1908.

KARSONDAS DHARAMSEY v. GANGABAI.

the Court was asked to construe that will and to determine on that basis the rights of Gordhandas and Karsandas, in all that it purported to have disposed of, that is to say the entire estate, with the exception of the charity trust as it then stood. That is what the Court did, using the plainest language. It is not now open to the plaintiff to put forward a second claim to the whole or any part of that property on a different and inconsistent basis. I hold that the suit is barred by *res judicata*, and must be dismissed.

Costs on the plaintiff. To pay the Advocate-General attorney and client costs. Defendants to pay the costs of the demurrer when ascertained by the Taxing Master.

Attorneys for the plaintiff: *Messrs. Cragie, Lynch & Owen.*

Attorneys for the defendants: *Messrs. Mansukhlal, Jamshetji & Hiralal.*

Attorneys for defendant 2: *Messrs. Daphtary, Ferreira & Divan.*

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

DATTO GOVIND KULKARNI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* PANDURANG VINAYAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1908.
June 25.

Hindu law—Adoption—Widow succeeding as a gotraja sapinda in a joint Hindu family to an estate not her husband's—Powers of adoption.

A. and S. were two joint Hindu brothers. S. died in 1876 leaving a widow P. and two daughters him surviving. After S.'s death, P. continued to live with A., who died in 1877. P. succeeded him as there was no issue or nearer heir to A. P. adopted defendant 1 as a son. The plaintiffs, some of whom were reversioners entitled to succeed to A. as his heirs after the termination of P.'s life estate, sued to recover possession of the property, alleging that P. was not authorized to make the adoption she did, and it was, therefore, bad.

* Second Appeal No. 562 of 1907.

1908.

DATTO GOVIND v. PANDURANG VINAYAK.

Held, that the adoption by P. was invalid.

A Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder under the rule established by *Lulloobhoy* v. *Cassibai* (L. R. 7 I. A. 212) and in consequence of the absence of nearer heirs, cannot make a valid adoption.

Amava v. *Mahadgauda*(1) and *Payapa* v. *Appanna*(2), doubted.

Ramkrishna v. *Shamrao*(3), followed.

SECOND appeal from the decision of C. Roper, District Judge of Sátára, confirming the decree passed by B. B. Kunte, Subordinate Judge at Vita.

Suit to recover possession of property.

The property in dispute belonged to Antaji and Sadashiv, two Hindu brothers, who were joint in food and estate.

Antaji's wife died first. Then in 1876, Sakharam died leaving him surviving his widow Parvati and two daughters. After the death of Sadashiv, his widow Parvati and Antaji lived together in their family house till Antaji's death in 1877. Antaji left no issue.

Parvati, his brother's widow, being his nearest *gotraja sapinda* succeeded to his estate.

In 1899, shortly before her death, Parvati adopted defendant No. 1 and placed him in possession of the property.

The plaintiffs, some of whom were reversioners entitled to succeed to Antaji's estate on the death of Parvati, sued to recover possession of the property, alleging that the adoption of defendant No. 1 by Parvati was null and void.

The Court of first instance dismissed the suit holding that the adoption was good.

This decree was confirmed on appeal, on the following ground:

"The appellants raise two contentions which, as I understand, are these:

(*a*) When on Sadashiv's death the whole joint property vested in his brother Antaji, there was no longer any power to adopt on the part of Sadashiv's widow.

(1) (1896) 22 Bom. 416. (2) (1898) 23 Bom. 327.
(3) (1902) 26 Bom. 526.

(*b*) Even if there was such a power, the plaintiffs are preferential heirs to the watan portion of the property under section 2 of the Watan Act. The cases at I. L. R. 18 Cal., 385 and 8 B. H. C. R. 114, are practically similar to the present one and it is laid down clearly in the Calcutta case and impliedly in the Bombay case that a son adopted after his father's death by a widow has the same rights of inheritance to his father's share in a joint property as he would have had in case he had been adopted during his adoptive father's life-time. The adoption in this case took place after Antaji's demise and he being the last male member of the joint family which consisted of himself and his brother Sadashiv, there was nobody whose consent it was necessary for the widow to obtain before adopting a son to her husband. The estate had come to her as heir after Antaji's death and even if Antaji had been alive when she adopted defendant 1 the joint interest of Sadashiv in the estate would have vested in defendant 1 on his adoption.

The second contention is also not sound since defendant 1 does not claim through a female but through his adoptive father Sadashiv. The adoption is, therefore, in my opinion, valid and thereby the whole of the plaint property has vested in defendant 1."

The plaintiffs appealed to the High Court.

M. V. Bhat for the appellants.

K. H. Kelkar for the respondents.

CHAUBAL, J. :—Antaji and Sadashiv were two joint Hindu brothers and the property in suit was the estate of the joint family consisting of the two brothers. Sadashiv died in 1876, leaving a widow Parvati and two daughters. After Sadashiv's death his widow continued to live with Antaji, who had become by survivorship the sole owner of the family property. Antaji's wife died during his life-time, and in 1877 Antaji himself died, leaving no issue or nearer heir than his brother's widow Parvati, who, as the nearest *gotraja sapinda* alive, succeeded him. Parvati took only a widow's estate in the property she thus inherited and was in possession and enjoyment of it till 1899, in the July of which year she died. She had, however, a few days before her death, adopted Pandurang, defendant 1, and the present dispute is between Pandurang, the adopted son, and the plaintiffs, some of whom are the reversioners entitled to succeed to Antaji as his heirs after the termination of Parvati's widow's estate. The fact of the adoption has been held established by both the Courts, and there is no question that plaintiffs 2, 4, 5, 6,

1908.

DATTO GOVIND v. PANDURANG VINAYAK.

7, 8 and defendant 3 are entitled to succeed if the adoption of Pandurang by Parvati is held to be invalid.

The Courts below have decided against the plaintiffs, holding the adoption by Parvati to be valid in law. This decision in favour of the validity of the adoption is mainly based on the authority of *Rupchand Hindumal* v. *Rakhmabai*[1] and *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*[2]. The lower Courts hold, and we think so far rightly, that during Parvati's life, the plaintiffs, as reversioners, could not be said to have any vested interest in the property. They further hold that though Parvati's adoption is not one to the last male holder, still that would not make it spiritually invalid, and as her action does not divest any estate vested in third parties and was derogatory of no other rights but her own, the adoption was perfectly valid.

It is the soundness of this latter position which is mainly attacked before us, and which, in our opinion, requires further and more careful consideration than is apparently bestowed upon it in the lower Courts.

The decision of the lower Courts no doubt has some support in the observations of this Court in the case of *Amava* v. *Mahadgauda*[3] and *Payapa* v. *Appanna*[4]. But it appears to me that the judgment of the Full Bench of this Court in *Ramkrishna* v. *Shamrao*[5] is so absolutely inconsistent with the main ground of the decision in these cases, that it seems to me doubtful if they can now be regarded as binding authorities.

At any rate the Full Bench decision clearly lays it down, that the consideration of the adopting widow not divesting any estate but her own cannot be accepted as the sole criterion of the validity or otherwise of an adoption by a widow: and the adoption by a grandmother succeeding as heir to her grandson, who died unmarried, was held to be invalid. Their Lordships held that after the decisions of the Judicial Committee in the cases of *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[6],

(1) (1871) 8 Bom. H. C. R. (A. C. J.) 114.
(2) (1891) 18 Cal. 385.
(3) (1896) 22 Bom. 416.
(4) (1898) 23 Bom. 327.
(5) (1902) 26 Bom. 526.
(6) (1865) 10 Moo. I. A. 279.

Pudma Coomari Debi v. *Court of Wards*[1], *Thayammal* v. *Venkatarama Aiyan*[2] it was not open to this Court to consider how far the principle laid down by these cases was in accordance with either the letter or spirit of the Hindu Law as expounded in the Books or as understood by the Hindus themselves: and they hold that the grandmother's power to adopt was extinguished and could not afterwards be revived.

In the case before us the question of Hindu Law arising categorically stated is "can a Hindu widow, who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder under the rule established by *Lulloobhoy Bappoobhoy* v. *Cassibai*[3] and in consequence of the absence of nearer heirs, such as the mother and grandmother, make a valid adoption."

It is admitted that the widow Parvati had never any express authority from her husband Sadashiv such as would entitle her to adopt in a joint family: it is also admitted that Antaji while alive never authorized any adoption by her to her husband. It is therefore clear that Parvati never had the power of adoption before Antaji's death: and any possibility of her having such became extinct on his death. He was the last sole owner of the family property: and it is his estate which she got by inheritance as a *sapinda*. The fact that Antaji left no widow behind him is a mere accident, which, I do not think, improves her status: and the considerations under which a mother succeeding to a son dying unmarried is held entitled to adopt have, in my opinion, no place here. If Antaji had left a grandmother surviving, she would have succeeded him in preference to Parvati: and I think it would be absurd to hold that while a mother or grandmother could not have adopted, a more distant female coming in as a *sapinda* can validly adopt.

It was indeed urged by Mr. Kelkar for the respondent that a power to adopt was inherent in every Hindu widow: that she may be temporarily incapable of acting upon it: that it was in suspension during Antaji's life-time, and that it revived when she got the estate as a *sapinda*, when her act of adoption would

(1) (1881) L. R. 8 I. A. 229. (2) (1887) L. R. 14 I. A. 67.
(3) (1880) L. R. 7 I. A. 212.

1908.

DATTO GOVIND v. PANDURANG VINAYAK.

not have the effect of divesting any estate but her own. But I feel that every one of these considerations applied to the case of the grandmother in the case of *Ramkrishna* v. *Shamrao*[1]. It may also be noticed that this was exactly the argument urged before their Lordships of the Judicial Committee by Mr. Mayne in *Thayammal's* case (*vide* at page 69 of L. R. 14 I.A.) and was not acceded to. I do not think there is any authority for the proposition that the right to adopt is a necessary incident of inheritance. In an undivided Hindu family, the widow of a co-parcener can only get it by the express authority of her husband, or with the assent of the survivors in their life-time. Parvati never having acquired it in either way, I think it could not start afresh in her after Antaji's death. And Mr. Kelkar had practically to admit in argument that unless the decision in *Ramkrishna* v. *Shamrao*[1] was taken to be a special one with respect to a grandmother only or was taken to be wrongly decided, he could not differentiate the case of a *sapinda* widow. But we feel we are bound by the Full Bench decision and cannot go behind it.

The result is that in my opinion the adoption of Pandurang by Sadashiv's widow was invalid: and that the plaintiffs Nos. 2, 4, 5, 6, 7, 8 and the defendant 3 are entitled to the declaration they seek. I would therefore reverse the decrees of both the Courts below and decree possession of the suit property to the plaintiffs and defendant named above. Costs on defendant throughout.

BATCHELOR, *J.*:—I agree. The case for the adoption seems to me weaker here than it was in *Ramkrishna* v. *Shamrao*[1] since Bai Parvati is a remoter heir of Antaji than was the grandmother of her grandson in *Ramkrishna's* case. Yet the grandmother's adoption was pronounced invalid by the Full Bench of this Court, and by that decision we, as a Division Bench, are bound. As in my opinion, the law laid down by the Full Bench governs the facts of the case before us, I concur in the decree proposed by my learned colleague.

Decree reversed.

R. R.

(1) (1902) 26 Bom. 526.