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HARI SABAJI v. SHRINIVAS VITHAL

Madgavkar J.

case of property attached before judgment. Speaking for myself, I still prefer the reasoning and the conclusion of Couts Trotter J. and Ramesan J. in the Full Bench Madras case referred to above to that of Rankins C. J. in *Shibnath Singh Ray* v. *Sheikh Saberuddin Ahmed*[1] and of *Bohra Akhey Ram* v. *Basant Lal.*[2]

In the present case we are of opinion that the words "attachment shall cease" in the concluding sentence of rule 57 do not mean necessarily attachment of all the properties attached even though they do not form the subject-matter of the application for execution. Attachment merely results in the property remaining in *custodia legis*. But cases repeatedly occur where one or more out of such properties may be taken away from such *custodia legis* by order of the Court or by consequence of law; the others so remain under attachment. In the present case, we are of opinion that in the properties with which the present appeal is concerned, the attachment did not cease but subsisted on the date of the plaintiff-appellant's purchase, and his suit therefore fails.

We agree, therefore, with the decision of Mr. Justice Baker and dismiss the appeals with costs.

Appeals dismissed.

B. G. R.

[1] (1928) 56 Cal. 416.

[2] (1924) 46 All. 894.

APPELLATE CIVIL.

Before Sir John Beaumont, Kt., Chief Justice, and Mr. Justice Murphy.

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April 7.

SANGANGOUDA FAKIRGAUDA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* HANMANTGOUDA SANGANGOUDA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption—Adoption made by father's widow—Consent of son's widow—Adoption invalid.

It is settled law that where a Hindu dies leaving a widow and a son and the son dies leaving a widow the power of the father's widow to adopt is extinguished

*Appeal under the Letters Patent No. 25 of 1929.

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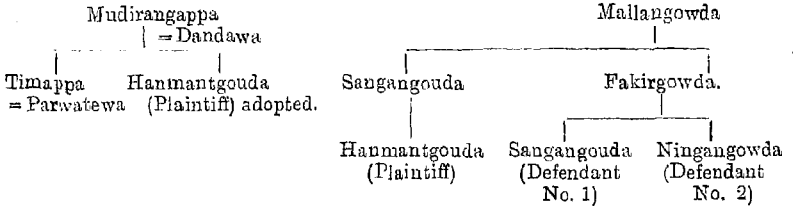
and can never afterwards be revived. Accordingly any adoption made by the father's widow even with the consent of the son's widow is invalid under Hindu law.

Payapa v. *Appanna*,[1] differentiated.

Ramkrishna v. *Shamrao*[2] and *Madana Mohana* v. *Purushothama*,[3] followed.

APPEAL under the Letters Patent against the decision of Madgavkar J. confirming the decree passed by A. S. R. Macklin, District Judge at Bijapur, reversing the decree passed by Sumitra A. H., Subordinate Judge at Bagalkot.

Relationship between the parties will be apparent from the following genealogical tree :—



The following statement of the facts is taken from the Judgment of the Chief Justice :—

"The material facts are that the adoptive father Mudirangappa died in 1875 leaving a widow named Dandawa, whom I will hereafter refer to as 'the father's widow'. He also left a son named Timappa who died in 1881. Timappa left a widow named Parwatewa, whom I will refer to as 'the son's widow'."

In 1902 Dandawa adopted plaintiff. To this adoption Parwatewa consented. Dandawa died in 1906 and Parwatewa died in 1920.

In 1924, plaintiff claimed to succeed to vatan property in suit as the heir of his natural father Sangangouda.

The Subordinate Judge held the factum of adoption proved and also held that the adoption having taken

(1) (1898) 23 Bom. 327.
(2) (1902) 26 Bom. 526 F. B.
(3) (1918) L. R. 45 I. A. 156.

place with the consent of Parwatewa, who was the widow of the last male-holder, was a good adoption and therefore the plaintiff had lost all his rights in his natural family. The suit was accordingly dismissed.

Plaintiff appealed to the District Court. The learned District Judge disagreed with the view taken by the Subordinate Judge and held that the adoption was invalid. He therefore found that the plaintiff retained his rights in the natural family and decreed the plaintiff's claim.

Defendants preferred the Second Appeal to the High Court. This appeal was heard by Madgavkar J. who confirmed the decree of the District Court observing as follows :—

"It is contended for the appellants that the Full Bench decision in *Ramkrishna* v. *Shamrao*[1] is not applicable but that the present case falls within the third exception laid down by Mr. Justice Ranade in *Payapa* v. *Appanna*[2] and that the view in *Payapa's* case[2] had been applied and followed in a series of cases such as *Shidappa* v. *Ningangauda*,[3] *Pratapsing Shivsing* v. *Agarsingji Raisingji*,[4] *Vaman Vithal* v. *Venkaji Khando*[5] and *Yeshvadabai* v. *Ramchandra*.[6]

For the respondent reliance is placed on the Full Bench decision in *Ramkrishna* v. *Shamrao*.[1]

As was pointed out by Shah J. in *Shidappa* v. *Ningangauda*,[3] the Full Bench ruling in *Ramkrishna* v. *Shamrao*[1] is not in conflict with the main ground of the decision in *Payapa's* case.[2]

The essential points in the two cases were entirely different. The question in *Payapa's* case[2] affirmed a rule that 'it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietory rights'. To this rule Ranade J. sought to summarise four exceptions. The Full Bench decision in *Ramkrishna* v. *Shamrao*[1] affirmed the view of this Court in *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis*[7] where it was held that 'an adoption to herself and her deceased husband by a mother who has succeeded as heir to her son after his death and that of his widow is invalid according to Hindu law.' In the full Bench case it is laid down that 'where a Hindu dies, leaving a widow and a son,

(1) (1902) 26 Bom. 526.
(2) (1898) 23 Bom. 327.
(3) (1914) 16 Bom. L. R. 663 at p. 667 : 38 Bom 724.
(4) (1918) L. R. 46 I. A. 97.
(5) (1920) 45 Bom. 829.
(6) (1927) 29 Bom. L. R. 1320.
(7) (1893) 17 Bom. 164.

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and that son himself dies 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 facts in the last case were very similar to the facts here, and these observations apply precisely to the facts now in question. Mudirangappa died in about 1875 and left his son Timappa who died about 6 years later, leaving a widow Parvatewa who died in 1920. Dandawa, the widow of Mudirangappa, purported to adopt the plaintiff-respondent in 1902 as heir to her husband Mudirangappa. That power under the above Full Bench ruling and on general principles she did not possess, and it was extinguished when Timappa died, leaving the widow Parvatewa. The case would be different had the power been potential and capable of revival as it might be in the various sorts of cases, some of which have been referred to in *Payapa's* case. In such a case it might well be that the consent of the parties affected by such adoption might validate an adoption otherwise invalid. This however is not the case in the present appeal. The same view has been taken by other High Courts : *Adivi Suryaprakasa Rao* v. *Nidamarty Gangaraju*,[1] where it was held that ' a power given to a widow to adopt is absolutely at an end when once the estate has vested in the heir of her deceased son and is not revived even if she afterwards succeeds to the estate ' and ' that, in such a case, the consent of the son's heir in whom the estate had vested, will not validate the adoption '; *Manikyamala Bose* v. *Nunda Kumar Bose*[2] and the observations of the Privy Council in *Madana Mohana* v. *Purushothama*.[3]

Defendants preferred an appeal under the Letters Patent.

M. R. Jayakar, with *H. D. Sapre*, for the appellants.

Nilkant Atmaram, for the respondent.

BEAUMONT, C. J. :—[After stating the facts quoted above continued as follows:]

Mr. Jayakar, to whom we are indebted for his very able argument, has referred us to a large number of cases commencing with the Privy Council case of *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*,[4] *Pudma Coomari Debi* v. *Court of Wards*,[5] *Thayammal and Kuttisami Aiyan* v. *Venkatarama Aiyan*,[6] *Keshav Ramkrishna* v. *Govind Ganesh*,[7] *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak*

(1) (1909) 33 Mad. 228.
(2) (1906) 33 Cal. 1306.
(3) (1918) L. R. 45 I. A. 156.
(4) (1865) 10 Moo. I. A. 279.
(5) (1881) L. R. 8 I. A. 229.
(6) (1887) L. R. 14 I. A. 67.
(7) (1884) 9 Bom. 94.

Hasabnis,[1] *Ramkrishna* v. *Shamrao*,[2] *Anandibai* v. *Kashibai*[3] and *Manikyamala Bose* v. *Nanda Kumar Bose*.[4] Those cases establish a rule which, I think, is accurately stated in the judgment of the Full Bench of this Court in *Ramkrishna* v. *Shamrao*,[2] a judgment which was expressly approved by the Privy Council in *Madana Mohana* v. *Purushothama*.[5] The learned Judge Mr. Justice Chandavarkar delivering the judgment of the Court states the rule which he gathers from the Privy Council decisions at page 532 in these terms :—

"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."

Now it is clear that the facts of this case do come within the literal terms of that rule, because a Hindu died leaving a widow and a son and that son died leaving his own widow. But Mr. Jayakar says that in none of those cases was the question of consent to the adoption by the person in whom the estates were vested in any way raised. Of course the facts in the various cases differ but putting it shortly I think they were all cases of this nature: A Hindu dies leaving a widow and descendants. So long as the descendants live the widow cannot exercise her power of adoption because of the general rule that she cannot divest the estate of others. Eventually by reason of the deaths of parties and the failure of issue, natural or adopted, the estates descend upon the original deceased owner's widow and the question which the Court has had to decide has been whether, when that event happens, the power of adoption which up to that time the widow has not been able to exercise can then be exercised by her. The question really has been whether the

[1] (1892) 17 Bom. 164.
[2] (1902) 26 Bom. 526.
[3] (1904) 28 Bom. 461.
[4] (1906) 33 Cal. 1306.
[5] (1918) L. R. 45 I. A. 156.

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power should be treated as having been in abeyance while the estates were vested elsewhere than in the widow and as having revived on the estates descending upon the widow, or whether the power should be treated as having come to an end. The Privy Council decided that in such cases the rule was that the power had come absolutely to an end, had been extinguished and could not be revived. I think, as appears from the Privy Council judgment in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*,[1] that the rule is rather one of convenience than of principle, and that the Court felt that at some time or other this power of adoption must come to an end and could not be kept in a state of suspended animation indefinitely. At any rate the cases do undoubtedly establish that that rule exists, but Mr. Jayakar is quite right in saying that in none of those cases was the question of consent by the owner for the time being of the estate discussed, and he says that this case really falls within the principle of *Payapa* v. *Appanna*.[2] Now *Payapa's* case[2] was the converse of the present case. In that case the son had pre-deceased the father leaving a widow. Therefore, on the father's death the estate descended upon his widow, who had a power of adoption exercisable at any time. She consented to the son's widow exercising a power of adoption to the son, and it was held that that adoption was good. Mr. Justice Ranade who gave the judgment of the Court refers in the first instance to the settled rule that (p. 329) " it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights ". Then he says that there are four exceptions to this general rule and the

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

[2] (1893) 23 Bom. 327.

third one is stated in these terms (p. 331) :—" When the adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent ", and in the course of his judgment Mr. Justice Ranade gives what he considers the justification for the rule. He says at page 332 of the report :—" Nothing is more common in this country than to find that parents, when they grow old, and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves." Mr. Nilkant has suggested that *Payapa's* case[1] is not good law, and he relies on an observation of Mr. Justice Chaubal in *Datto Govind* v. *Pandurang Vinayak*.[2] But *Payapa's* case[1] has been followed by this Court in *Siddappa* v. *Ningangavda*[3] and in *Yeshvadabai* v. *Ramchandra*.[4] In particular, in the case of *Siddappa* v. *Ningangavda*,[3] Mr. Justice Shah, a great authority on Hindu law, not only follows *Payapa's* case[1] but expressly says that he approves of it. I think, therefore, that we must take *Payapa's* case[1] as being an authority binding upon this Court. But I also think that the learned Judges who decided *Payapa's* case[1] had not present to their minds any case of the exercise of a power of adoption which had come to an end. They state the rule by saying that the adoption is " validated " by the consent. The word " validated " would be an inappropriate word to apply to a power which had altogether ceased to exist. I think, therefore, we must take the rule as stated in connection with the facts of that particular case in which there is no suggestion that the power had come to an end and had been extinguished. The real question which we have

[1] (1898) 23 Bom. 327.
[2] (1908) 32 Bom. 499.
[3] (1914) 38 Bom.724.
[4] (1927) 29 Bom. L. R. 1320.

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to determine in this appeal is whether this case on its facts falls within *Payapa's* case[1] or whether it falls within the general rule established by the Privy Council as stated in *Ramkrishna* v. *Shamrao.*[2] Mr. Jayakar says, and I am disposed to agree with him, that there is no substantial difference between the adoption which was held valid in *Payapa's* case[1] and the adoption with which we are dealing in this case. It does not seem to matter to the reversioners whether the father's widow consents to the adoption by the son's widow or whether the son's widow consents to the adoption by the father's widow. In either case the adoption goes in the same line and the effect on the reversioners is the same. But there is in my opinion this essential difference between *Payapa's* case[1] and the present case. In *Payapa's* case[1] there was no question of the power to adopt of the son's widow having been extinguished. It is true that it had never become exercisable and could not be exercised at the moment when the particular adoption was made, because any such exercise would divest the estate of the father's widow. But if that is the only objection to the exercise of the power it seems logical to hold that the objection can be removed with the consent of the person affected—namely, the father's widow. But in the present case, having regard to the decisions of the Privy Council, we are bound to hold that the power of adoption in the father's widow has absolutely come to an end, has been extinguished and cannot be revived; and if that is so, it seems to me impossible to say that it can be validated by the consent of anybody. However the case is put, it is clear that the power of adoption which was exercised in this case was the power of the father's widow, and not the son's

[1] (1898) 23 Bom. 327. [2] (1902) 26 Bom. 526.

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widow. However much it may have been exercised with the consent of the son's widow, it is in no sense a delegation of the power which admittedly existed in the son's widow, because any adoption by the father's widow must be to her husband, the father, and any adoption by the son's widow must be to her husband, the son. On the whole therefore I have come to the conclusion that to apply the principle of *Payapa's* case[1] to the facts of this case would really be to go behind the rulings of the Privy Council, and that we must hold that the adoption by the father's widow in this case was invalid. The appeal must accordingly be dismissed with costs.

MURPHY, J. :—The facts out of which this appeal arises are the occasion of a new point of Hindu law, or at any rate of one not directly included in existing decisions. The original plaintiff, Hanmantgouda, was adopted into another family by Dandawa, a widow to her deceased husband. He however claimed to be the next heir to his natural father, on the ground that his adoption by Dandawa had been invalid, because at the time she had no power to adopt, since her husband, who had died in 1875, had left a son Timappa who died in 1881 leaving a widow Parwatewa, who on these facts was alone entitled to adopt a son to the family. The reply was that Dandawa's adoption had been made with Parwatewa's consent, which validated it. Whether Parwatewa could, by consenting to the adoption, validate it, is the only point in the appeal.

I think the general rule is beyond dispute, that the person entitled to adopt in a Hindu family is the widow of the last male owner, with certain exceptions, such as a widow in an undivided Hindu family who adopts with the consent of her husband's surviving coparceners. The

[1] (1898) 23 Bom. 327.

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original Court dismissed the plaintiff's suit. The first appellate Court allowed it, and a single Judge of this Court agreed with the first appellate Court in Second Appeal. This appeal is under the Letters Patent.

The general rule to be derived from authoritative decisions is that where a Hindu dies leaving a widow and a son, and the son dies leaving a widow to continue the line by means of an adoption, the power of the first widow is extinguished and can never be revived We have considered the cases of *Pudma Coomari Debi* v. *Court of Wards*,[1] *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*,[2] *Thayammal and Kuttisami Aiyan* v. *Venkatarama Aiyan*,[3] *Ramkrishna* v. *Shamrao*,[4] which was a decision of the Full Bench, *Krishnarav* v. *Shankarrav*,[5] and *Vaman Vithal* v. *Venkaji Khando*,[6] and the cases relied on for the contrary, the original one being *Payapa's* case—which is the exact converse of the present one—*Payapa* v. *Appanna*.[7] The facts there were that the widow of the last male owner, in whom the right vested, consented to an adoption by her predeceased son's widow, such an adoption being held valid, as being in agreement with Hindu sentiment, by the late Mr Justice Ranade. The later Bombay cases are all on adjacent facts to those in *Payapa's* case: see, *Vaman Vithal* v. *Venkaji Khando*[6] and *Yeshvadabai* v. *Ramchandra*.[8] Mr. Justice Ranade's third exception, in *Payapa's* case, rests on an analogy drawn from the parallel instances where an adoption is permissible with the consent of the person in whom the estate vested at the time, and Mr. Jayakar's argument really is, that this is such a case, and therefore comes within

(1) (1881) L. R. 8 I. A. 229.
(2) (1865) 10 Moo. I. A. 279.
(3) (1887) L. R. 14 I. A. 67.
(4) (1902) 26 Bom. 526.
(5) (1892) 17 Bom. 164.
(6) (1920) 45 Bom. 829.
(7) (1898) 23 Bom. 327.
(8) (1927) 29 Bom. L. R. 1320.

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that rule. On the facts in *Payapa's* case the widow of the predeceased son might have validly adopted with the consent of her father-in-law and the decision is really an extension of this power of consenting to the widow, in whom the estate vested on his death. But the facts are not so here. On those of the present case, Dandawa never had a power of adoption, for on her husband's death her son stood in its way, and on his death, the estate vested in the son's widow, and if Dandawa adopted, she was really doing so as deputy of her daughter-in-law, and there is no authority for holding such an adoption valid. The rule is clear that, in such circumstances, the power of the former widow, if it ever existed, is extinguished, and that it can never be revived. I agree that the appeal must be dismissed with costs, and the decree of the lower appellate Court confirmed.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Broomfield.

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April 14.

GANESH SAKHARAM SARAF AND OTHERS (HEIRS OF THE ORIGINAL DEFENDANTS), APPELLANTS *v.* NARAYAN SHIVRAM MULAYE (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sections 2 (11), 50 and 53—Decree for injunction against father—Execution of decree against son—Legal representative, meaning of.

A decree for injunction obtained against the father as the manager and representative of a joint family estate can, on his death, be executed against his son as his legal representative under section 50 read with section 53 of the Civil Procedure Code.

Sakarlal v. *Bai Parvatibai*,[1] *Krishnabai Pandurang* v. *Sawlaram Gangaram*[2] and *Amritlal* v. *Kantilal*,[3] followed.

*Appeal No. 60 of 1929, under the Letters Patent in Second Appeal No. 825 of 1927.

[1] (1901) 26 Bom. 283. [2] (1926) 51 Bom. 37.

[3] (1930) 33 Bom. L. R. 266.