APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Fawcett.

1921. *August* 23.

BHAU ADGOUDA PATIL (ORIGINAL PLAINTIFF), APPELLANT *v* NARASAGOUDA TATYA PATIL (ORIGINAL DEFENDANT No. 2), RESPONDENT*.

Hindu law—Adoption—Adoption made by the husband—Validity doubtful —Widow making another adoption during life-time of first adopted son— Second adoption not valid—Rule of Viruddha Sambandha.

Under Hindu law, a widow cannot adopt a son during the life-time of a son adopted by her husband, even though the validity of the adoption by her husband is doubtful.

Bhujangouda Adgonda v. *Babu Bala Bokare* (1), affirmed.

Per SHAH, J. :—"According to the decisions of this Court she can adopt only in the absence of a prohibition by her husband. That prohibition may be express or implied ; and in the present case the least that is implied by the husband's act of adoption is that his widow shall not adopt any other boy to him during the life-time of the adopted boy or until the adoption is declared invalid by a competent Court at the instance of somebody other than the widow interested in the estate."

Quaere:—Whether the rule of Viruddha Sambandha applies to the case of an adoption of a sister's son, when the adoptive father long before the date of the adoption has left his family of birth and passed by adoption into another family or into another branch of the same family.

APPEALS under the Letters Patent.

This was a suit to recover possession of property.

The facts were that one Adgouda had a brother Narasagouda, a sister Sonubai and a wife Sitabai. He was given in adoption to a distant *bhaubandh*. Later, he became a leper.

In June 1909, Adgouda made a gift of his property to his natural brother Narasagouda (defendant No. 2), and executed a *vyavastha patra* to that effect. But in

* Letters Patent Appeals Nos. 45 and 46 of 1920.

(1) (1919) 44 Bom. 627.

September of the same year he cancelled the *vyavastha patra* with the consent of Narasagouda. About this time, he adopted his sister Sonubai's son (defendant No. 1).

Adgouda died in 1911. In 1912, Sitabai adopted the plaintiff. The parties were Jains.

The plaintiff sued to recover possession of the property.

The lower Courts held that the adoption by Adgouda of his sister's son (defendant No. 1) was invalid and decreed the suit.

The defendants appealed. The appeal was heard by Macleod C. J., when his Lordship held that the adoption of the plaintiff was invalid as it took place during the life-time of defendant No. 1 who was the previously adopted son. The judgment is reported at 44 Bom. 627.

The plaintiff appealed under the Letters Patent.

Coyajee, with *D. A. Tuljapurkar*, for the appellant:- The adoption of the sister's son by the husband being invalid, there was no lawful act of the husband to be considered by the widow, and she was free to make another adoption: see *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*[1]. The husband himself could have disregarded and repudiated the adoption, and the widow could, therefore, equally repudiate it. The husband having been under a false impression that the adoption of a sister's son was valid, the widow was not bound by an act which would not have been done had the husband known the true legal position: *Lakshmappa* v. *Ramava*[2], and *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[3].

[1] (1879) 3 Bom. 273. [2] (1875) 12 Bom. H. C. 364.

[3] (1899) L. R. 26 I. A. 113.

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K. N. Koyajee, for the respondent (in Letters Patent Appeal No. 46 of 1920) :—Although in the Bombay Presidency a widow can adopt a son without express authority, this power of the widow is based on the assumption that she acts in accordance with her husband's wishes. Thus an express or implied prohibition would debar the widow from making an adoption so prohibited : *Bayabai* v. *Bala Venkatesh Ramakant*[1]. Whether the husband made a valid or an invalid adoption in the present case, the widow could not go against the will or wish of her husband.

In the present case, the adoption by the husband was not really invalid in law. The husband, having been himself adopted long ago into another family, could validly adopt the son of his sister in the family to which he no longer belonged. It is now well-established that the prohibition against adopting the son of a woman whom the adopter could not marry is to be restricted to the three specified instances mentioned in the texts : *Ramchandra* v. *Gopal*[2] ; *Walbai* v. *Heerbai*[3], and *Yamnava* v. *Laxman Bhimrao*[4]. But the authors of the texts could not have meant to include abnormal cases where the adopter did not, owing to his own adoption elsewhere, belong to his natural family. And, the general principle of capacity to marry the adopted son's mother having been abandoned, no disability can be imposed on a brother who has himself been adopted into another family.

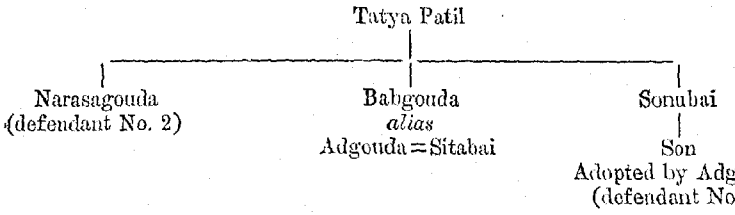
Coyajee, in reply :—A sister's son remains a sister's son even though the brother has been adopted into another family. No decision has been cited to the contrary.

A. G. Desai, for the respondent (in Letters Patent Appeal No. 45 of 1920) :—I adopt the arguments on

(1) (1866) 7 Bom. H. C. Appx. i.
(2) (1908) 32 Bom. 619.
(3) (1909) 34 Bom. 491.
(4) (1912) 36 Bom. 533.

behalf of the respondent in Appeal No. 45, but I submit that in case his adoption is set aside, the property should go to my client under the *vyavastha patra* of 7th June 1909.

SHAH, J. :—The facts, which have given rise to these appeals, are few and undisputed. The following table indicates the relationship of the parties :—



Adgouda, the second son of Tatya Patil, was given in adoption in another branch of the family. He suffered from leprosy during the last few years of his life and on the 7th June 1909 he executed a *vyavastha patra* whereby he made a provision for the maintenance of his wife and mother and gave the rest of his property to his natural brother, Narasgouda, who is defendant No. 2 in the suit, by way of gift. He changed his mind later and on the 3rd September 1909 adopted his natural sister's son who is defendant No. 1 in the suit. He cancelled the *vyavastha patra* on that very day and subsequently in July 1910 obtained a release from his natural brother, whereby all his property given by way of gift was reconveyed to him except certain land and a moiety of the house, which defendant No. 2 retained for himself. We are not concerned with the portion thus retained by defendant No. 2 in this litigation. Adgouda died in 1911 leaving a widow Sitabai and the adopted son Bhujgouda. In November 1912, Sitabai adopted the plaintiff, Bhau.

On behalf of Bhau and as his guardian Sitabai filed the present suit in October 1914 to recover possession

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of the property of Adgouda from defendant No. 1, the boy adopted by Adgouda during his life-time, and defendant No. 2 who was said to be in wrongful possession of the property in collusion with defendant No. 1.

In the trial Court and in the Court of first appeal, the plaintiff succeeded on the ground that the adoption of defendant No. 1 by Adgouda was invalid, and that, therefore, the subsequent adoption of the plaintiff by Sitabai was valid. Both the defendants appealed to this Court and the learned Chief Justice, who heard the appeals, held that the adoption by Sitabai during the life-time of defendant No. 1 was invalid, and dismissed the plaintiff's suit with costs throughout. The plaintiff has preferred separate appeals under the Letters Patent. I do not quite understand why there are separate appeals, when they arise out of the same suit. We are not concerned, however, with that point.

On the facts as stated above, it is urged on behalf of the plaintiff that the adoption of defendant No. 1 was invalid, as he was the son of Adgouda's natural sister, and that Sitabai, the widow of Adgouda, was entitled to ignore that adoption as being invalid and to effect another valid adoption.

As regards the first point I do not desire to express any opinion. No special custom is proved, and both the trial Court and the Court of first appeal have held that the Hindu law applicable to the three regenerate classes is applicable to the present parties. It is also settled now that the adoption of a sister's son is invalid among the regenerate classes in the absence of any special custom to the contrary. The question that arises is whether the rule applies to the case of an adoption of a sister's son, when the adoptive father long before the date of the adoption has left his family of birth and passed by adoption into another family or

into another branch of the same family as in the present case. In other words the question is whether the restrictive rule is to be limited strictly to cases of brother and sister or whether it could apply to a case where the brother has passed by adoption into another family and the former relationship is modified to that extent. No decision on the point has been cited to us: and in spite of opinions against the validity of such an adoption I am not prepared to decide the question without a full argument and consideration of the scope of the rule whereby the adoption in three specific cases including the case of a sister's son is prohibited.

Assuming, without deciding, that the adoption of defendant No. 1 by Adgouda was invalid, the question is whether Sitabai, the widow of Adgouda, could make another adoption to her husband during the life-time of the boy adopted by her husband. The point is one of first impression. No reported precedent on the point has been cited to us: and it must be considered in the light of the power which the widow has in this Presidency to adopt, in the absence of any prohibition expressed or implied by her husband.

It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him valid or invalid. In spite of the liberal interpretation of her powers to adopt in this Presidency, I do not think that the Hindu law contemplated, and certainly it has not provided, that the widow could practically ignore and supersede her husband's act of adoption. There is no authority for it: and I think that the general effect of the Hindu law of adoption is against such a power. Even an invalid adoption may become effective under certain conditions and the wife—or rather the widow—cannot go against

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her husband's wishes so unequivocally expressed or treat the adoption by her husband as non-existent.

According to the decisions of this Court she can adopt only in the absence of a prohibition by her husband. That prohibition may be express or implied; and in the present case the least that is implied by the husband's act of adoption is that his widow shall not adopt any other boy to him during the life-time of the adopted boy or until the adoption is declared invalid by a competent Court at the instance of somebody other than the widow interested in the estate.

The law of adoption as administered in this Presidency does not interfere with the complete control of the husband over the adoption; that control can be exercised even after his death over his widow as to whether there shall be any adoption to him and if so, whether the selection of the boy shall be regulated in any way. The widow is of course free to act where the control is not exercised by the husband; but it seems to me that it would be inconsistent with the control which the husband has over the act of adoption to him, to allow his widow to give a complete go-by to his act and to let her act as she has done in this case.

The following observations of Westropp J. in *Bayabai* v. *Bala Venkatesh Ramakant*[1] appear to me to be pertinent to the present point:—

"Assuming, but not deciding, that the deviation of the Maratha School is established to the furthest extent to which any of the foregoing authorities reach (namely, that the widow may, without express authority or order from her husband, and without the consent either of his or her relations, adopt a son), and without in the least degree wishing or intending to infringe on the law of adoption by a widow so far as it can be considered as established in Maharashtra, cherished as I believe that law to be by the Hindu community, or a very considerable proportion of it, yet I am not disposed to extend it, or

[1] (1866) 7 Bom. H. C. Appx. i, xvii.

to depart from the general Hindu law one single step further than provincial or local usage has firmly settled as admissible. And I have not any doubt that we should extend it much beyond its present boundaries, were we to hold that the widow may adopt where the husband has, when perfectly in the possession of his senses, as well on the day preceding his death, as on the day of his death, in reply to suggestions that he should adopt a son, positively refused so to do."

I do not think that the observations of Sir Lawrence Jenkins, C. J., in *Lakshmibai* v. *Sarasvatibai*[1] on the question whether the widow's power to adopt rests on any delegation from her husband or is her own inherent right affect the present question. Taking the widow's right to be inherent and not merely delegated it is clearly subject to the control of the husband as stated in that case. In fact in that case the learned Chief Justice proceeded to consider whether the prohibition by the husband was implied or not. I do not think that the observations in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[2] on the decision in *Lakshmappa* v. *Ramava*[3], which have been referred to by Candy J. in *Lakshmibai's case*[1], affect the present point in any way; and I see no reason to think that by those observations their Lordships of the Privy Council meant to cast any doubt on the proposition that the husband can control the power of the widow to adopt after his death expressly or impliedly by his acts.

I may refer to the following observations of their Lordships of the Privy Council in *Yado* v. *Namdeo*, (not yet reported):—

"The Hindu law in the Maratha country of the Presidency of Bombay and in Gujarat as to the power of the widows to adopt to their deceased husbands differs widely from the Hindu law as it has been variously interpreted in other parts of India, but whether it is the original law on the subject or as the learned Judge in *Ramji* v. *Ghamau*[4] assumed, a deviation from it is not now an easy question to decide with certainty: probably it is a deviation."

(1) (1899) 23 Bom. 789.
(2) (1899) L. R. 26 I. A. 113.
(3) (1875) 12 Bom. H. C. 364.
(4) (1879) 6 Bom. 498.

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I may respectfully add that whether it is a deviation or not it cannot be extended in favour of the widow in the sense in which the appellant seeks to extend it in this case without deviating from the fundamental basis of the law of adoption.

It is urged by Mr. Coyajee that Adgouda himself could have repudiated this adoption as it was invalid in law, and that therefore it was open to the widow to do the same thing after her husband's death provided she did so within the period of limitation allowed by law. This argument ignores the fundamental difference between the power of the husband to adopt a particular boy or not to adopt at all and the position of the widow with reference to her husband's act. Assuming, without admitting, that Adgouda could have repudiated the adoption of defendant No. 1 during his life-time even though it had taken place in fact, it does not follow that his widow could do so after his death when he had given no indication whatever in his life-time that he ever intended to go back upon it. It seems to me that the widow was bound to accept the adoption by her husband as an existing and binding fact ; and on that basis the adoption by her during the life-time of the adopted son is clearly invalid.

It is also urged on behalf of the appellant that the adoption of a sister's son is invalid, and does not require to be set aside and that therefore the widow could act as if it had not taken place. I have considered the decision in *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*[1] as bearing on this point. But the point which arises in the present case did not arise in that case; and the real answer to the argument is afforded by the consideration that the widow is bound by the act of her husband. It may appear somewhat

[1] (1879) 3 Bom. 273.

anomalous that the widow should not be allowed to treat as non-existent an adoption by her husband which is invalid. But I do not think that there is anything anomalous in the widow being required to accept the act of adoption by her husband with all its implications at least so far as she herself is concerned.

I would, therefore, affirm the judgment appealed from and dismiss these appeals with costs.

FAWCETT, J.:—I concur. In my opinion, the fact that Adgouda adopted defendant No. 1 and treated him as his adopted son till his death amounts to an implied prohibition against the widow adopting another boy during defendant No. 1's life-time, at any rate until his adoption is declared invalid at the suit of some one interested other than the widow.

Appeals dismissed.

R. R.

APPELLATE CIVIL.

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

BHIMRAO NAGOJIRAO PATANKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* SAKHARAM BIN SABAJI KANTAK, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1921. *August 23.*

Mortgage—Redemption—Contract to lease property to a mortgagee on a permanent tenure—Clog on equity of redemption.

Property in suit was mortgaged to defendant's ancestor by a deed, dated March 17, 1879 and on the same date another document was executed purporting to lease the land to the mortgagee on a permanent tenure at a fixed rent. The plaintiff sued to redeem. The defendant pleaded that the plaintiff was not entitled to redeem as what was mortgaged to him was not the suit land but merely the right to recover the rent secured by the permanent lease.

* Second Appeal No. 644 of 1920.