and if so what terms, that is a matter which does not arise before us now, but which will be considered at the proper time and place if the question is agitated. The result is that the District Judge's decree must be reversed and the decree of the Court of first instance must be restored. Costs throughout on the plaintiff except as to the defendant's costs in the Court of first instance which he himself will bear.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

PAWADEWA KOM CHANBASAPPA MULLAH AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS, *v.* VENKATESH HANMANT KULKARNI AND OTHERS (ORIGINAL PLAINTIFFS 1 AND 2, AND DEFENDANTS 3 AND 4), RESPONDENTS.*

Hindu law—Inheritance—Exclusion from inheritance—Deaf and dumb son—Vesting of the estate in the widow of the last male holder—Subsequent birth of a son to one of the disqualified sons—Divesting of estate.

M., a Hindu, died leaving him surviving a widow and three sons C. and two others, all of whom were born deaf and dumb. His widow succeeded to the estate, the sons being disqualified from inheriting. Later on C. married and a son was born to him. The widow thereafter sold the property to plaintiffs who now sued to recover possession from the wife and son of C. It was contended for the defendants that the widow succeeding to her husband, took only a widow's estate and that that estate was divested by the after-born son of C.

Held, that the plaintiffs were entitled to succeed. Both in fact and in contemplation of law C.'s son had no existence when the estate vested in the widow; and his subsequent birth could not divest the estate.

Held, further, that C.'s son stood in no better position than would have been occupied by his father C. if the latter's disqualification had been removed after the widow had succeeded to the inheritance; and in that case, the widow's title would prevail inasmuch as it was superior to C.'s while his disqualification endured.

* Second Appeal No. 530 of 1907.

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SECOND appeal from the decision of T. D. Fry, District Judge of Dhárwár, reversing the decree passed by V. V. Kalyanpurkar, Subordinate Judge of Gadag.

Suit to recover possession of property.

The property belonged originally to one Malam, who died leaving a widow Bandeva and three sons, all of whom were born deaf and dumb. Bandeva succeeded to the property.

One of the disqualified sons Chanbasappa then married, and a son (defendant 2) was born to him.

After the birth of defendant 2, Bandeva sold the property to plaintiffs.

The plaintiffs brought a suit to recover possession of the property from the wife and son of Chanbasappa (defendants 1 and 2).

The Subordinate Judge held that Bandeva had no authority to execute the sale and that it was not binding on defendant 2. He, therefore, dismissed the suit.

This decree was on appeal reversed by the District Judge, who, in the course of his judgment, remarked as follows :—

"Though Chanbasappa's congenital infirmity was merely a personal disqualification and was not shared by his son defendant No. 2 (Mayne's Hindu Law, 7th Edn., p. 811) still defendant No. 2 was born after the property had vested in Bandeva whose estate is not divested by his birth. Thus the contest is between the alienees of the widow Bandeva and the reversioner who attacks Bandeva's alienation and has himself mortgaged his rights. The point for determination thus being whether Bandeva's alienation was valid and binding? I find in the affirmative."

The defendants Nos. 1 and 2 appealed to the High Court.

G. S. Rao for the appellant.

D. A. Khare for respondents Nos. 1 and 2.

BATCHELOR, J.:—This was a suit to recover possession of certain property and the facts found are that the property originally belonged to one Malam, who died leaving a widow Bandeva and three sons, the eldest being Chanbasappa. All three sons were born deaf and dumb, and as they were therefore disqualified from inheriting, the widow Bandeva succeeded to the estate of

her husband. In October 1900 she sold the property in suit to the plaintiffs.

After Malam's death, Chanbasappa, the disqualified son, married, and a son, defendant 2, was born to him before the widow's sale to the plaintiffs. This son, who admittedly suffers under no disqualification, was not conceived till after the inheritance had passed to Bandeva.

The plaintiffs suing on the sale-deed were met by various defences, as that the sale was fraudulent; that it was made without consideration; that it was made without necessity; and that the sons of Malam were not born deaf and dumb. On all these defences the findings of the Courts below are conclusive against the defendants, and Mr. Rao does not seek to re-open any of these matters now. He puts this appeal on a point of pure law, which is very briefly referred to in the judgment of the lower appellate Court. The contention is that Bandeva, succeeding to her husband, took only a widow's estate, and that estate was divested by the second defendant, the after-born son of Chanbasappa.

Mr. Rao in his interesting argument has referred us to the original texts bearing upon the position of the sons of disqualified heirs, but the point of present concern is so well settled in this Presidency that it is now unnecessary to discuss the original authorities. Mr. Rao's contention here goes no further than this, that the qualified son of a disqualified heir is entitled to inherit; and that is a proposition which is not, and cannot be, denied: see *Bapuji* v. *Pandurang* [1].

The difficulty begins with the next step of the argument, in which we are invited to hold that the qualified son of Chanbasappa, though not conceived till after the estate vested in Bandeva, divested Bandeva of the estate which she had taken. Here again the question is not quite at large, for in the already cited case of *Bapuji* v. *Pandurang* [1] a Division Bench of this Court held—and their decision is binding on us—that a nephew, having succeeded to the inheritance in exclusion of a son born deaf and dumb, was not divested by a qualified son born afterwards to

(1) (1882) 6 Bom. 616.

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the disqualified son. That decision followed *Kalidas Das* v. *Krishan Chandra Das*[1] where the judgment of Sir Barnes Peacock, Chief Justice, was held to be based upon principles applicable as well to this Presidency as to Bengal.

It is true that in *Krishna* v. *Sami*[2] the opposite view was taken by a Full Bench of the Madras High Court, but as a Division Bench we are bound by the decision in *Bapuji* v. *Pandurang*[3]. This narrows down the controversy to a single point, which may be expressed thus: given that an after-born qualified heir does not divest the estate of a male in whom it has already vested as full owner, is the case different where the estate already vested is merely that restricted estate which a widow takes as heir of her husband? It appears to us that the burden of establishing the affirmative lies heavily on the appellants who contend for it, inasmuch as the general principle is against them. That principle is expressed by Mr. Mayne in his treatise on Hindu Law and Usage (§ 600, 5th Edition) as follows:—"The Hindu Law never allows the inheritance to be in abeyance, and if the claimant is not capable of succeeding at the time the descent takes place, the subsequent removal of his incapacity will not enable him to dispossess a person whose title was better than his while the defect existed, though inferior to his own after the defect was removed." In the succeeding paragraphs the learned author discusses the Bombay and Madras decisions which we have cited, and subscribes to the view which found favour in *Bapuji* v. *Pandurang*[3].

It is, no doubt, true, as Mr. Rao has urged, that the principle that an estate once vested shall not afterwards be divested is not quite inflexible, and the learned pleader has pointed to the cases of an adopted son and of a son in the womb, who in certain circumstances will divest the estate of a third person who has succeeded as heir. But these special cases are referable to another principle, which cannot be invoked in favour of the present appellants. A son in the womb who afterwards comes into separate existence is in the eye of the law already born.

(1) (1869) 2 Ben. L. R. 103, F. B. (2) (1885) 9 Mad. 61.
(3) (1882) 6 Bom. 616.

And the specially favourable position of an adopted son stands on much the same footing "because" in the words of the Judicial Committee, "of the peculiar law applicable to that relation." (1) And speaking of an adopted child their Lordships continue:—"In contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognises as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him."

Mr. Rao has contended that there is some analogy between these cases and the case of the second defendant in this suit, but for our part we can see no analogy. Both in fact and in contemplation of law the second defendant had no existence when the estate vested in Bandeva. It is true that she took only a woman's estate, and that that estate is subject to certain limitations; but those limitations are concerned with her powers of enjoyment and alienation, and do not, as it seems to us, make the inheritance more easily divestible in her hands than it would be in the hands of a male heir. No authority is shown to us for the opposite opinion, and we cannot discover any support for it in principle. The second defendant, it seems to us, stands in no better position than would have been occupied by his father, Chanbasappa, if the latter's disqualification had been removed after the widow had succeeded to the inheritance; and in that case, on the principle already stated, the widow's title would prevail inasmuch as it was superior to Chanbasappa's while his disqualification endured.

No other point is taken, and the result is that the appeal must be dismissed with costs.

Appeal dismissed.

R. R.

(1) *Tagore* v. *Tagore* (1872), 9 Ben. L. R. 377 at p. 397.