APPELLATE CIVIL.

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

BHARMAPPA ADOPTIVE FATHER BHARAMAGAUDA MUDIGAUDAR (ORIGINAL DEFENDANT), APPELLANT *v.* UJJANGAUDA ADOPTIVE FATHER BHARAMAGAUDA (ORIGINAL PLAINTIFF), RESPONDENT*.

1921. *September* 27.

Hindu law—Exclusion from inheritance—Dumbness congenital and incurable—Person having such a son is not sonless—Adoption by such person not valid

According to the Hindu law prevailing in the Bombay Presidency a person affected by dumbness which is congenital and incurable is excluded from inheritance.

Vallabhram Shivnarayan v. *Bai Hariganga*[1], followed.

A person having a grandson subject to the defect of such dumbness cannot correctly be described as sonless so as to make an adoption by him during the life- ime of the grandson valid.

SECOND appeal from the decision of E. H. Waterfield, District Judge of Dharwar, confirming the decree passed by D. V. Yennimadi, Subordinate Judge at Haveri.

Suit to recover possession of property.

One Bharmagauda owned the property in dispute. He had a son named, Bharmagauda, who had two sons, Basangauda and Ujja (defendant). Both the son Bharmagauda and the grandson Basangauda died during Bharmagauda's life-time. The other grandson, Ujja was suffering from dumbness which was both congenital and incurable. Bharmagauda adopted the plaintiff as his son.

After Bharmagauda's death, the plaintiff sued to recover possession of the property from the defendant.

The lower Court decreed the suit.

* Second Appeal No. 804 of 1920.

(1) (1867) 4 Bom. H. C. (A.C.J.) 135.

1921.

BHARMAPPA v. UJJAN-GAUDA.

The defendant appealed to the High Court.

Coyajee with *Nilkant Atmaram*, for the appellant.

Tyabji with *S. V. Palekar*, for respondent No. 1.

SHAH, J.:—The facts which have given rise to this appeal are few and not now disputed. One Bharmagauda had a son of the same name. That son had two sons, Basangauda and Ujja. The son (Bharmagauda) and the grandson Basanganda predeceased the father Bharmagauda. This Bharmagauda adopted the present plaintiff during the life-time of his grandson Ujja. This Ujja is found by the lower Courts to have been dumb from his birth. Bharmagauda died in 1915; and the present suit was filed in 1916 by the plaintiff as the adopted son of Bharmagauda to recover possession of the property from the defendant No. 1 (the grandson of Bharmagauda) on the ground that owing to dumbness and insanity he was disqualified to inherit his grandfather's property. The defendant No. 1 repudiated the allegations, and contended that the plaintiff's adoption was invalid. The allegation as to the insanity of defendant No. 1 was not proved: but it is found that from the time of his birth the defendant No. 1 was dumb and that his dumbness was incurable. The lower Courts held that the adoption of the plaintiff by Bharmagauda, the grandfather of defendant No. 1, was proved and that it was valid and accordingly decreed the plaintiff's claim.

In support of the appeal to this Court it is urged on behalf of the legal representative of defendant No. 1, who died during the pendency of the appeal in the District Court, that the defendant No. 1 was not disqualified according to Hindu law, and that even if he was disqualified, the adoption of the plaintiff by Bharmagauda during the life-time of the grandson was invalid.

As regards the first contention it is clear on the finding of fact that the defendant No. 1 (Ujja) was dumb from his birth and that his dumbness was incurable. According to the Mitakshara such a son or grandson would be excluded from inheritance. No doubt Yajnavalkya does not mention a dumb person among those who are excluded from inheritance. But Vijnanesvara includes him in the list under the word *Adya* on the authority of Manu. In the Vyavahara Mayukha also on the authority of the same text of Manu a dumb man is referred to as excluded from inheritance. It is urged, however, that this ground of disqualification, like several other grounds, has become obsolete, and the observations in *Surayya* v. *Subbamma*[1] have been relied upon in support of this argument. It also appears that in Steele's Hindu Law and custom it is stated at page 224 that "lame and deformed persons are not excluded, nor are the deaf and dumb." It may be that some of the grounds of exclusion from inheritance mentioned in the texts are obsolete. While I agree generally with the observations in the above case as to the hardship and obsolete nature of some of the grounds of exclusion from inheritance I do not see how all of them could be treated on the same footing. Each defect must be considered on its merits, and if it could be fairly and safely stated that it is obsolete it may be treated in that manner. But it would not be right, nor does it appear to me to be possible, in view of the decisions on the point, to treat all these grounds as obsolete.

In the present case we are concerned only with congenital and incurable dumbness. The effect of such a defect on the right to inherit was considered by this Court so far back as 1867 in *Vallabhram Shivnarayan* v. *Bai Hariganga*[2] and it was held after full argument

(1) (1919) 43 Mad. 4. (2) (1867) 4 Bom. H. C. (A. C. J.) 135.

1921.

BHARMAPPA v. UJJAN-GAUDA.

that, according to the Hindu law prevailing on this side of India, a person born dumb was incapable of inheriting. That decision is binding upon us: and I see no good reason to refer this question to a Full Bench for consideration. It follows that Ujja was excluded from inheritance on account of his dumbness from birth.

The next question is, whether the adoption of the plaintiff during Ujja's life-time is valid? It may be stated that the subsequent death of Ujja during the pendency of this litigation without having a son does not affect the question as to the validity of the plaintiff's adoption. If it was invalid at the time, the subsequent event cannot validate it. This position has not been seriously questioned before us, and it seems to me to be clear that the validity of the plaintiff's adoption must be determined with reference to the facts as they existed at the date of the adoption.

It is not disputed, and in fact it is indisputable, that in the life-time of a natural son, grandson or great grandson no valid adoption could be made. This is clear from the Dattaka Mimamsa, section 1, paragraphs 3, 6 and 13 (Stokes' Hindu Law Books, pages 531, 532 and 533). But it is urged that the existence of a grandson, disqualified as in the present case, is no bar to an adoption by the grandfather. There is no decided case on this point: and so far as I have been able to see there is nothing in the Mitakshara or the Vyavahara Mayukha to lend support to this view. The basic principle of adoption, as I understand it to have been laid down by the Smriti writers, does not support the contention. The opinions expressed by writers on Hindu law are conflicting; and treating it as a point of first impression, at least so far as this Presidency is concerned, I have come to the conclusion

that the fact of the grandson suffering from dumbness by birth does not render the adoption valid which would be otherwise invalid on account of its having been made during his life-time.

I shall state my reasons briefly for this conclusion. In the first place we have the texts of Atri, Manu and Saunaka which lay down that the adoption can be made only by a person who has no son, i.e., who never had a son or whose son is dead. The Dattaka Mimamsa begins with the text of Atri, and in the first section the author refers to the text of Saunaka and Manu (see paragraphs 3, 4 and 9 of section I in Stokes' Hindu Law Books at pp. 531, 532 and 533). The essential condition for a valid adoption according to these texts is that the adopter must be sonless at the time of the adoption. While speaking of an "adoption" Yajnavalkya does not refer to this condition; nor does Vijnanesvara refer to it in his commentary on Yajnavalkya's verse (see paragraphs 9 to 15 of Chapter I, section XI of the Mitakshara—Stokes' Hindu Law Books, pages 415-418). It is significant, however, that while referring to the disqualifying circumstances in Chapter II, section X, Yajnavalkya provides that the sons (natural and Kshetraja) of those who would be excluded from inheritance are not subject to any disability, provided they are free from similar defects; and Vijnanesvara points out that natural and Kshetraja sons are mentioned with a view to exclude other sons mentioned before. (See Mitakshara, Chapter II, section X, paragraphs 10, 11 and 12; Stokes' Hindu Law, page 457). It is also further provided that the unmarried daughters of those who are excluded from inheritance and the sonless wives of such persons are to be maintained. It is clear from these passages that neither Yajnavalkya nor Vijnanesvara would have favoured the view that a person having a son subject

1921.

BHARMAPPA v. UJJANGAUDA.

to any of the defects mentioned by them could be treated as *sonless*. Indeed it also appears from Visvarupa's commentary on these verses of Yajnavalkya that those who are excluded from inheritance are not necessarily incompetent to perform sacrifice, &c. This passage is translated at page 16 of the report in *Surayya* v. *Subbamma*[1] and the original passage in Sanskrit may be found in Setlur's Mitakshara at p. 838. I also find in Apararka's commentary on the same Smriti that there is no such general disqualification to perform religious functions. [See Yajnavalkya's Smriti in the Apararka's commentary—Anandashram Series, Vol. 46 (Part II), p. 750].

In the Vyavahara Mayukha there is no indication in the chapter relating to adoptions that a son subject to any defect which would exclude him from inheritance was no son at all. On the contrary the text of Saunaka has been referred to and *aputrena* has been translated "as one having no male issue or one whose male issue has died." (See Mandlik's Hindu Law, p. 52 or Stokes' Hindu Law Books, p. 60—paragraph 10 of Vyavahara Mayukha, Chapter IV, section V): and I may here refer to the observation in Mandlik's Hindu Law, Appendix IV at p. 456 that "a sonless man alone at present dopts a son." In the chapter relating to persons excluded from inheritance there is nothing to indicate hat a person having a dumb son was to be treated as sonless.

The Dattaka Mimamsa does not, in my opinion, afford any indication to the contrary. The passage in section II, paragraph 62 (Stokes' Hindu Law Books at p. 561), has been relied upon as showing that persons subject to disqualifying defects are no sons at all. In the first place the reference to persons excluded

[1] (1919) 43 Mad. 4.

from inheritance is incidental; and if it is read in relation to the context and the argument in relation to which the reference is made, I am not clear that the passage means what it is argued before us it means. It has been interpreted, however, by some writers on Hindu law, whose opinions are entitled to weight, as supporting the contention on behalf of the respondent. But apart from the difficulty of determining the true meaning of this reference to "impotent persons and the rest," this much is clear that there is no such opinion expressed by Nanda Pandita in the first section where he deals with the question as to who can adopt. Next he proceeds to deal with the question as to who is to be adopted. In that section several opinions expressed by the author have been treated as merely recommendatory and not obligatory. I am not, therefore, prepared to accept the contention that the opinion of Nanda Pandita is that a son subject to a disqualifying defect is no son at all as regards the power of the father to adopt, nor am I prepared to give effect to an opinion, not supported by any Smriti, expressed incidentally in the course of an argument on another point, and not stated at the place where he would be expected to state it if it were his opinion.

It is needless to refer to the opinions of writers on Hindu law in detail. I may here mention that in spite of the respectable body of opinions in favour of the view that a second adoption in the life-time of another adopted son was permissible the Privy Council held in *Rungama* v. *Atchama*[1] that such an adoption was invalid. On the point now under consideration the weight of opinions in favour of the view that the adoption is valid is by no means so great as it

[1] (1846) 4 Moo. I. A. 1.

1921.

BHARMAPPA v. UJJAN-GAUDA.

was in favour of the view once held that a second adoption during the life-time of the first adopted son was valid. The task of reconciling these opinions is difficult: and after all we have to consider whether the Hindu law goes so far as to lay down that a son subject to a disqualifying defect is no son at all for the purpose of enabling the father to make a valid adoption during the life-time of such a son. I may, however, refer to the inference drawn by Sutherland in his synopsis of the Dattaka Mimamsa and Dattaka Chandrika (Stokes' Hindu Law Books at page 664), and to the opinion expressed in Strange's Hindu Law at page 77 (Vol. I) in favour of the view that an adoption in the life-time of a disqualified son is valid. This opinion is accepted in Sarkar's Treatise on Adoption, page 196 (2nd edition) and Ghose's Hindu Law, Vol. I at page 669 (3rd edition). In Steele's Hindu Law and Custom at page 42 it is stated that "insanity of a begotten son is no legal cause of adoption. An adoption can take place only where no begotten son or grandson exists, or where the begotten son has lost caste." This remark was quoted apparently with approval in *Rangama's case*[a]. It is true that at page 181 of the same book it is stated as follows:—"It is allowed in case of a begotten son becoming outcaste or insane, or otherwise becoming incapable of conducting the family affairs: such adoption is in the name of the son. A madman is, however, seldom married, and an outcaste is often readmitted. No son can be adopted during the life-time of a begotten son (not disqualified as above)." As already pointed out the same author has stated that a dumb person is not excluded from inheritance. But this Court has not accepted that opinion: and the statement of the custom on the present point, which even if strictly

[a] (1846) 4 Moo. I. A. 1.

taken may not cover the case of a dumb person without proof of his being "incapable of conducting the family affairs," could hardly be preferred to his statement of the law on the same point, at page 44.

On the best consideration that I can give to the point, I do not think that a person having a grandson who is subject to the defect of dumbness from his birth as in the present case can correctly be described as sonless so as to make an adoption by him during the life-time of the grandson valid. I base this conclusion upon the Mitakshara and the Vyavahara Mayukha and next upon the Dattaka Mimamsa and the Dattaka Chandrika as I understand them. I hold, therefore, that the adoption of the plaintiff was invalid. I would allow this appeal and dismiss the plaintiff's suit with costs throughout.

MACLEOD, C. J.:—I concur.

Appeal allowed.

R. R.

APPELLATE CIVIL.

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

NARSINHA GOPAL AND ANOTHER (ORIGINAL JUDGMENT-DEBTORS), APPELLANTS *v.* BALVANT MADHAV VADGAONKAR (ORIGINAL DECREE-HOLDER), RESPONDENT*.

1921. *October* 3.

Instalment decree—Failure to pay two instalments—Whole decree can be executed—Relief against the clause—Court of Equity.

The amount due under a decree was made payable in instalments, and it was provided that on failure to pay two instalments, the whole amount then due could be recovered with interest by sale of certain property over which a charge was declared. The first instalment which became due on the 10th

* Second Appeal No. 294 of 1921.