APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1913. *June* 19.

BHIMABAI BIRATAR KRISHNAPPA DESAI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 10 AND 11), APPELLANTS, *v.* TAYAPPA MURARRAO NADGAUDA AND OTHERS (ORIGINAL DEFENDANTS NOS. 2, 4 AND 9 AND PLAINTIFF), RESPONDENTS.*

Hindu Law—Adoption—Widow of the last vatandar—Adoption by the widow—Death of the adopted son unmarried—Second adoption by the widow—Vesting of the property in the male member of the vatandar family—Divesting of estate by adoption—Bombay Hereditary Offices Act (Bombay Act V of 1886), section 2†—Second adoption not valid.

On the death of the last vatandar his widow went into possession of the vatan property. She adopted a son who died in 1902 unmarried. In 1904, she adopted another boy. The plaintiff, a reversioner, sued in 1909, for a declaration that he was the vatandar and to recover possession of the vatan property.

Held, that the widow could not make a second adoption; for the property was, on the death of her first adopted son, vested in the plaintiff, a male member of the family, and it could not subsequently be divested by any adoption made by her.

APPEAL from the decision of G. N. Kelkar, First Class Subordinate Judge at Belgaum.

Suit for declaration and possession.

One Krishnappa was the last sole vatandar of the property in dispute. He died in 1888, leaving him surviving a widow (defendant No. 1) and a daughter (defendant No. 11). In 1899 she adopted a boy named Bhogappa, who died unmarried in 1902. She then adopted another boy Jayarao (defendant No. 10) in 1904.

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* First Appeal No. 157 of 1911.

† The section runs as follows :—

2. Every female member of a watan family other than the widow of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any watan, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such watan, or part thereof, or interest therein.

In 1909, the plaintiff, the paternal uncle of Krishnappa, sued to obtain a declaration that as the vatandar he was entitled to recover judi from defendants Nos. 2—9 in respect of lands in their possession; and to recover possession of the lands from defendant No. 1.

The Subordinate Judge found that the first adoption divested the widow of her right to hold the vatan for her life as the widow of the last male holder. Bhogappa became the vatandar by his adoption; and on his death, the plaintiff who was the nearest male member of the vatan family became qualified to inherit the vatan. It was not competent to defendant No. 1, who was the mother of the last vatandar, to make another adoption and to affect the devolution of the vatan property. The plaintiff's claim was therefore decreed; and the defendant No. 1 was awarded maintenance at the rate of Rs. 1,000 a year.

Defendants Nos. 1, 10 and 11 appealed to the High Court.

Jayakar, with *V. V. Bhadkamkar* and *A. V. Lele*, for the appellants.

Setlur, with *C. A. Rele*, for respondent No. 3 (plaintiff).

Jayakar :—In the case of *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[1], the Privy Council expressly recognise the power of a widow to adopt when she succeeds to her unmarried son. The doctrine of divesting the estate by adoption does not apply to a case like this. See *Ramkrishna* v. *Shamrao*[2] and *Datto Govind* v. *Pandurang Vinayak*[3]. The circumstance that the property in the present case has vested in the plaintiff under section 2 of the Hereditary Offices Act (Bombay Act V of 1886) does not affect the above principle.

(1) (1865) 10 Moo. I. A. 279.

(2) (1902) 26 Bom. 526.

(3) (1908) 32 Bom. 499.

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Sethur :—The property having been vested in the plaintiff, the widow's power of adoption has come to an end. See *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[1]; *Payapa* v. *Appanna*[2]; *Chandra* v. *Gojarabai*[3]; *Rupchend Hindumal* v. *Rakhmabai*[4]; *Amava* v. *Mahadgauda*[5].

Cur. adv. vult.

BATCHELOR, J. :—The suit out of which this appeal arises was brought by the plaintiff to recover certain vatan property on the ground that he was the heir of the last male holder, one Bhogappa. The parties concerned are related in the manner shown in the following tree :—

Krishnappa.

Ramappa (plaintiff).	Bhogappa.
	Krishnappa = Bhimabai (defendant No. 1).

Krishnappa, son of Bhogappa, died in April 1888. In 1899 Bhimabai, the defendant No. 1, adopted a boy named Bhogappa, who in 1902 died unmarried. In 1904 Bhimabai made another adoption, this time of a boy named Jerav, the tenth defendant.

The only question which falls to be decided in this appeal is whether this second adoption by Bhimabai is valid or not. The contention for the plaintiff is that it is invalid, Bhimabai's power of adopting being at an end on the death of the first adopted son, Bhogappa.

As I have noticed, the property in suit is vatan property, and it is admitted that when the adopted boy Bhogappa died in 1902, the estate vested in the plaintiff

(1) (1876) L. R. 4 I. A. 1.
(2) (1898) 23 Bom. 327.
(3) (1890) 14 Bom. 463.
(4) (1871) 8 B. H. C. R. (A. C. J.) 114.
(5) (1896) 22 Bom. 416.

as his heir. Was it competent to Bhimabai, two years later, to divest this estate of the plaintiff, and to vest it in the secondly adopted son?

I agree with the learned Judge below in thinking that the answer should be in the negative, and I rely for my decision mainly on the case which appellants' own counsel has cited, *viz.*, *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[1]. There one Gour Kishore, whose wife was Chundrabullee, died leaving a son Bhowanee Kishore, who married Bhoobun Debia. Bhowanee Kishore died without issue after succeeding to all his father's estate, and his widow succeeded him as heir, taking a vested interest in the whole of his estate. Some time after Bhowanee Kishore's death, his mother, Chundrabullee, adopted the respondent, Ram Kishore. It was held by the Judicial Committee that this adoption was void, the power being incapable of execution. The present question is whether the grounds upon which their Lordships' decision is based are grounds applicable to the facts of this suit or not. The only difference in the facts of that case and of this is that whereas Bhowanee Kishore died leaving a widow, here the boy Bhogappa died unmarried.

It is contended by Mr. Jayakar for the defendant-appellants that the decision in *Bhoobun Moyee's case* proceeded, not on the ground that Chundrabullee's adoption divested the vested estate of the deceased son's heir, but upon the narrow grounds of ceremonial competence peculiar to that case; that is to say, the argument is that Chundrabullee's adoption was pronounced invalid because Bhowanee Kishore had lived to an age which enabled him to perform all the customary services for the benefit of his father and had left his widow surviving. And counsel points to the passage at page 311 of the report, where their Lordships say: "If Bhowanee Kishore had

[1] (1865) 10 Moo. I. A. 279.

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died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds." This passage, however, as I understand it, is adverse to the present appellants. In the present case, owing to the provisions of the Vatan Act, Bhimabai was no more the heir of the last male holder, Bhogappa, than was Chundrabullee the heir of Bhowanee Kishore; and the case so far is exactly on all fours with the case before the Privy Council. Moreover, even if the test were merely ceremonial competence, it does not appear that the last male holder's widow would be in any better position than the agnate male heir, Ramappa. But the words which follow the passage just cited seem to me to leave no room for doubt as to the basis of their Lordships' judgment. Referring to the hypothesis that Chundrabullee had been her son's heir, the judgment proceeds: "By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the Text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested." Here I think we have the summary and culmination of the judgment; and if this is the true ground and principle of the decision, then clearly the appellants are out of Court, for what the mother seeks to do by this second adoption is precisely to defeat and divest the estate of the deceased son's heir vested in possession.

If the judgment in *Bhoobun Moyee's case* had stood alone, I should have been unable to read it in any sense but this. There is, however, as I think, high authority to support this reading. The case was considered in *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama*

Lakshmi Narsayya[1] and there it was described as deciding "that, the son having died leaving a widow in whom the inheritance had vested, the mother could not defeat the estate which had so become vested by making an adoption, though in pursuance of a written authority from her husband." This seems to me a plain indication that the real ground of decision in the earlier case was as I have stated.

If it be necessary to fortify this opinion by reference to the decisions of this Court, we may turn to *Payapa* v. *Appanna*[2] where Ranade, J., dealt with the exceptions to the general rule of Hindu Law that it is only the widow of the last full owner who is entitled to take a son in adoption to such owner. The second of the exceptions there noticed by the learned Judge was the case of the mother who succeeds as heir to an unmarried son, and on the authority of *Rajah Vellanki's case* it was stated that the principle of the recognition of the mother's power was "that the act of adoption is derogatory of no other rights than those of the adopting mother." The same principle was expressly repeated in *Venkappa Bapu* v. *Jivaji Krishna*[3], where the Court in terms repudiated the doctrine that the limitation on the mother's power to adopt depended upon the investiture, or marriage or competency of the son to whom she succeeded as heir.

It was, however, contended for the appellants that this view of the law, based upon two decisions of the Privy Council as interpreted by several judgments of this Court, is opposed to the later pronouncements of this Court in *Ramkrishna* v. *Shamrao*[4] and *Datto Govind* v. *Pandurang Vinayak*[5]. Taking

(1) (1876) L. R. 4. I. A. 1.
(2) (1898) 23 Bom. 327.
(3) (1900) 25 Bom. 306.
(4) (1902) 26 Bom. 526.
(5) (1908) 32 Bom. 499.

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first this later decision to which I was a party, it appears to me irrelevant to the present controversy. That was a case where one Parvati, widow of Sadashiv, had succeeded as the nearest *gotraja sapinda* to the estate of Sadashiv's brother, Antaji. Parvati succeeded for a widow's estate, and shortly before her death she adopted the defendant. The suit was brought against this adopted son by the reversioners of Antaji, and the question raised was whether Parvati's adoption of the defendant was good in law. The lower Courts had held in favour of the adoption on the ground that Parvati in adopting did not divest any estate vested in third parties. My brother Chaubal and I decided that, though the adoption did not offend against this particular principle, it was void on other grounds; but no one questioned, or was concerned to question, the soundness of the principle that where a mother succeeds as heir to her son, her power to adopt is limited by the restriction that she must not divest an estate already vested.

Similar comments may be made on the Full Bench decision in *Ramkrishna* v. *Shamrao*[1]. It has, in my opinion, no bearing upon the question now in debate. It was not a case of an adoption by the mother, but by the grandmother, of the last male owner; and an attempt was made to justify that adoption on the ground that *Bhoobun Moyee's* case could be used as establishing this proposition, that a widow's adoption must necessarily be good provided only it does not divest the vested estate of another heir. Thus the argument pressed upon the Court was that, although the estate of the adopting widow's husband had passed to a succession of persons as his heirs before it reverted to the widow herself, yet, when it did so

(1) (1902) 26 Bom. 526.

revert, she was entitled to adopt because no other estate but her own would be affected. The Court disallowed this contention, in other words, it held that the position taken on behalf of the boy adopted by the grandmother was an unwarrantable extension of the principle laid down in *Bhoobun Moyee's case*. To put it another way, *Ramkrishna* v. *Shamrao*[1] is authority only for this proposition, that in certain cases a widow has no power to adopt even though her adopting would divest no estate but her own. Such a proposition has no bearing upon our present question, which is: given that the adoption by the mother does divest another heir's vested estate, is the adoption valid? I am of opinion, on the authorities referred to, that the answer should be in the negative. I think, therefore, that the appeal fails, and should be dismissed with costs.

Of the cross-objections filed by the respondents, two only have been pressed, and in my opinion both should be allowed. In the first place, the learned Judge below has allowed plaintiff mesne profits only since the date when the management of the property was undertaken by the Court of Wards. "Profits prior thereto I do not award," says the learned Judge "as it would be a hardship to the poor old lady" (*i.e.*, the first defendant). I confess I do not follow this; nor can I accept the appellants' counsel's argument that the order should be affirmed because it is likely that the first defendant was acting on other people's advice. All this seems to me no reason for depriving the plaintiff of his ordinary right to mesne profits during the period for which the first defendant has kept him out of his property. The idea that the loser in litigation may on mere sentimental grounds evade the usual and proper consequences of

[1] (1902) 26 Bom. 526.

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losing is not, I think, an idea which deserves encouragement in India. I would, therefore, set aside this part of the Subordinate Judge's decree and substitute an order awarding the plaintiff mesne profits for a period of three years before suit up to the date when possession is restored to him. As the parties cannot agree as to the rate of mesne profits, there must be an inquiry by the lower Court as to the rate which should be allowed.

Lastly, I would modify the lower Court's order as to costs by awarding the costs of the suit to the plaintiff from the first defendant, as well as from the defendants Nos. 10 and 11. Respondent Venkappa Ramappa will have his costs of the cross-objections.

SHAH, J. :—The facts which give rise to this appeal are few and undisputed. One Krishnappa died leaving a widow—Bhimabai, a daughter—Venkabai and a divided granduncle—Ramappa. Bhimabai adopted Bhogappa in 1899, who died unmarried in 1902. On the death of Bhogappa, the property in suit which is now admitted to be vatan property, was vested in Ramappa as the next male heir of Bhogappa, to the exclusion of his adoptive mother Bhimabai under section 2 of Bombay Act V of 1886. In 1904 Bhimabai adopted another boy—Jayarao. Ramappa filed the present suit in 1909 to recover possession of the property in suit, on the ground that Bhogappa was the last male owner and that he was his next male heir, so far as the vatan property was concerned. Bhimabai—defendant No. 1, her adopted son Jayarao—defendant No. 10 and her daughter—defendant No. 11 disputed the plaintiff's claim on several grounds in the lower Court. The lower Court decided all the issues against the defendants with the result that subject to the defendant No. 1's right of residence and maintenance the plaintiff's claim was decreed. The defendants Nos. 1, 10 and 11 have preferred the present appeal against the decree of the lower Court.

Though several points have been raised in the memorandum of appeal, only one point is urged at the hearing in support of the appeal, viz., that the adoption of Jayarao is valid and sufficient to divest the estate, which was vested in Ramappa on Bhogappa's death. It is argued on behalf of the appellants that on Bhogappa's death, his mother had a right to make a second adoption and that the circumstance that the property had already vested in Ramappa did not prevent the adoption from being operative. Mr. Jayakar for the appellants has relied upon the case of *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharaj Chowdhry*[1] and has argued that the decision in that case was really confined to the specific case of the estate being vested in the *widow* of the deceased son at the time when Chundrabullee (the mother) exercised her power of adoption and did not proceed upon the general consideration that the estate being vested in another heir, Chundrabullee's power to adopt was at an end.

I am clearly of opinion that the argument should be disallowed. The judgment in *Bhoobun Moyee's case* shows that the decision was based not upon the particular consideration that the heir of the deceased son, in whom the estate was vested, was the *widow* of the son, but upon the general consideration that the estate having been vested in the heir of the deceased son, the mother's power to adopt was at an end. "The question is" their Lordships say "whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken. This seems contrary to all reason and

(1) (1865) 10 Moo. I. A. 279.

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to all the principles of Hindoo Law, as far as we can collect them." Their Lordships further observe that "If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the Text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested." In the absence of anything more, I should have held that the passages quoted above afforded a complete answer to the appellants' argument. But the Judicial Committee in the later case of *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[1] allowed the mother's right to adopt and distinguished *Bhoobun Moyee's case* on the ground that the son having died leaving a widow in whom the inheritance had vested, the mother could not defeat the estate which had become so vested, by making an adoption.

This limitation upon the mother's power to adopt has been recognised by this Court in *Venkapa Bapu* v. *Jivaji Krishna*[2]. On principle the mother would be in no better position than any other widow, when the adoption has the effect of divesting the estate vested in a third person. Apart from the case of co-widows, which stands on a special footing of its own the general rule that an adoption by a widow, which has the effect of divesting an estate vested in a third person, if made without the consent of that person, is invalid or insufficient to divest the estate so vested, is recognised and acted

(1) (1876) L. R. 4 I. A. 1. (2) (1900) 25 Bom. 306.

upon by this Court in several cases. See *Rupchand Hindumal* v. *Rakhmabai*[1]; *Chandra* v. *Gojarabai*[2]; *Amava* v. *Mahadgauda*[3]; *Payapa* v. *Appanna*[4].

The other cases of *Ramkrishna* v. *Shamrao*[5] and *Datto Govind* v. *Pandurang Vinayak*[6], relied upon by Mr. Jayakar, have no bearing upon the present case. There the grandmother and a widow, inheriting as a *gotraja sapinda* under the rule laid down in *Lulloobhoy* v. *Cassibai*[7], respectively were held to have no power to adopt in spite of the fact that by adoption in neither case was the estate, vested in a third person, divested. The question as to whether an adoption is valid when it has the effect of divesting an estate already vested in a third person did not arise and was not considered in either of these cases.

I hold, therefore, that the mere fact that the heir in the present case is a granduncle and not the *widow* of the deceased Bhogappa or that the plaintiff is the next heir under the special rule of devolution laid down by Act V of 1886 in respect of vatan property and is not the next heir of Bhogappa according to Hindu Law cannot make any difference in the result. The adoption of defendant No. 10 affords no answer to the plaintiff's claim. I agree that the appeal should be dismissed with costs.

As regards cross-objections, I see no reason whatever to interfere with the provision made by the lower Court for the residence of defendant No. 1. As for the mesne profits, I think that the lower Court is wrong in disallowing them to the plaintiff for the period prior to the date of the suit. The reason given by the lower Court does not appear to me to be satis-

(1) (1871) 8 Bom. H. C. R. (A. C. J.) 114.
(2) (1890) 14 Bom. 463.
(3) (1896) 22 Bom. 416.
(4) (1898) 23 Bom. 327.
(5) (1902) 26 Bom. 526.
(6) (1908) 32 Bom. 499.
(7) (1880) L. R. 7 I. A. 212.

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factory. The plaintiff asserted his right to the property before the Revenue authorities long ago. The defendants had no reason to suppose that the plaintiff would not assert his right to the property. They have wrongfully withheld the property from the plaintiff so long, and should be directed to pay the mesne profits for three years prior to the date of the suit and for the period from the date of the suit until delivery of possession. I agree that the decree of the lower Court should be modified as regards mesne profits and costs in favour of the plaintiff as proposed by my learned colleague.

Decree modified.

R. R.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman and Mr. Justice Shah.

1913.

June 20.

HANMANT VALAD RAKHMAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* ANNAJI HANMANTA (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XLI, rule 11—Civil Circular, issued by the Bombay High Court, No. 51†—Summary dismissal of appeal—Necessity of writing a judgment.

A lower Court of appeal must write a judgment when it dismisses an appeal under Order XLI, rule 11 of the Civil Procedure Code (Act V of 1908), as provided by Civil Circular 51 issued by the High Court, Bombay.

Tanaji Dagde v. *Shankar Sakharam*(1), overruled.

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* Second Appeal No. 480 of 1912.

† The circular runs as follows :—

51. When an appellate Court dismisses an appeal under section 551 of the Code of Civil Procedure, a judgment should be written and a formal decree drawn up.

(1) (1911) 36 Bom. 116.