v. *Atchama*(3).

Under these circumstances the finding of the lower Court of appeal, that the daughters must be held to have consented, cannot be accepted as a binding adjudication of fact. On the whole, I feel satisfied that the adoption in this case was void for want of legal power in the adoptive mother Savitri to make a valid adoption, and that this defect was not cured by the consent of the real heirs.

FULTON, J.:—As Godi was only twelve at the time of the adoption she was, I think, incompetent to give an assent thereto such

(1) 8 Bom. H. C. Rep., 114, A. C. J.

(2) 14 M. I. A., 346.

(3) 4 M. I. A., 1.

1896.

VASUDEO v. RAMCHANDRA.

as to satisfy the requirements of justice alluded to in Mr. Justice Melvill's judgment in *Rupchand* v. *Rakhmabai* [1]. The adoption, therefore, cannot be upheld having regard to the decision in *Gayabai* v. *Shridharacharya* [2], for there seems no authority for holding that subsequent assent can give validity to an adoption which was not valid when made. It is unnecessary, then, to discuss the question whether, after the estate has passed by inheritance to a daughter or other heir of the last male holder, the widow of a predeceased co-parcener can adopt to her husband with the assent of the heir in whom the estate has vested.

I think, therefore, the decrees of the Assistant Judge and the Division Bench must be reversed and the claim rejected with costs on plaintiff throughout.

HOSKING, J.:—I agree in holding the adoption invalid on the grounds that Godi being at the time only twelve years of age was unable to give such an assent as would bind her, and that the adoption being *ab initio* invalid could not be made valid by any subsequent ratification by Godi on attaining years of discretion.

Accordingly I concur in reversing the decree of the Division Bench.

Decree reversed.

(1) 8 Bom. H. C. Rep., at p. 119, A. C. J. (2) P. J. for 1881, p. 115.

FULL BENCH.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Parsons, Mr. Justice Ranade, Mr. Justice Fulton and Mr. Justice Hosking.

1896. *November 24.*

RAMCHANDRA BHAGAVAN (ORIGINAL DEFENDANT), APPELLANT, *v.* MULJI NANABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Widow—Adoption—Motive—Inquiry as to motives in making adoption irrelevant.

Held by a Full Bench (Hosking, J., dissenting) that in the Bombay Presidency, a widow having the power to adopt, and a religious benefit being caused to her

* Second Appeal, No. 273 of 1896.