APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

PAYAPA AKKAPA PATEL (ORIGINAL PLAINTIFF), APPELLANT, *v.* APPANNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1898. *July* 11.

Hindu law—Adoption—Adoption by widow of a predeceased son—Consent of mother-in-law—Adoption must be by widow of the last full owner—Exceptions to this rule.

By Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and a person in whom the estate does not vest, cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights.

To this rule there are four exceptions :—

1. In the case of co-widows. Though, on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows has not been held to be essential.

2. In the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner.

3. When an adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent.

4. Where there has been ratification by conduct or acquiescence.

Per PARSONS, J. :—The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested.

One Bhimappa died in 1878, leaving a widow Umava and a daughter-in-law Sarasvati him surviving. His only son Darigavda, the husband of Sarasvati, had predeceased him. On Bhimappa's death his estate vested in his widow Umava. In 1879 Sarasvati with Umava's consent adopted a son Shentapa (defendant No. 3). The plaintiff in this suit sued to recover certain land which formed part of Bhimappa's estate, alleging that it had been given to him by Umava. The first defendant alleged and proved that he had bought the land from the third defendant (Shentapa), who was the adopted son of Sarasvati.

Held, (dismissing the suit), that the adoption was valid, and that the first defendant was entitled to the land.

* Second Appeal, No. 931 of 1897.

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THE plaintiff sued to recover possession of certain land from the first defendant, who had ousted him in 1891. The plaintiff alleged that the land had been given to him by Umava, the widow of one Bhimappa, the former owner of the land.

Umava had succeeded to the land on the death of her husband (Bhimappa) in 1878. She was then sixty years of age. Their only son Darigavda had predeceased Bhimappa and left a widow Sarasvati, who at Bhimappa's death was twenty years old.

For the defence it was alleged that Sarasvati, with the consent of Umava, had adopted a son named Shentapa (defendant No. 3) to her husband (Darigavda), and that he had sold the land to the first defendant, who was in possession.

The Subordinate Judge found that Sarasvati did as a matter of fact adopt the third defendant with the assent of her mother-in-law Umava, in whom Bhimappa's estate had vested on Bhimappa's death, and that such adoption was valid, and that the title of the first defendant as purchaser from the third defendant as such adopted son was established. He, therefore, dismissed the plaintiff's claim.

On appeal the Judge confirmed the decree.

The plaintiff appealed to the High Court. The only question raised in appeal was as to the validity of an adoption by a daughter-in-law in the life-time of her mother-in-law, the estate having vested in the latter as heir and not in the daughter-in-law, by reason of her husband having predeceased his father.

Dhondu P. Kirloskar, for the appellant (plaintiff) :—The only question is, whether the adoption of Shentapa (defendant No. 3) is valid. We contend that it is invalid. Umava was the widow of the last male holder, and, therefore, she alone was entitled to adopt. Her consent to the adoption by her daughter-in-law was not sufficient to make the adoption valid.

Manekshah J. Taleyarkhan, for the respondents (defendants) :—It is not necessary that the widow who adopts should be the widow of the last male holder. It has been held that when a son dies unmarried, or without leaving a widow, his mother can adopt. The test of a valid adoption, in a case like the present, is

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whether the consent of the person in whom the estate has vested has been obtained. Here the mother-in-law, in whom the estate had vested, consented to the adoption by her daughter-in-law, and she having consented, the adoption was valid. It was not necessary to obtain the consent of the reversioners in whom the property had not vested.

The following cases were cited during arguments:—*Shri Dharnidhar* v. *Chinto*[1]; *Vasudeo* v. *Ramchandra*[2]; *Rupchand* v. *Rakhmabai*[3]; *Babu* v. *Ratnoji*[4]; *Amava* v. *Mahadgauda*[5]; *Pudma Coomari Debi* v. *The Court of Wards*[6]; *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[7]; *Gavdappa* v. *Girimallappa*[8]; *Krishnarav* v. *Shankarrav*[9]; *Bhoobum Moyee* v. *Ram Kishore*[10]; *Waman Dhondo* v. *Ramchandra*[11].

RANADE, J. :—Both the lower Courts have found that Sarasvati, the widow of the predeceased son of Bhimappa, did, as a matter of fact, adopt respondent No. 3 as her son with the full assent of her mother-in-law, Bhimappa's widow Umava, and that the adoption so made with the assent of the person in whom the estate vested on Bhimappa's death was a valid adoption. In the appeal before us the sole contention raised related to the validity of such an adoption by a daughter-in-law in the life-time of her mother-in-law when the estate was vested in the latter as heir, and not in the daughter-in-law by reason of her husband having predeceased his father.

There can be no doubt that, as a general rule of strict Hindu law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights. This position was first laid down in *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore*[10], and has been

(1) (1895) 20 Bom., 250.
(2) (1896) 22 Bom., 551.
(3) (1871) 8 Bom. H. C. Rep., A. C. J., 114.
(4) (1895) 21 Bom., 319.
(5) (1896) 22 Bom., 416.
(6) (1881) 8 I. App., 229.
(7) (1876) 4 I. App., 1.
(8) (1894) 19 Bom., 331.
(9) (1892) 17 Bom., 164.
(10) (1865) 10 Moore's I. App., 279.
(11) P. J., 1897, p. 183.

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repeatedly affirmed by their Lordships in *Pudma Coomari Debi* v. *The Court of Wards*[1], and again in *Thayammal* v. *Venkatarama*[2], and *Tarachurn* v. *Suresh Chunder*[3]. Effect was given to this view by the Madras High Court in *Annammah* v. *Mabbu Bali Reddy*[4], by the Calcutta High Court in *Tarachurn* v. *Suresh Chunder*[5] and by this Court in *Keshav* v. *Govind*[6]; *Chandra* v. *Gojarabai*[7]. In most of these cases the estate had vested in the daughter-in-law by reason of her husband having survived his father—*Mussumat Bhoobum Moyee Debia* v. *Ram Kishore*; *Thyammal* v. *Venkatarama*, *Tarachurn* v. *Suresh Chunder*, *Krishnarav* v. *Shankarrav*[8] and *Keshav* v. *Govind*, and it was held that the mother-in-law could not by exercising her power of adoption defeat her daughter-in-law's rights. The same principle governs cases when the son dies before his father, and it is the daughter-in-law who seeks by adoption to divest the mother-in-law of her rights—*Shri Dharnidhar* v. *Chinto*[9]. The same rule applies to the case of collateral relations—*Rupchand* v. *Rakhmabai*[10]; *Annammah* v. *Mabbu Bali Reddy*[4]; *Chandra* v. *Gojarabai*[7].

Although this is the general rule, four distinct classes of exceptions or qualifications to this rule have been recognized. The first exception has reference to the case of co-widows. Though on the death of the husband without male issue, the estate vests in all his widows, it has been held that the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows has not been held to be essential—*Rakhmabai* v. *Radhabai*[11]; *Ramji* v. *Ghamau*[12]; *Amava* v. *Mahadgauda*[13]. In such cases the widows are apparently considered to be not distinct but united in their concern to respect the wishes and promote the interest of the husband, and the act of the same widow is held to bind the others.

(1) (1881) 8 I. A., 229.
(2) (1887) 14 I. A., 67.
(3) (1889) 16 I. A., 166.
(4) (1875) 8 Mad. H. C. Rep., 108.
(5) (1886) 17 Cal., 122.
(6) (1884) 9 Bom., 91.
(7) (1890) 14 Bom., 463.
(8) (1892) 17 Bom., 164.
(9) (1895) 20 Bom., 250.
(10) (1871) 8 Bom. H. C. Rep., 114.
(11) (1868) 5 Bom. H. C. Rep., 181.
(12) (1879) 6 Bom., 498.
(13) (1896) 22 Bom., 416.

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The second exception to the rule that it is only the widow of the last full owner who can adopt a son to him on his death without issue, has been recognized in the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner. This exception was approved by the Privy Council in *Rajah Velanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[1], where the principle of such recognition is laid down, namely, that the act of adoption is derogatory of no other rights than those of the adopting mother. The judgment expressly states that this circumstance distinguished such a case from the general rule as laid down in *Mussumat Bhoobum Moyee* v. *Ram Kishore*[2] and that the decision in the latter case expressly recognized this distinction. This view was given effect to in *Ramji* v. *Ghamau*[3] and *Gavdappa* v. *Girimallappa*[4], *Sangapa* v. *Vyasapa*[5], in which last case the ruling in *Krishnarav* v. *Shankarrav*[6] was distinguished on the ground that the deceased's son last full owner had been married and had left a widow whose rights were defeated by the adoption, which of course brought the case under the general rule.

The third modification of the general rule is the one with which we are more immediately concerned here, though it is in reality only a further development of the principle on which the second exception is based. It is to the effect that when the adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent. The validity of the principle of the general law is not affected by a qualification which recognizes that a person may waive his right in favour of the adoption. In the *Ramnad case*[7] their Lordships in their judgment observed that in the case of an adoption by a predeceased son's widow, the consent of the father-in-law, or, in his absence, of "all the brothers, who in default of

(1) (1876) 4 I. A., 1.
(2) (1865) 10 Moore's I. A., 279.
(3) (1879) 6 Bom., 498.
(4) (1894) 19 Bom., 331.
(5) P. J. for 1896, p. 528.
(6) (1892) 17 Bom., 164.
(7) (1868) 12 Moore's I. A., 397.

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the adoption would take the husband's share, would be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener *against their will*. This same consideration influenced their Lordships in deciding *Sri Raghunadha* v. *Sri Brozo Kishoro*[1] that the consent of kinsmen was limited to those kinsmen who are by their union interested in the family property. This view was given effect to by this Court in *Ramji* v. *Ghamau*[2]; *Dinkar* v. *Ganesh*[3]. When such consent was proved to have been given by the party in whom the estate vested, the adoption was upheld, though it had the effect of divesting the party giving such consent of his rights—*Rupchand* v. *Rakhmabai*[4]; *Babu* v. *Ratnoji*[5]; *Venkoji* v. *Dullo*[6]. When the consent of the parties in whom the estate vested was not proved, the adoption was held invalid—*Vasudeo* v. *Ramchandra*[7]. It is true in this last case Mr. Justice Candy differed from Mr. Justice Parsons and was of opinion that the decision in *Babu* v. *Ratnoji* was not correct. Mr. Justice Candy was of opinion that *under no circumstances* can an adoption, not made by the widow of the last full owner, be valid so as to divest the heir in whom the estate has vested of his or her rights. As has been shown above, the proposition as thus stated is too broadly put, and that it needs the qualification of "against their will" or "without their consent" to make it complete. The general rule is subject to certain recognized qualifications and among others to the qualification that the consent of the person in whom the estate has vested, not given at a later stage, but given at the time and with full knowledge, cures the defects, if any, in the formal adoption. Nothing is more common in this country than to find that parents, when they grow old, and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves. In the present case, Bhimappa was admittedly very old when he died in 1878. His widow Umava was herself sixty years old, while Sarasvati was only twenty

(1) (1876) 3 I. A., 154.
(2) (1879) 6 Bom., 498.
(3) (1879) 6 Bom., 505.
(4) (1871) 8 Bom. H. C. Rep., 114.
(5) (1895) 21 Bom., 319.
(6) R. A., 129 of 1893.
(7) (1896) 22 Bom., 551.

at the time. Umava not only approved Sarasvati's adoption, but she actually joined with her in executing the varaspatra in 1879, and later on she herself executed a malkipatra in 1882 in favour of the adopted son of Sarasvati. Both deeds are registered and both recite that the adoption was made with the consent of Umava and by the orders of Bhimappa. There was no such consent proved in any of the cases relied upon by Mr. Justice Candy in the case in which he expressed a doubt on this point. This contemporaneous express consent validates the action of Sarasvati in adopting respondent No. 3.

The fourth exception is clearly allied to the one discussed above and is based on the principle of ratification by conduct or acquiescence—*Sadashiv* v. *Hari*(1); *Rajendro Nath* v. *Jogendro Nath*(2); *Ravji* v. *Lakshmibai*(3); *Sukhbasi Lal* v. *Guman Singh*(4). It is not necessary to discuss this point further here, as in this case the adoption is not questioned by Umava. She never disputed the third respondent's status during his life, and in her deposition before the Mámlatdár she gave her consent to have her lands transferred to this respondent's name.

These are some of the qualifications of the general rule. The present case falls under the third exception, and I feel satisfied that the claim has been properly disposed of in the Courts below. I would, therefore, confirm the decree of the lower Court, and dismiss the appeal with costs.

PARSONS, J.:—My learned colleague has dealt so ably and exhaustively with the point of Hindu law at issue in this second appeal, that I feel any thing I can say beyond expressing concurrence with him will be mere surplusage. The validity of an adoption made under circumstances very similar to the present was affirmed by the Chief Justice and myself in *Babu* v. *Ratnoji*(5). The correctness of this decision was doubted by Candy, J., in the case of *Vasudeo* v. *Ramchandra*(6), but it became unnecessary for the appeal Court to pronounce upon it, as the appeal was decided on other grounds: see *Vasudeo* v. *Ramchandra*(7). In the mean-

(1) (1874) 11 Bom. H. C. Rep., 190.
(2) (1871) 14 Moo. I. A., 67.
(3) (1887) 11 Bom., 381.
(4) (1879) 2 All., 366.
(5) (1895) 21 Bom., 219.
(6) P. J. for 1896, p. 299.
(7) (1896) 22 Bom., 551.

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time, however, the opinion of Candy, J., had been considered by this Court in *Amava* v. *Mahadgauda*[1] and pronounced to be in accordance with the decision in *Annammah* v. *Mabbu Bali Reddy*[2] and a dictum in *Shri Dharnidhar* v. *Chinto*[3], but not deriving support from the case of *Krishnarav* v. *Shankav*[4]. My learned colleague has now shown that the opinion rests on a proposition that has been too broadly expressed in the cases quoted. The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested. This seems to me to be a very proper and sensible conclusion to come to and I am glad that my learned colleague pronounces it to be in full accord with the principles of Hindu law.

Decree confirmed.

(1) (1896) 22 Bom., 416.
(2) (1875) 8 Mad. H. C. Rep., 108.
(3) (1895) 20 Bom., 250.
(4) (1892) 17 Bom., 164.

APPELLATE CIVIL.

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

1898. July 25.

BAI JASODA (ORIGINAL PLAINTIFF), APPLICANT, *v.* BAMANSHA MANCHERJI (ORIGINAL DEFENDANT), OPPONENT.*

Small Cause Courts Act, Provincial, (IX of 1887), *Sec.* 25—*Civil Procedure Code (Act XIV of* 1882), *Sec.* 203—*Decree not according to law—Substantial failure of justice—Interference under extraordinary jurisdiction.*

The plaintiff, a Hindu widow, sued for Rs. 74-4-0, being the balance due on an account. She called six witnesses to prove her claim. The defendant did not appear to defend the suit. The Judge, however, dismissed the suit, the only judgment recorded by him being as follows:—"Claim not proved. Claim rejected with costs." The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction, and the above decree was set aside, and a decree passed for the plaintiff with costs.

Held, that the decree being founded on a judgment not in accordance with section 203 of the Civil Procedure Code (Act XIV of 1882), was not according to law, and, therefore, the High Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887) had jurisdiction to pass such order in the matter as it thought fit.

* Application No. 42 of 1898 under extraordinary jurisdiction.