here. As to this, I see no reason to interfere, except that I agree in the variation of the form of the injunction which my brother Heaton has stated. The Bombay case came on for hearing as a Short Cause in the vacation. The defendant did not put in his affidavit till the day of the hearing; and his Bijapur suit with its eight defendants and vague allegations would seem to offer good opportunities for vexation and delay. Under these circumstances, I can well understand an injunction being granted to restrain that vexation and delay so far as practicable.

The Bombay suit was directed to be replaced on Board on 9th June after the defendant had filed his written statement. We can now direct the Prothonotary to effect this for the 5th or 12th August.

In the result, I agree that this appeal should be dismissed with costs.

Solicitors for the appellants: Messrs. *Captain & Vaidya.*

Solicitors for the respondents: Messrs. *Crawford, Bailey & Co.*

Appeal dismissed.

G. G. N.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

MALLAPPA ADOPTIVE FATHER BHARMAPPA NATURAL FATHER MALLAPPA KENCHI-RADI MINOR BY HIS GUARDIAN APPELLANT No. 2 SHIVALINGAWA KOM BHARMAPPA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* HANMAPPA BIN MARDEPPA KENCHI-RADDIAWAR, NATURAL HEIR OF THE DECEASED MARDEPPA BIN HANMAPPA AND OTHERS (ORIGINAL DEFENDANTS NOS. 2, 3, 4), RESPONDENTS.*

* Second Appeal No. 565 of 1917.

1919.

MALLAPPA v. HANMAPPA.

Hindu law—Adoption—Husband dying in union with co-parceners—Widow succeeding as heir to her unmarried son after partition—Power of the widow to adopt—Validity of adoption.

One B died in union with his brothers leaving a minor son M. Thereafter there was a partition between M and his uncles. M died unmarried leaving his mother S as his heir. Subsequently S adopted the plaintiff who sued to recover possession of M's share in the hands of the latter's uncles, the defendants. The defendants contended that the adoption of the plaintiff was invalid because B died in union and thereafter his widow could not adopt without the consent of his co-parceners, and that her right to adopt came to an end at the separation and could not be revived,

Held, that the adoption of the plaintiff was valid as the widow's power to adopt remained suspended even after separation and could be exercised as there were no longer any coparceners whose consent was necessary.

SECOND appeal against the decision of E. Clements, District Judge, Dharwar, modifying the decree passed by N. D. Upponi, Subordinate Judge at Haveri.

Suit to recover possession.

One Bharmappa died in union with his brothers Kariappa, Mardeppa, Kenchappa (defendants Nos. 1—3) and Karchannappa, husband of defendant No. 1. After Bharmappa's death his widow Shivalingava (plaintiff No. 2) as guardian of her minor son Mahadevappa asked for partition in the undivided property and she was given the house in suit and one-fifth share of the lands which were allowed to remain with the defendants who gave her one-fifth share of the income till 1905.

In 1907 Mahadevappa died unmarried leaving Shivlingava as his heir. Shivlingava asked for separate possession of her share which the defendants refused in 1908. In 1909 she adopted plaintiff No. 1 who sued to recover possession of the property from the defendants.

Defendants Nos. 2 and 3 contended *inter alia* that plaintiff No. 1 was not the duly adopted son of plaintiff No. 2 who was not entitled to adopt; that the

adoption was invalid and inoperative and that the immoveable property of the family was never partitioned.

The other defendants did not appear.

The Subordinate Judge held that the adoption of plaintiff No. 1 by plaintiff No. 2 was proved and that it was valid on the ground that a mother's power to adopt when she succeeded as heir to her unmarried son was based not on the general principles of adoption, but upon a concession shown to her because by her act instead of infringing the vested rights of others she derogated the rights of none but herself: *Payapa* v. *Appanna*[1]; *Venkappa Bapu* v. *Jivaji Krishna*[2]. He, therefore, decreed the plaintiff's suit.

On appeal, the District Judge held that the adoption of plaintiff No. 1 was invalid and awarded possession of the property to plaintiff No. 2 only.

The plaintiffs appealed to the High Court.

H. B. Gumaste, for the appellants:—The only point is whether a mother who succeeds to her son can adopt if her husband was in union with his brothers at the time of his death. I submit such an adoption is good. Whether the husband of the adoptive mother died separate or in union does not at all affect the validity of the adoption.

It has been held that a mother can adopt: Sarkar's Hindu Law, page 264, and Mayne's Hindu Law, 8th Edition, para. 116; and also *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[3]; *Gavdappa* v. *Girimallappa*[4]; *Payapa* v. *Appanna*[1]; *Venkappa Bapu* v. *Jivaji Krishna*[2]; *Verabhai Ajubhai* v. *Bai Hiraba*[5].

(1) (1898) 23 Bom. 327.
(2) (1900) 25 Bom. 306.
(3) (1876) L. R. 4 I. A. 1.
(4) (1894) 19 Bom. 331.
(5) (1903) L. R. 30 I. A. 234; 27 Bom. 493.

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The test is, whether the act of adoption is derogatory of the vested right of any other than that of the adopting mother? if not, the adoption is good.

The consent of the kinsmen also is not necessary in this case. Mahadevappa the last owner died leaving the mother as his heir. The kinsmen have no vested interest.

The case of *Ramkrishna* v. *Shamrao*[1] is not against me at all. In the present case the power to adopt has never been extinguished. It was only suspended during Mahadevappa's life-time. It is revived after his death. Even according to defendants the power cannot be said to have been extinguished. If the adoption is good, if the consent of kinsmen is given, it only means that the mother has power to adopt though with their consent. Consent is necessary only to divest the person in whom the estate has already vested before the adoption. Here it is clearly not necessary.

The case of *Datto Govind* v. *Pandurang Vinayak*[2] has no application. The remarks at p. 503 clearly distinguish that case. Besides, it is a case of an adoption by a Gotraja Sapinda. But an adoption by a mother is recognised as an exception. The mother has power to adopt. It is not extinguished. No consent is required. Therefore the adoption is perfectly good.

A. G. Desai, for respondents Nos. 1 and 2:—A widow's power to adopt is not unlimited. That by adoption she divests no estate but her own is not the only test. If her power is once extinguished, it cannot be revived: *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis*[3]; *Datto Govind* v. *Pandurang Vinayak*[2]; *Ramkrishna* v. *Shamrao*.[1]

[1] (1902) 26 Bom. 526. [2] (1908) 32 Bom. 499.
[3] (1891) 17 Bom. 164.

In each of these cases, the widow's power had on the death of her husband become extinct and it could not revive, whether she took absolute or limited interest in the estate inherited.

At Bharmappa's death, his widow plaintiff No. 2 could not adopt, first because her husband died joint: *Ramji* v. *Ghamau*[1]; and secondly because he left him surviving a son Mahadevappa. Even if after succeeding to her son Mahadevappa she could adopt, she could not get round the first bar: *Datto Govind* v. *Pandurang Vinayak*[2].

A widow in a joint Hindu family cannot adopt. She can if her husband or his father authorizes her to adopt: *Bachoo Hurkisondas* v. *Mankorebai*[3]; *Vithoba* v. *Bapu*[4]; or if her husband's co-parceners give consent to the proposed adoption: *Ramji* v. *Ghamau*[1]. There is no fourth exception and this Court will not, as observed in *Ramji* v. *Ghamau*[1] add any new exception to those already stated.

MACLEOD, C. J.:—The plaintiff sued for possession of the house and a one-fifth share of the lands as described in para. 1 of the plaint with mesne profits.

The first plaintiff is the adopted son of the second plaintiff who is the widow of one Bharmappa. Bharmappa admittedly died in union with his brothers, defendants Nos. 1 to 3 and the husband of defendant No. 4, leaving a minor son Mahadevappa. Thereafter there was a partition between Mahadevappa and his uncles. He died unmarried in 1907 leaving his mother the second plaintiff as his heir. In 1908 she demanded her share which the defendants refused, since when they have been in possession against her. In 1909 she adopted the 1st plaintiff.

(1) (1879) 6 Bom. 498 at p. 503.
(2) (1908) 32 Bom. 499.
(3) (1907) L. R. 34 I. A. 107.
(4) (1890) 15 Bom. 119.

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The 2nd and 3rd defendants in their written statement contended *inter alia* that the adoption was invalid, and this is the only question which has been argued before us in second appeal. The trial Court decided in plaintiff's favour. The lower appellate Court, however, modified the decree of the trial Court, holding that the adoption was invalid, and awarded possession to the 2nd plaintiff only. It must be considered now as settled law that a widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband provided that her son has not attained ceremonial competence: *Verabhai Ajubhai* v. *Bai Hiraba*[1].

The principle of such recognition is that the act of adoption is derogatory of no other vested right than those of the adopting mother: see *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*[2]; *Gavdappa* v. *Girimallappa*[3], and *Payapa* v. *Appanna*[4]. But it has been contended that, because Bharmappa died in union and thereafter his widow could not adopt without the consent of his coparceners, her right to adopt came to an end at the separation and could not be revived. No authority which is really in point has been cited for such a proposition. Reliance was placed on the decision in *Ramkrishna* v. *Shamrao*,[5] but what was decided in that case was that when the inheritance of the son has vested in some other heir than the mother herself her power of adoption comes to an end and cannot be revived. Nor is the case of *Datto Govind* v. *Pandurang Vinayak*[6] of any assistance to us. There A and S were two joint brothers. S died leaving a

(1) (1903) 27 Bom. 492.
(2) (1876) L. R. 4 I. A. 1.
(3) (1894) 19 Bom. 331.
(4) (1898) 23 Bom. 327.
(5) (1902) 26 Bom. 526.
(6) (1908) 32 Bom. 499.

widow, who on A's death succeeded to the estate. She adopted a son to her husband and the reversioners objected. The question whether a widow, who succeeds to an estate not her husband's but as Gotraja Sapinda of the last male holder, in consequence of the absence of nearer heirs such as the mother and grandmother, could make a valid adoption was answered in the negative.

That is not the question before us in this case, which, as far as I can gather, has never arisen before, and must be decided on general principles. In this Presidency no express authorization by the husband to the widow to adopt is necessary. Only if he is a member of a joint family the consent of the coparceners is necessary. In this case there could be no talk of adoption as long as Mahadevappa was alive, but it is not correct to say that the power to adopt must be in the widow at the time of her husband's death, and if it is not, that it cannot arise afterwards. If Bharmappa had died separate the power to adopt remained suspended, at any rate as long as Mahadevappa did not marry or attain ceremonial competence. Until the separation her power still remained suspended, and if Mahadevappa had died in union she could have adopted with the consent of defendants Nos. 1 to 3. I see no reason, therefore, why after the separation the power of adoption did not remain suspended, the only change being that if events happened which enabled it to be exercised there were no longer any coparceners whose consent was necessary. The rights of reversioners are not vested, so that her adoption of the 1st plaintiff was not derogatory of any vested right. That, and the condition that the son's estate has not vested first in some other than herself, are the only two conditions which in my opinion stand in the way of the widow's right to adopt even if her husband died in union.

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Therefore the appeal must be allowed and the decree of the trial Court restored with proportionate costs on the defendants Nos. 2 and 3 throughout, except that only Rs. 400 are allowed as mesne profits.

HEATON, J.:—I agree.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

1919.

August 25.

RUKMINIBAI DIRATAR KRISHNARAO GOPAL TAMBVEKAR (ORIGINAL DEFENDANT No. 10), APPELLANT *v.* LAXMIBAI WIDOW OF NARAYAN GOPINATH TAMBVEKAR AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 9), RESPONDENTS.*

Hindu law—Agrahar gift—Private religious gift to Brahmins—Condition necessitating residence treated as recommendatory and not enforceable at law—Alienation by a donee not residing in the village—Validity of the alienation—Transfer of Property Act (IV of 1882), sections 10, 11.

An Agrahar gift of certain lands and a house was made to a donee and his descendants entitling him to enjoy the lands, reside in the house, and perform the six-fold religious duties. It was further enjoined that the donee should not abandon his house and go to another place and enjoy his Vritti given to him in connection with the Agrahar from that place. If the donee acted in contravention of the above provision, his conduct should be considered an act of irreligiousness; and the gift should be revoked and granted to another fit person. The donee complied with the above conditions for some years; but eventually went to another village to live and sold the lands and the house. In a suit by the alienee to recover arrears of rent for the lands, a question having arisen whether the alienation was valid:—

Held, that the Agrahar gift was a private gift to the donee and an absolute gift according to law; that the further provision as regards residence in the same village was only a recommendation and an appeal to the religious conscience of the donee and his descendants; and that as a condition it was not valid and enforceable in law.

Held, accordingly, that the alienation was valid.

Anantha Tirtha Chariar v. *Nagamuthu Ambalagaren*(1).

*Appeal No. 18 of 1917 from order.

(1) (1881) 4 Mad. 200.