the execution of a registered conveyance, and may defeat in that way the right of a neighbour to pre-empt. There is a good deal to be said in favour of the view which Mahmood J. accepts in *Janki* v. *Girjadat*[1] and which is concurred in by Banerji J. in *Begam* v. *Muhammad Yakub*[2]. But in the latter case Banerji J. agreed to allow the claim for pre-emption on grounds, which, as I read the judgment, would apply to a case like the present. After giving the best consideration to the question, I think that where there has been a transfer of possession accompanied by the payment of the price and the intention to convey the property is clear as in this case it cannot be said that the right of pre-emption according to the Mahomedan law has not arisen.

Decree confirmed.

J. G. R.

[1] (1885) 7 All. 482. [2] (1894) 16 All. 344.

APPELLATE CIVIL.

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

1921.
July 18.

PARVATAVA KOM NEMAPA HAVILDAR (ORIGINAL PLAINTIFF), APPELLANT *v.* FAKIRNAIK BIN IRANAIK NAIKAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 3 AND 4), RESPONDENTS*.

Hindu law—Adoption—Minor widow 12½ years of age—Capacity to adopt.

Adoption by Hindu widow 12½ years of age held invalid.

Murgeppa v. *Kalawa*[1], followed.

PER SHAH, J.:—" Without attempting to lay down any general rule as to whether at that age a girl could ever make a valid adoption......in the absence of any clear evidence as to the special capacity of this girl to exercise an independent judgment at that age, I am not prepared to hold that she could exercise such judgment as is required in the case of adoption."

*First Appeal No. 184 of 1919.

[1] (1919) 44 Bom. 327.

1921.

PARVATAVA v. FAKIRNAIK.

FIRST appeal from the decision of H. V. Chinmulgund, First Class Subordinate Judge at Dharwar.

One Nemapa had two wives, Parvatava (plaintiff) and Nilava (defendant No. 2), and a mother Kallava (defendant No. 4). Shortly ter his death, the junior widow Nilava, who was then 12½ years of age, adopted Adiveppa, defendant No. 3, the son of defendant No. 1.

The senior widow Parvatava did not accept the adoption, and filed the present suit to set the adoption aside. The adopted boy filed another suit to restrain Kalava from interfering with his enjoyment of the property.

The trial Court held that the plaintiff was not the wife of Nemapa and that the adoption by Nilava was valid. Parvatava's suit was dismissed.

Parvatava appealed to the High Court.

G. P. Murdeshwar, for the appellant.

Nilkant Atmaram, for respondents Nos. 1 and 2.

MACLEOD, C. J.:—One Parwatava filed Suit No. 180 of 1917 to recover possession of the suit property alleging that it belonged to Nemapa who died in 1917 leaving him surviving the plaintiff, his senior widow, defendant No. 2, his junior widow, and defendant No. 4, Kalava his mother; that defendant No. 2 the junior widow adopted defendant No. 3; and that that adoption was false and invalid. The alleged adopted son has filed Suit No. 334 of 1918 asking for a perpetual injunction restraining Kalava, the mother of Nemapa, from obstructing him in the enjoyment of the plaint lands.

The learned Subordinate Judge has found that the marriage between Parvatava and Nemapa was not proved. He also held that the adoption of Adiveppa

was proved and valid. If the adoption of Adiveppppa is not valid, then the question regarding the marriage of Parvatava and Nemapa becomes of secondary importance, because Kalava, the person principally interested, has given evidence to the effect that the marriage did take place, and as a matter of fact the whole of the evidence with regard to that marriage is all one way.

Now it is admitted that Nilava when she adopted Adiveppa was only $12\frac{1}{2}$ years old at the most. The learned Judge has said: "I have given the best consideration to the point and have come to the conclusion that if our High Court has decided that a girl of about 15 years could validly adopt, it follows that one of $12\frac{1}{2}$ years could also validly adopt; because between the two girls, capacity to understand such things cannot be substantially different."

I regret I cannot agree with the logic of that decision. The intelligence of a young person in ordinary circumstances will keep on growing year by year, and if the High Court laid down the limit of years of discretion as 15, it certainly would not follow that a girl of $12\frac{1}{2}$ would have attained to the same degree of discretion as a girl of 15. If once you depart from the limit of 15 which of course is purely an arbitrary one, then it would be easy to go back to any extent which would be absurd. But certainly I should not be disposed to think, taking all the considerations and circumstances and conditions of people of this class into account, that a girl younger than 15 could possibly exercise that volition of mind and that independence of judgment which would enable her to make a really valid adoption. *A fortiori* there would have to be very clear evidence to satisfy the Court that a girl of 12 or $12\frac{1}{2}$ years could exercise her own independent judgment in the matter of an adoption.

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In *Murgeppa* v. *Kalawa*[1] it was argued on the authority of Mayne that puberty was the test, and I said there "that a girl has attained to puberty may be one circumstance, but in this country not necessarily the only one. The actual age of the widow may be another test and probably the most important one. In this case I think both the tender age of the widow, and the fact that she has not reached the age of puberty, make it perfectly clear that she was not competent to know what she was doing. If we were to hold that such a person could adopt, we should open the door to all sorts of intrigue, so that the elder members of the family might be able to induce widows of tender age to make adoptions in the interests of those persons"; and Mr. Justice Heaton said: "Certainly no ordinary child of twelve years of age is capable of volition of the kind here required unless he or she is a very exceptional person."

It is not entirely a question of intelligence. A girl of 12 may be exceptionally intelligent, but it is more a question of her power to resist the influence which her elders will exercise, and must naturally exercise, over her actions. However intelligent she might be, she would not be likely to withstand the inducements put forward and the persuasion exercised in order that she should adopt a person according to the wishes of her elders. In this case it is quite obvious that the adoption of Adiveppa, who was the brother of Nilava, could not possibly be considered as an adoption by Nilava, but that it was brought about by the persuasion of others, probably of Nilava's father. Adiveppa's suit must fail.

Then it is not necessary to deal at length with the question of the marriage of Parvatava, because

[1] (1919) 44 Bom. 327.

Kalawa the mother has sworn that Parvatava was married, and, therefore, Parvatava's suit must succeed, and she must have a decree for possession of the suit property, and there will be an inquiry as to mesne profits from the date of suit. Although the plaintiff's suit was dismissed the Judge found that Kalava's maintenance should be Rs. 180 a year, and that a portion of the house should be given to her for her residence. That was of course on the footing that the adopted son succeeded. Therefore we confirm that finding. At present Kalava and Parvatava seem to be living in harmony, but if they separate, then Parvatava will have to provide for the maintenance and residence of her mother-in-law. The appeals are allowed. Suit No. 334 of 1918 is dismissed and Appeal No. 44 of 1921 is allowed with costs throughout. Suit No. 180 of 1917 is decreed with costs throughout against defendant No. 1 who has been fighting the matter.

SHAH, J.:—I agree. I desire to add a word with reference to the question as to whether the adoption by Nilava, who was about 12 years and 6 months old at the date of the adoption, is valid or not. Without attempting to lay down any general rule as to whether at that age a girl could ever make a valid adoption, it seems to me clear that in the absence of any clear evidence as to the special capacity of this girl to exercise an independent judgment at that age, I am not prepared to hold that she could exercise such judgment as is required in the case of adoption. The evidence in the case as to her capacity is meagre and does not go beyond this that she was an intelligent girl. I am unable to agree with the conclusion reached by the lower Court that because an adoption by a girl at the age of 15 is upheld in one case an adoption by a girl at the age of 12 may also be upheld. I agree with the *ratio*

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decidendi in *Murgeppa* v. *Kalawa*.[1] In the present case we have to decide the question in first appeal; and on the proved facts, I feel no difficulty in holding that the adoption by Nilava cannot be upheld.

Appeals allowed.

R. R.

[1] (1919) 44 Bom. 327.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Fawcett.

1921. *July* 20.

NAGINDAS MANEKLAL AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 4), APPELLANTS v. MAHOMED YUSUF MITCHELLA (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu law—Alienation—Necessity—Sale of ancestral house by adult co-parceners—Benefit of joint family—Minor co-parceners—Validity of Sale.

A Hindu joint family owned several houses, one of which was in such a dilapidated condition that the Municipality required it to be pulled down. The adult co-parceners contracted to sell it to the plaintiff. The joint family was in fairly good circumstances; and it was not necessary to sell the house. But the house could not be used by the family for residence and would not have fetched any rent. The plaintiff having sued for specific performance of the agreement to sell, the minor co-parceners contended that the contract did not affect their interest in absence of "necessity" for the sale:

Held, that the agreement of sale was binding on the minor co-parceners, because the adult co-parceners had properly and wisely decided to get rid of the property which was in such a state as to be a burden to the family.

PER SHAH, J.:—"The term 'necessity' must not be strictly construed. The benefit to the family may under certain circumstances mean a necessity for the transaction."

SECOND appeal from the decision of M. M. Bhatt, Assistant Judge of Surat, confirming the decree passed by J. N. Bhatt, Subordinate Judge at Surat.

Suit for specific performance.

*Second Appeal No. 486 of 1919.