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could be treated as pending after it was disposed of in 1917 nor can the second application be held to be an application for the revival of the first Darkhast to save limitation in favour of the plaintiff.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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

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February, 6.

ANJIRABAI KOM GULABRAO KESHAVRAO POWAR (ORIGINAL DEFENDANT), APPELLANT *v.* PANDURANG BALKRISHNA POWAR (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu law—Adoption—Death of son, a widower without children—Mother succeeding as heir—Adoption by mother—Validity.

Under Hindu law, a mother succeeding to her son who has died without leaving any other nearer heir, is entitled to adopt even though the son may have attained the age of ceremonial competence and may have been married before his death.

Venkappa Bapu v. *Jivaji Krishna*[1], followed.

Madana Mohana v. *Purushothama*[2], considered.

SECOND appeal, from the decision of B. R. Mehendale, First Class Subordinate Judge, with Appellate Powers, at Satara, reversing the decree passed by V. V. Bapat, Subordinate Judge at Karad.

Gopal and Kesu were two divided brothers, the sons of one Babaji. Gopal had a son Balkrishna whose widow Rakhma adopted the plaintiff Pandurang on June 14, 1907. Kesu had a wife Lakshmi and a son Maruti. Maruti had had two wives but they were both dead when he himself died, at the age of twenty-five, on December 5, 1904. After his death his mother Lakshmi (defendant No. 1), the widow of Kesu, adopted Gulabrao (defendant No. 2) on December 16, 1916.

*Second Appeal No. 204 of 1923.

(1) (1900) 25 Bom 306. (2) (1918) L. R. 45 I. A. 156.

On January 12, 1917, the plaintiff filed the present suit for a declaration that the adoption of Gulabrao was invalid.

The trial Court upheld the adoption on the ground that Maruti had left no widow or issue, and dismissed the suit.

The plaintiff however appealed and the appellate Court, considering itself bound by the case of *Madana Mohana* v. *Purushothama*[1], held the adoption invalid on the ground that, Maruti having attained full legal capacity, Lakshmi's power to adopt had come to an end.

Gulabrao having died his widow Anjirabai appealed to the High Court.

G. N. Thakor, with *P. V. Kane*, for the appellant:— A mother succeeding to her own son, who was married but who left neither child nor widow behind him, can validly adopt. The principle governing the limit of a widow's power to adopt is explained in the judgment in the Full Bench decision of *Ramkrishna* v. *Shamrao*[2], which sums up the law laid down by Lord Kingsdown in the Privy Council in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[3] (and afterwards interpreted and reaffirmed in *Pudma Coomari Debi* v. *The Court of Wards*[4] and *Thayammal* v. *Venkatarama Aiyan*[5]) thus:—

"Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived." Here the last owner, Maruti, died at the age of twenty-five, both his wives having predeceased him, and his

(1) (1918) L. R. 45 I. A. 156.
(2) (1902) 26 Bom. 526 at p. 532.
(3) (1865) 10 Moo. I. A. 279.
(4) (1881) L. R. 8 I. A. 229 : 8 Cal. 302.
(5) (1887) L. R. 14 I. A. 67 : 10 Mad. 205.

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mother succeeded to him direct. The lower Courts have not considered the case of *Venkappa Bapu* v. *Jivaji Krishna*[1], in which the last male owner died at the age of thirty, his wife having died before him, and his mother succeeded him, and adopted a boy. The adoption was objected to on the ground that the last male owner had attained ceremonial competence and therefore the mother could not adopt. The adoption was, however, upheld, Ranade J., remarking that the mention of investiture, marriage or competency by the authors of West and Buhler's Digest as limitations on the widow's power to adopt had reference more to the ceremonial law than to the civil law as administered by the Court. There is no case in which the judgment in *Venkappa Bapu* v. *Jivaji Krishna*[1] has either been dissented from or overruled. It is incidentally to be noted that the passages about ceremonial competence in West and Buhler's Digest (3rd Edition, pp. 985, 986) have been omitted in the recent edition (4th Edition, p. 881).

[Counsel also referred to the following cases:—

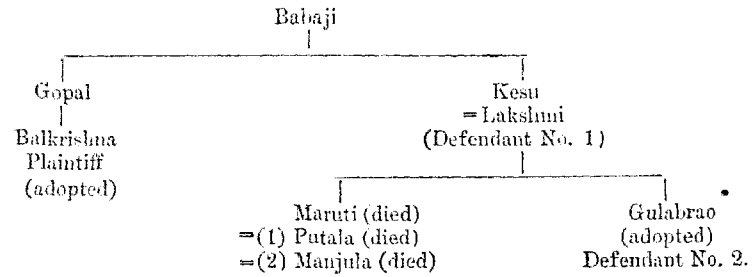
Gavdappa v. *Girimallappa*[2], *Sangapa* v. *Vyasapa*[3] and *Madana Mohana* v. *Purushothama*[4].]

H. C. Coyajee, with *D. C. Virkar*, for the respondent:—The Privy Council decision in *Madana Mohana* v. *Purushothama*[4] lays down that the widow's power to adopt a son to her husband comes to an end as soon as the son, whether natural or adopted, attains the age of ceremonial competence. It is this attainment of ceremonial competence that is the limitation imposed by law, upon the widow's exercising the power of adoption. The power once thus extinguished, cannot be revived by the subsequent vesting of the estate in the widow as the heiress of her deceased son. The

[1] (1900) 25 Bom. 306.
[2] (1894) 19 Bom. 331.
[3] [1896] P. J. 528.
[4] (1918) L. R. 45 I. A. 156.

actual state of the family at the time of the death of the son is immaterial: See *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[1] and *Pudma Coomari Debi* v. *Court of Wards*[2]. The recent edition of Mayne's Hindu Law and Usage supports this view.

MACLEOD, C. J.:—The genealogy of the parties in this appeal is as follows:—



Gopal and Kesu, the sons of Babaji, were divided. The plaintiff in this case is the grandson of Gopal. Kesu died leaving a widow Lakshmi, the 1st defendant, and a son Maruti. Maruti had two wives, but both died before him, so that on Maruti's death his mother Lakshmi succeeded to him as his heiress. Subsequently she adopted the 2nd defendant. The plaintiff seeks to obtain a declaration that the 2nd defendant is not a validly adopted son of the 1st defendant. The trial Judge said:—

"As Maruti left no widow or issue, the defendant No. 1 had authority according to Hindu law to adopt a son to her husband. I, therefore, find the 3rd issue in the affirmative."

The appellate Judge considered himself bound by the authority in *Madana Mohana* v. *Purushothama*[3] and, consequently, held Lakshmi's power of adoption had come to an end on the ground that Maruti had attained full legal capacity to continue the line,

(1) (1865) 10 M. I. A. 279. (2) (1881) L. R. 8 I. A. 229.
(3) (1918) L. R. 45 I. A. 156.

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either by the birth of a natural born son or by the adoption to him of a son by his own widow. On a careful consideration of the judgment in that case, it seems to me that the question now in issue was not decided, for, in that case admittedly Brojo Kishor left a widow, and consequently, his estate would go to her and not to his mother.

The point in issue was decided in *Venkappa Bapu* v. *Jivaji Krishna*[1]. The head note runs :—

"A mother succeeding as heir to her deceased son, who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage, investiture or otherwise before his death."

So that the plaintiff's adoption was valid inasmuch as it only affected the mother's interests, and did not affect the vested rights of others.

In *Ramkrishna* v. *Shamrao*[2] the converse was held, namely, that—

"Where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

The opinion expressed by the Court in that case appears to be *obiter* as the point in issue was whether, where a Hindu grandmother succeeds as heir to her grandson who had died unmarried, her power to make an adoption was at an end. However the principle laid down by Chandavarkar J. with regard to the case of a Hindu dying leaving a widow and a son was approved of in the case mentioned by the learned appellate Judge, viz., *Madana Mohana* v. *Purushothama*[3].

In the Privy Council case of *Verabhai Ajubhai* v. *Bai Hiraba*[4], a Hindu died leaving a widow and a son,

(1) (1900) 25 Bom. 306.
(2) (1902) 26 Bom. 526.
(3) (1918) L. R. 45 I. A. 156.
(4) (1903) 27 Bom. 492.

who died between fifteen and sixteen years of age and *unmarried*. The widow then adopted a son to her husband, and it was held that the adoption was valid. But the question did not arise how the case would have stood if it had been proved that the son had attained ceremonial competence. Their Lordships said that that question might be open to controversy, and they saw no reason for pursuing the inquiry.

In *Madana Mohana* v. *Purushothama*[1] it is clear that Brojo Kishore left a widow, and the passage in the judgment, which I think might give rise to some difficulty, is as follows :—

"That widow was not a party to the suit, and, whether or not she had power to adopt to Brojo it has not been established against her that she had no such power. Their Lordships think it right to draw attention to this circumstance, but they do not desire to be understood as saying that even in its absence the succession of Brojo and his dying after attaining *full legal capacity to continue* the line would not *in themselves* have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of Adikonda's widow, who was not the widow of the last owner, and so could not adopt a son to him."

Although *obiter* it is suggested in the last Edition of Mayne, p. 154 that that passage left no doubt what their Lordships' view would have been if Brojo Kishore had died having attained full legal capacity to continue the line (by which I presume that their Lordships meant his being capable of begetting a son). The case came from Madras and the circumstances to which their Lordships thought it right to draw attention was the existence of a widow with a power to adopt and the word 'absence' refers to the power and not to the widow. Whether the son's widow has or has not a right to adopt, the decisive factor is her survival of her husband and the vesting in her of a life estate in her husband's property. Whether the son had attained

[1] (1918) L. R. 45 I. A 156 at p. 161.

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ceremonial competence or was capable of begetting a son would only be matters of importance as affecting his mother's right to adopt if he died unmarried or if his wife predeceased him, and with all due respect to the learned editor of Mayne, in my opinion these questions in this Presidency have remained beyond controversy since the decision in *Venkappa Bapu* v. *Jivaji Krishna*[1], the correctness of which has never been disputed in this Court and has not been in any way disturbed by the *obiter dicta* in *Madana Mohana* v. *Purushothama*[2]. It seems to me that we must follow the *ratio decidendi* in the judgment of Mr. Justice Ranade at p. 312 where he discusses whether the attainment of ceremonial competence of a son could affect the rights of his mother to adopt in case he died without leaving a son or a widow :—

"The...limitation on the widow's powers has reference more to the ceremonial law than to the civil law as administered by the Court, and the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others. The vested rights of no other relations were affected by Tulsawa's adoption of the plaintiff."

I think, therefore, this appeal must be allowed and the suit must be dismissed with costs throughout.

SHAH, J. :—I agree. I desire to make it clear that Gopal and Kesu were divided, and that the contention of the plaintiff is that the mother had no right to adopt after the death of her son Maruti as he died after attaining the age of ceremonial competence and after he was married. It is found in the case that Maruti's wives predeceased him, and when Maruti died there was no nearer heir to him than his mother. Lakshmi inherited Maruti's estate as his mother and afterwards adopted defendant No. 2. An adoption effected by the mother under such circumstances according to the decisions of

[1] (1900) 25 Bom. 306. [2] (1918) L. R. 45 I. A. 156.

this Presidency is valid. (See *Gavdappa* v. *Girimallappa*[1], *Sangapa* v. *Vyasapa*[2] and *Venkappa Bapu* v. *Jivaji Krishna*[3]). It is quite true that in *Verabhai Ajubhai* v. *Bai Hiraba*[4] this question as to the power of the mother to adopt after the son had attained the age of ceremonial competence was raised, but their Lordships of the Privy Council did not decide that question ; and it may be said that in fact there is no decision up to the present day in which the power of the mother to adopt after her son's death, when the son has left no nearer heir than herself, has been held to come to an end in consequence of the circumstance that at the time of his death the son had attained the age of ceremonial competence or was married. The observations of their Lordships of the Privy Council in *Madana Mohana* v. *Purushothama*[5] relate to a different state of facts. In that case it is clear that the son had left a widow, and it is not disputed, and cannot be disputed, that if the son leaves a widow or any other heir except the mother, then the power of the mother to adopt would come to an end. These observations do not suggest, in my opinion, that if the son had attained the age of ceremonial competence or was married before his death and if the mother inherited his estate, the mother would not be competent to adopt or that in such a case the power of the mother to adopt would come to an end. In the absence of any decisions to the contrary, it seems to me that the view taken by Mr. Justice Ranade in *Venkappa Bapu* v. *Jivaji Krishna*[3] that the mother is entitled to adopt, when the son has died without leaving any other nearer heir even though he may have attained the age of ceremonial competence and may have been married before his death, must be accepted.

Decree reversed.

J. G. R.

(1) (1894) 19 Bom. 331.
(2) [1896] P. J. 528.
(3) (1900) 25 Bom. 306.
(4) (1903) 27 Bom. 492.
(5) (1918) L. R. 45 I. A. 156.

APPELLATE CIVIL.

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

1924.

February 15.

MAKANJI MAVJI (ORIGINAL OPPONENT), APPLICANT *v.* BHUKANDAS NAGARDAS (ORIGINAL APPLICANT), OPPONENT*.

Civil Procedure Code (Act V of 1908), section 55, clause 4—Issue of warrant against judgment-debtor—Simultaneous proceeding against surety—Death of judgment-debtor—Surety's liability.

Under section 55, clause 4 of the Civil Procedure Code 1908, the issue of a warrant against the judgment-debtor is not sufficient by itself to bar the Court from proceeding against the surety if the warrant is unfruitful. It is only when the judgment-debtor has been brought back before the Court, so that the Court can commit him to civil prison, that the surety is released.

The judgment-debtor's death after the first condition had failed, namely the undertaking to apply to the Court to be declared an insolvent, cannot affect the surety's liability with regard to that condition.

APPLICATION under extraordinary jurisdiction against the order passed by V. P. Raverkar, First Class Subordinate Judge, at Surat.

The facts material for the purposes of this report are sufficiently stated in the judgment.

M. B. Dave, for the applicant.

P. B. Shingne, for the opponent.

MACLEOD, C. J.:—This is an application under section 25 of the Provincial Small Cause Courts Act asking us to set aside an order made by the First Class Subordinate Judge of Surat on June 30, 1923, in the following circumstances. One Bhukandas Nagardas had obtained a decree against one Merwanji Rustomji Mody for Rs. 420 and costs. The plaintiff applied for execution of the decree against the defendant by his arrest. Notice was issued upon the judgment-debtor calling upon him to show cause why he should not be arrested in execution of the decree against him. As the judgment-debtor did not appear to show cause, the Court, on January 19, 1923, made an order for his arrest.

*Civil Extraordinary Application No. 221 of 1923.

In pursuance of the warrant the judgment-debtor was arrested and brought before the Subordinate Judge. On February 27, 1923, an order was made on an application by the judgment-debtor under section 55 (4) of the Civil Procedure Code that he wanted a month's time to make an application to be declared an insolvent. The Judge made an order that on the judgment-debtor giving security for Rs. 450 he should be released. The present petitioner then came forward and passed a bond in the following terms:—

"I Makan Mavji residing at Katargaon with my will and for me and my heirs and assigns make a contract with the Court that the defendant Merwanji Rustomji will appear in Court when called upon in any proceeding upon the application or upon the decree in execution and that he will give an application within the abovementioned period and if he does not appear or does not make an application, I, my heirs and assigns, bind ourselves to give Rs. 500 by its order to the Court."

Accordingly the judgment-debtor was released. But he failed to apply to be declared an insolvent within a month from the date of the order. The Court then on its own motion made an order on the original Darkhast to the following effect:—

"Insolvency application not presented, re-issue warrant of arrest."

The judgment-creditor had notice of this order, so on April 4, 1923, he made an application to the Court to the effect that the application for insolvency not having been given in time, the surety had become liable, and prayed that the warrant should not be issued against the judgment-debtor, but that the surety should be called upon to pay the amount of the decree. Before any order could be passed on that application the judgment-debtor died on May 17, 1923. Accordingly the judgment-creditor continued his application against the surety. The Court granted the application and directed execution against the surety to issue for the sum remaining due under the decree.

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Whether that decision was right depends upon the proper construction to be put on section 55 (4) of the Civil Procedure Code. When a judgment-debtor is brought before the Court on arrest, he may express his intention to apply to be declared an insolvent, and if he does so, he is asked to furnish security to the satisfaction of the Court, first, that he will within one month so apply; secondly, that he will appear when called upon, in any proceeding upon the application, that is to say, the application for insolvency; and thirdly, that he will appear when called upon in any proceeding upon the decree, in execution of which he was arrested. If he furnishes security, the Court shall then release him from arrest. If he fails to apply to be declared an insolvent, or fails at any time to appear either on the application for insolvency, or upon the decree in execution, the Court may direct the security to be realized or may commit the prisoner to the civil prison in execution of the decree. I do not think this means that the Court may proceed both against the surety and against the debtor. Obviously if the surety is proceeded against and the amount is recovered from him under the conditions of the bond, then the judgment-debtor cannot be committed to jail in execution, and also if the judgment-debtor is committed to the civil prison, the state of affairs is just the same as if the surety had never come forward, so that the Court cannot concurrently proceed against the surety.

Now in this case the surety became liable as soon as the judgment-debtor failed to apply to be declared an insolvent within the month allowed to him. The Court of its own motion issued the warrant of arrest. Clearly if that warrant had been executed and the judgment-debtor had been committed to the civil prison, then with regard to that condition in the bond, the surety would have been released. But it is

contended that the issue of the warrant is not sufficient by itself to bar the Court from proceeding against the surety, if the warrant is unfruitful, and that seems to me to be the right construction of the section. It is only when the judgment-debtor has been brought back before the Court, so that the Court can commit him to the civil prison, that the surety is released. It may often happen that although the condition of the bond has not been fulfilled, and the debtor has absconded, still the Court may endeavour to bring him back, so that he may be committed to the civil prison. But if the arrest cannot be effected, then as the Court has not succeeded in the first alternative open to it, it is still possible to the Court to resort to the second alternative and proceed against the surety. The fact that the judgment-debtor died would protect the surtey against any failure with regard to that condition in the bond which made him liable for the appearance of the debtor in Court or in any proceeding in insolvency. But the judgment-debtor's death after the first condition had failed, namely, the undertaking to apply to the Court to be declared an insolvent, cannot possibly affect the surety's liability with regard to that condition.

We think, therefore, that the order of the lower Court is right and the Rule must be discharged with costs.

SHAH, J. :—I agree.

Rule discharged.

J. G. R.