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similar provision in their local enactments has been taken by the Calcutta High Court in *Eshan Chunder* v. *Banku Behari Pal* (1), and by the Madras High Court in *Municipal Council, Tanjore* v. *Visvanatha Rau* (2). For this reason we reverse the conviction and sentence.

(1) (1897) 25 Cal., 160. (2) (1897) 21 Mad., 4.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *April* 4.

GOPAL BALKRISHNA KENJALE (ORIGINAL PLAINTIFF), APPELLANT, *v.* VISHNU RAGHUNATH KENJALE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—Adoption by a daughter-in-law of A after the estate has vested in A's widow—Permission by A to adopt—Non-consent of widow—Divesting of estate once vested—Widow's authority to adopt in Bombay—Daughter-in-law must have permission—Co-widows—Adoption by one co-widow—Adoption of a son older than adoptive mother.

An adoption cannot divest a person of an estate which has once vested in him, unless such adoption is made with his consent. An exception to this rule is where a co-widow adopts. Such an adoption will divest the younger widow of her estate. Another exception is where a daughter-in-law adopts with the authority of her father-in-law, who is head of the family, as in *Vithoba* v. *Bapu* (1).

Unless prohibited expressly or by implication, a widow in the Presidency of Bombay has authority to adopt, but a daughter-in-law, *i.e.*, the widow of a predeceased son, must be specially authorized by her father-in-law in order that she may make a valid adoption binding as against the heirs of her father-in-law.

Sakubai was the widow of Balkrishna, who died in 1877 in the life-time of his father Raghunath. Fourteen years later, *viz.*, in 1891, Raghu died, leaving a widow Saibai, who succeeded to his estate as his heir. In March, 1892, Sakubai adopted the plaintiff Gopal, who was older than herself, as son to her husband, alleging that she had Raghu's permission to do so. The plaintiff sued for a declaration that as adopted son of Balkrishna he was entitled to succeed as heir to the property of Raghu, as against the defendant Vishnu, who claimed to have been adopted by Saibai as son to Raghu. The lower appellate Court disallowed the plaintiff's adoption on the grounds (1) that Saibai had not consented to it, and (2) that the plaintiff was older than his adoptive mother Sakubai.

* Second Appeal, No. 957 of 1897.

(1) (1890) 15 Bom., 110.

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Held (confirming the decree of the lower Court), that as the adoption of the plaintiff Gopal was made by Sakubai without proper authority and without Saibai's consent, it was inoperative and invalid. As Saibai did not give her consent to the plaintiff's adoption, that adoption did not divest her of her exclusive right to succeed as heir of Raghu.

Semble—The fact that an adopted son is older than the adopting mother does not make his adoption invalid. The rule prescribing a difference of age in favour of the adopting mother is only directory and not mandatory.

SECOND appeal from the decision of Khán Bahádur M. N. Nanavati, additional First Class Subordinate Judge with appellate powers.

The plaintiff sued for a declaration that he was the adopted son of one Balkrishna Raghunath and as such entitled to the estate of Balkrishna, and of Balkrishna's father, one Raghunath Ganesh.

Balkrishna had died about 1877 in the life-time of his father (Raghu) and had left a widow named Sakubai. Fourteen years later, *viz.*, on 13th December, 1891, Raghu died and left a widow named Saibai (defendant No. 2).

The plaintiff alleged that before he died, Raghu, with Saibai's consent, gave his daughter-in-law Sakubai permission to adopt a son to her (Sakubai's) husband Balkrishna, and that she accordingly had adopted him (the plaintiff) on the 3rd March, 1892, in the presence and with the consent of Saibai. He further alleged that on the 7th March, 1892, Sakubai executed an adoption-deed which was duly signed.

As evidence of Raghu's permission to adopt, the plaintiff relied upon a letter (Exhibit 72) written by Raghu to Sakubai's father, dated 7th December, 1891, the material part of which was as follows :—

"I am suffering from fever for the last five or six days and I feel very weak. Consequently you should come to Gulunche with Annapurnabai, as we want to give a boy in adoption to Sakubai as previously arranged between you and us. I had a mind to effect the adoption in the month of Shrávan last, but as my wife had to leave this place on account of my father-in-law's death, the adoption did not take place. I have sent for my wife and you should all come here, when an auspicious day will be fixed and the ceremony will be performed."

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Defendants Nos. 1 and 2 (Vishnu and Saibai) contended that Sakubai had no right to adopt, and they denied that she had got Raghu's permission to do so. They alleged that the right to adopt was Saibai's, who had succeeded as heir to her husband Raghu; that in exercise of that right, and carrying out Raghu's wish, she had duly adopted the first defendant Vishnu on the 25th November, 1892. They further alleged that the plaintiff was not fit to be adopted by Sakubai, as he was older than she was.

The Court of first instance passed a decree for the plaintiff, holding that he had been duly adopted by Sakubai with Raghu's permission, though without Saibai's consent. It also held that the fact of the plaintiff being older than his adoptive mother Sakubai did not affect the adoption, and that the result of the plaintiff's adoption with the permission of Raghu was to divest Saibai (defendant No. 2) of her husband's estate which on his death had vested in her.

On appeal the Judge reversed the decree and rejected the plaintiff's claim. He was of opinion that Raghu's intention with regard to plaintiff's adoption died with him and he held that plaintiff's adoption was invalid on the grounds that Saibai did not consent to it and that the plaintiff was older than his adoptive mother Sakubai.

The plaintiff preferred a second appeal to the High Court.

P. P. Khare, for the appellant (plaintiff):—Sakubai clearly had Raghu's permission to adopt. That being so, the consent of Saibai (defendant No. 2) was not necessary. The fact that plaintiff was older than Sakubai, is immaterial. An adoption is made to the father and not the mother—*Bhagvandas* v. *Rajmal*[1]; West and Bühler (3rd Ed.), pp. 971, 973, 987. In Bombay there is no restriction as to age in cases of adoption. A minor or a bachelor can adopt. A married man may be adopted—Tagore Law Lectures, 1888, pp. 364, 365; *Raje Vyankatrav* v. *Jayavantrav*[2]; *Nathaji* v. *Hari*[3]; *Dharma* v. *Ram-*

(1) (1873) 10 Bom. H. C. Rep., 241. (1867) 4 Bom. H. C. Rep., 191 (A. C. J.)

(3) (1871) 8 Bom. H. C. Rep., 67 (A. C. J.)

krishna[1]. The permission given to Sakubai by Raghu was a prohibition to Saibai.

Chintaman A. Rele for the respondents (defendants) :—Raghu's estate has vested in his widow Saibai (defendant No. 2). The plaintiff's adoption would divest it. That being so, her consent to his adoption was necessary—*Bhoobun Moyee* v. *Ram Kishore*[2]; *Shri Dharnidhar* v. *Chinto*[3]; *Vasudeo* v. *Ramchandra*[4]; Mayne's Hindu Law (5th Ed.), 209, 210. The letter (Exhibit 72), which is relied on as showing Raghu's permission to adopt, is not a testamentary writing, and merely shows his intention at the time to adopt. But that intention died with him. The letter cannot be construed as a direction to adopt after his death.

The son who is adopted must be younger than the mother—West and Bühler, 1055; Mayne, p. 152; Mandlik, p. 473-4. He must be the reflection of a son.

RANADE, J.:—The facts of this case are somewhat peculiar. The appellant, original plaintiff, claims to have been taken in adoption by one Sakubai, the widow of the predeceased son of Raghu Kulkarni, and brought the original suit for a declaration of his right to succeed as sole heir, and to recover possession of the property of Raghu against his natural brother, respondent No. 1, who claims to have been adopted as son to Raghu by his widow Saibai, respondent No. 2.

The undisputed and proved facts of the case are that Raghu died on 13th December, 1891. His son Balkrishna, who was Sakubai's husband, had died some thirteen years before. During his last sickness, Raghu expressed an intention that Sakubai should adopt a son, and invited her parents to come to his village, but by the time they arrived, Raghu became unconscious, and died on the same day, leaving Sakubai, his daughter-in-law, and Saibai, his widow, behind him. On the 3rd March, 1892, the adoption ceremony was performed, and appellant was given in adoption by his natural mother to Sakubai, and a deed of adoption was prepared and registered on 7th March, 1892. Both the

(1) (1885) 10 Bom., 80.
(2) (1865) 10 Moo. I. A., 279.
(3) (1895) 20 Bom., 250.
(4) (1896) 22 Bom., 551.

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Courts below have found that Sakubai had Raghu's permission to adopt, and that Saibai was not present at, and did not give her consent to, the adoption of the appellant by Sakubai. They also find that Sakubai was younger in age than the appellant.

The Court of first instance found that Raghu had given permission to Sakubai to adopt appellant, and that this authority held good after his death, and that respondent No. 2 had no such permission, and could not, therefore, validly adopt respondent No. 1 as son to Raghu, and that appellant's adoption by Sakubai according to Raghu's direction had divested respondent No. 2 of the estate vested in her after Raghu's death. The lower appellate Court, however, held that the permission of Raghu was general, and not particular in respect of appellant's adoption by Sakubai; that the intention of Raghu died with him, and that the estate of Raghu vested in respondent No. 2, and Sakubai's adoption of the appellant did not divest respondent No. 2 of her rights as sole heir, as respondent No. 2 did not assent to the adoption. Finally, it held that the appellant's adoption was invalid because of this want of Saibai's consent, and the fact that Sakubai was younger in years than the appellant. The lower Court of appeal accordingly reversed the decree of the Court of first instance; and the appellant contends in second appeal that the lower appellate Court was in error in disallowing the adoption on the ground of the want of consent of respondent No. 2, and appellant's being older than his adoptive mother Sakubai. These were the only two points argued before us.

As regards the want of consent, it is to be noted that appellant in his plaint rested his case strongly on the allegation that respondent No. 2 had given her consent to Sakubai's adoption of the appellant. As a matter of fact, however, both Courts have found that respondent No. 2 did not give such consent. The contention now raised before us is that such consent was immaterial, as Raghu's permission was operative as a sanction to the adoption, whether his widow, respondent No. 2, was or was not a consenting party. Independently of this permission, it is admitted that, as between the daughter-in-law, widow of the predeceased son of Raghu, and the mother-in-law, widow of Raghu himself, the right of the latter was every way superior.

The estate vested in her as heir, and unless she chose to divest herself of this right, no act of the daughter-in-law could divest respondent No. 2 of her rights as sole heir of Raghu. Sakubai's husband Balkrishna was living in union with his father Raghu at the time of his death, and his widow Sakubai had no independent right to adopt without the sanction of her father-in-law.

This point may be regarded as settled by a long course of authorities. It is only necessary to refer to *Shri Dharnidhar* v. *Chinto*[1], where, as in this case, the plaintiff was adopted by the widow of a predeceased son, and the claim was resisted by her brother-in-law who had succeeded as heir. The Full Bench decision in *Vasudeo* v. *Ramchandra*[2] also related to a case of adoption by the widow of a predeceased son, and it was held there that such adoption did not divest the daughters, who had succeeded as heirs to their father, of their inheritance even when there was reason to think that one, if not both the daughters, had assented to the adoption. The authority of the decision in *Babu* v. *Ratnoji*[3] has been questioned by the Chief Justice in the Full Bench case noted above on another point, but it well illustrates the principle of law that nothing but the consent of the person in whom the estate has vested by inheritance can divest him of the same by reason of any such adoption by the daughter-in-law. See also *Gayabai* v. *Shridharacharya*[4] and *Chandra* v. *Gajarabai*[5], where all previous authorities are reviewed at great length.

The case of a younger co-widow is an exception to this rule, for the elder widow may by subsequent adoption divest such younger widow of her rights in the estate. The case of *Vithoba* v. *Bapu*[6] also may be referred to as an exception. There the claim of a person adopted by the widow of a predeceased son, when the adoption was authorized by her father-in-law who was head of the family and guardian of the widow, was allowed to prevail against the rights of the widow's brother-in-law. Apart from these special exceptions, the general proposition, as stated above, holds good in all cases.

(1) (1895) 20 Bom., 250.
(2) (1896) 22 Bom., 551.
(3) (1895) 21 Bom., 319.
(4) P. J., 1881, p. 145.
(5) (1890) 14 Bom., 463.
(6) (1890) 15 Bom., 110.

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The next question for consideration is whether there was the father-in-law's authority in the present case which brought it within the exception, and took it out of the rule. The lower appellate Court has found, as a fact, that there was no such authority which survived after Raghu's death. Raghu indeed during his life-time expressed a wish to allow Sakubai to adopt a son, but nothing was done to give effect to this wish. The letter (Exhibit 72) confers no authority or power It is a mere expression of a casual wish contained in a note of invitation sent to Sakubai's father to come to Raghu's place. There was no particular reason why the presence of Sakubai's parents was necessary. Raghu could have easily himself carried out the adoption as he desired, more especially as his wife was with him for several days before his death. He made no will, and gave no power to Sakubai. He gave no directions to his widow (respondent No. 2) not to adopt, and, unless prohibited expressly or by implication, a widow in this Presidency has an implied authority to adopt. This cannot be said of the daughter-in-law, who is the widow of a predeceased son. She must be specially authorized by the father-in-law to make a valid adoption binding against the heirs of her father-in-law. As respondent No. 2 did not give her consent to the adoption of the appellant by Sakubai, the adoption did not divest her of her exclusive right to succeed as heir to Raghu.

It is not strictly necessary to discuss the validity of the other objection arising out of the difference of age between his adopting mother and the appellant. But it may be as well to notice the point briefly. Appellant was about 32 years old when he was examined and Sakubai was 2 or 3 years younger. The lower Court of appeal has relied on Mayne, para. 130, and West and Bühler, p. 1055. The original authorities referred to by these text-writers are the same, being collected from Steele's Hindu Law and Customs, and the opinions of shástris. As regards the earlier Smriti texts, there seems to be no definite rule laid down on the point. The inference in favour of the adopted son being younger than his adoptive father, is extended to the mother by a somewhat loose analogy and interpretation of the text that the adopted son should be the reflection of a legitimate son. But in a system of law where bachelors and

widowers are permitted to adopt, and where minors also can adopt, if they have arrived at the age of discretion, and where further married men with children have been held to be fit subjects for adoption, these strict interpretations of the old texts seem to be not a little out of place—*N. Chandvasekharudu* v. *N. Bramhanna*(1); *Nagappa* v. *Subba*(2); *Jumoona* v. *Bamasoonderai*(3); *Rajendro Narain* v. *Saroda Soonduree Dabee*(4); *Dharma* v. *Ramkrishna*(5); *Nathaji* v. *Hari*(6); *Lakshmappa* v. *Ramava*(7); *Mhalsabai* v. *Vithoba*(8); *Rangubai* v. *Bhagirthibai*(9). If a male person at any time of life may adopt a man of any age, and such male person is also permitted to marry a female minor of any age, it is obvious that the rule prescribing a difference of age in favour of the adopting mother must be only regarded as a directory rule, and not a command, the infraction of which invalidates the adoption. As observed above, it is not necessary to decide this point in the present appeal. As the adoption of appellant was made by Sakubai without proper authority, and without respondent No. 2's consent, it is inoperative and invalid for the purposes of the present claim. We would, therefore, reject the appeal, and confirm the decree with costs.

Decree confirmed.

(1) (1869) 4 Mad. H. C. Rep., 270.
(2) (1865) 2 Mad. H. C. Rep., 357.
(3) (1876) 3 I. A., 72.
(4) (1871) 15 Cal. W. R., 548.
(5) (1885) 10 Bom., 80.
(6) (1871) 8 Bom. H. C. Rep., 67.
(7) (1875) 12 Bom. H. C. Rep., 364.
(8) (1862) 7 Bom. H. C. Rep., Appx., 26.
(9) (1877) 2 Bom., 377.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

AMBABAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GOVIND AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1898. *April* 12.

Hindu law—Jains—Gujaráti Jains settled in Belgaum—Succession among Jains—Rights of illegitimate sons of a Jain—Division into four castes—Inheritance—Illegitimate sons—Ordinary Hindu law, that of Bráhmins, Kshatriyas and Vaishyas—Jains mostly Vaishyas—Four divisions of Jains—Dassa Porwad caste of Jains.

The Courts in India have always recognized the existance of four castes, *viz.*, Bráhmins, Kshatriyas, Vaishyas and Shudras.

* Second Appeal, No. 1235 of 1879.