APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

ANANDIBAI, WIDOW OF SADASHIV JIVANRAV (ORIGINAL PLAINTIFF), APPELLANT, *v.* KASHIBAI, WIDOW OF JIVANRAV SHAMRAV (ORIGINAL DEFENDANT 1), RESPONDENT.*

1904. *April* 13.

Hindu Law—Adoption—Co-widows—Estate vested in one co-widow by inheritance from her son—Adoption by the other co-widow.

A co-widow cannot make an adoption without the consent of the other co-widow in whom by inheritance from her son the whole estate had become vested.

Rakhmabai v. *Radhabai* (1), distinguished.

Semble, the consent of the other co-widow would not validate the adoption.

APPEAL from the decision of Vaman M. Bodas, First Class Subordinate Judge of Sátára, in Original Suit No. 429 of 1900.

One Jivanrav Shamrav Pasare died in or about the year 1855, leaving him surviving two widows, Lakshmibai and Kashibai, an infant son Ramrav by Kashibai, and a daughter Vithabai by Lakshmibai. Some months after Ramrav died. In 1875 Lakshmibai, without the consent of her co-widow Kashibai, adopted a boy Sadashiv, who died in 1883 leaving a widow Anandibai. After Lakshmibai's death in 1889, Sadashiv's widow Anandibai brought the present suit against Kashibai and Vithabai to recover possession of certain properties, alleging that they belonged to her as the widow of Sadashiv who was the adopted son of Jivanrav Shamrav Pasare.

The defendants contended, *inter alia*, that Jivanrav died leaving a son Ramrav who succeeded to his entire estate; that after Ramrav's death the succession devolved on his mother Kashibai alone, the junior widow of Jivanrav; that Lakshmibai, therefore, could not and did not adopt the plaintiff's husband Sadashiv; that she had no authority from Jivanrav to adopt, and that the alleged adoption having been made without Kashibai's consent was invalid and did not give the adopted boy any interest in Jivanrav's estate.

* Appeal No. 76 of 1903.

(1) (1868) 5 Bom. H. C. R. (A. C. J.), 131.

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The Subordinate Judge dismissed the suit holding that the plaintiff's husband Sadashiv was not lawfully adopted by Lakshmibai; that Lakshmibai was incompetent to adopt a son for Jivanrav; that Jivanrav's son Ramrav was his legal heir and representative in whom the whole property of Jivanrav vested, and that after Ramrav's death, his mother, defendant 1, was the rightful heir and successor to his property.

The plaintiff having appealed,

K. H. Kelkar appeared for the appellant:—In the Bombay Presidency the senior widow has a preferential right to adopt a boy to her husband: *Rakhmabai* v. *Radhabai*.(1) This ruling is affirmed in *Padajirav* v. *Ramrav*.(2) The rule in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharg* (3) that a person in whom the estate of the last male holder is not vested cannot adopt, is modified by various exceptions. The mother's case is an instance in point: *Payapa* v. *Appanna*.(4) The said rule is in fact a creation of modern law, and with respect to it nothing is found either in the Mitakshara or the Mayukha. The ruling of the Calcutta High Court in *Faizuddin Ali Khan* v. *Tincowri Saha* (5) is distinguishable on the ground that in Bengal the senior widow has no preferential right like the one conceded to her in Bombay. In the present case even Kashibai can adopt to her husband and divest the estate which she has inherited from her son: *Amava* v. *Mahadgauda*.(6) The test for the validity of an adoption does not consist solely in the doctrine of the divesting of the estate. In a case like the present, the test is to be found in seniority. We rely on the ruling in *Rakhmabai* v. *Radhabai* (1) in support of our contention. See also Golapchandra Sarkar on Adoption, p. 412.

Kashibai having consented to the adoption of Sadashiv, her consent cured the invalidity: *Rupchand Hindumal* v. *Rakhmabai*.(7)

(1) (1885) 5 Bom. H. C. R. (A. C. J.), 181.
(2) (1888) 13 Bom. 160.
(3) (1865) 10 Moo. I. A. 279.
(4) (1898) 23 Bom. 327.
(5) (1895) 22 Cal. 505.
(6) (1896) 22 Bom. 416.
(7) (1871) 8 Bom. H. C. R. (A. C. J.), 114.

Mahadev V. Bhat appeared for the respondents (defendants) :— The last male holder was Ramrav from whom inheritance is to be traced. On his death his mother succeeded by right of inheritance. The present is not a case of contest between two widows. Ramrav's birth effected a great change in the legal position of the two ladies. It reduced Lakshmibai to the position of a widow entitled to maintenance only. It was strictly by right of inheritance that Kashibai succeeded to her son Ramrav on his death, as if he had been a separated householder. There was no undivided family at Ramrav's death into which an adopted son could be admitted by virtue of adoption. In an undivided family where deceased co-parceners have left widows, it may plausibly be argued that any widow may continue the existence of the joint family by making an adoption. But the present is strictly a case of inheritance.

It is established by a series of decisions that an estate vested by inheritance in any person cannot be divested by subsequent adoption to a person other than the person from whom the estate vested : *Faizuddin Ali Khan* v. *Tincowri Saha*,(1) *Mondakini Dasi* v. *Adinath Dey*.(2) The real effect of the ruling in *Mussumat Bhoobun Moyee* v. *Ram Kishore*(3) was considered in a subsequent litigation relating to the same estate. The High Court of Bengal held that Ram Kishore's adoption was not altogether invalid, but that the only result of the previous decision was that he could not inherit the estate in the lifetime of Bhoobun Moyee. On appeal the Privy Council held that on the death of Bhavani Kishore and the vesting of his estate in his widow Bhoobun Moyee, the power of adoption which Bhavani Kishore's mother possessed came to an end and became incapable of execution : *Pudma Coomari Debi* v. *The Court of Wards*.(4) Further, the reasoning in *Ramkrishna Ramchandra* v. *Shamrao Yeshwant*(5) supports our contention. It was there held that the limit to the period within which an adoption may be made by a widow to her deceased husband did not depend upon the mere vesting of the estate in her at any time. The rule stated there, as deducible from previous decisions, is that

(1) (1895) 22 Cal. 565.
(2) (1890) 18 Cal. 69.
(3) (1865) 10 Moo. I. A. 279.
(4) (1881) 8 I. A. 229.
(5) (1902) 26 Bom. 526.

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when a Hindu dies and his line is continued by a son, his widow cannot adopt. Her power having become extinct cannot be revived: *Gavdappa* v *Girimallappa*,(1) *Amava* v. *Mohadganda*,(2) *Payapa* v. *Appanna*,(3) *Keshav Ramkrishna* v. *Govind Ganesh*,(4) *Venkappa Bapu* v. *Jivaji Krishna*.(5)

JENKINS, C. J.:—The plaintiff sues to recover possession of the properties described in the plaint, as the widow of Sadashiv, who, she alleges, was the adopted son of Jivanrav Shamrav Pasare. The defendants assert that in the circumstances no adoption could be made.

Jivanrav died over 40 years ago, leaving two widows, Lakshmibai and the defendant Kashibai, a son named Ramrao, and a daughter named Vithabai. The daughter was the child of the elder widow Lakshmibai, the son was the child of the younger widow Kashibai.

Ramrao died and his mother thereupon succeeded to the estate. In 1875, Lakshmibai purported to adopt Sadashiv, the plaintiff's husband, as son to her deceased husband, and the principal question in the case is whether she had power to make that adoption.

Mr. Kelkar for the plaintiff has argued that Lakshmibai was entitled to make the adoption, resting his contention mainly on the decision in *Rakhmabai* v. *Radhabai*,(6) where it was held that an elder Hindu co-widow had power to adopt a son to her deceased husband without the consent of the younger widow.

There, however, the two widows had succeeded on the death of their husband as his co-heiresses.

A petition of appeal to the Privy Council from the decree in that suit is said to have been presented, but it was not prosecuted to a hearing and the decision has since been recognized both here and in Calcutta. Still it has been said by a Full Bench of this Court that they did not feel themselves at liberty to carry the authority of that case beyond what its facts actually warrant.

(1) (1894) 19 Bom. 331.
(2) (1896) 22 Bom. 476.
(3) (1898) 23 Bom. 327.
(4) (1884) 9 Bom. 94.
(5) (1900) 25 Bom. 306.
(6) (1863) 5 Bom. H. C. R. (A. C. J.), 181.

And in Calcutta it has been held in circumstances undistinguishable from the present that an adoption could not be made without the consent of the co-widow in whom by inheritance from her son the whole estate had vested *Faizuddin Ali Khan* v. *Tincowri Saha*.[1]

It was there pointed out that no express consent to the adoption had been given by the co-widow, and that as she had inherited the property not from her husband, but from her son, it would be going too far to hold that she was under any such obligation to give her assent to the adoption by her co-widow as should have the effect of divesting her of her estate.

These remarks, with which we fully agree, are precisely applicable to the circumstances of this case. For here, too, there is no evidence of an express consent, nor do the circumstances justify the inference that Kashibai gave her consent to an adoption, which would divest her of the estate she had inherited from her son.

Had we been able to hold that Kashibai had consented, it would have been necessary to consider whether it would have been of any avail, for if the decision of the Full Bench in *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* [2] were applicable here, Lakshmibai's power to adopt was at an end and no assent would be of use.

The result is that we must confirm the decree with costs. The appellant to pay the court-fees which she would have had to pay if she had not been permitted to sue as a pauper.

Decree confirmed.

(1) (1895) 22 Cal. 565.

(2) (1902) 26 Bom. 526; 4 Bom. L. R. 315.