is this, that a man who has recovered the value of his goods in one action in the shape of damages, shall not be allowed to recover the goods themselves in another action; but this reason only applies when the damages have been actually recovered.

PRIVY COUNCIL.

JUMOONA DASSYA (PLAINTIFF) *v.* BAMASOONDARI DASSYA (DEFENDANT).

P. C.*
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Feb. 8, 9, & 10.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Adoption, Suit to set aside—Infant Marriage—Presumption as to Age—Power of Minor to give permission to adopt—Regs. X of 1793, *s.* 33, *and XXVI of* 1793, *s.* 2—*Minor under Court of Wards—Onus probandi—Estoppel.*

The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent cohabitation, has attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semble.—The operation of s. 33, Reg. X of 1793, which, read together with s. 2, Reg. XXVI of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quære, whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff.

APPEAL from a decision of the High Court, Calcutta (KEMP and PONTIFEX, JJ.), dated the 14th February 1873, reversing

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER.

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a decision of the Subordinate Judge of Rajshahye, dated the 26th February 1872.

The plaintiff Jumoona Dassya sued to set aside the adoption of a son by the defendant Bamasoondari Dassya, who was the widow of the plaintiff's deceased son Gobind Chunder Mozoomdar. The case was governed by the Hindu law prevalent in Bengal, under which a widow has no power to adopt without the sanction of her husband. Bamasoondari alleged that the adoption was made by her in conformity with a written authority to that effect executed by her husband shortly before his death. The plaintiff contended that this writing was a forgery contrived to defeat the reversionary interest of herself and her daughters in the property which had belonged to her son. In the first Court the written authority to adopt was held to be a forgery, and the plaintiff had a decree in her favour. On appeal the High Court held the authority to adopt to be proved, and on an objection that was taken as to Gobind Chunder's power to execute the permission to adopt, inasmuch as he was then a minor, they found that though not of full age he had arrived at years of discretion, and were of opinion that, on the authority of *Rajendra Narain Surma Lahoree* v. *Saroda Soonduree Dabee* (1), the deed of permission to adopt was not invalid by reason of his minority. They therefore dismissed the plaintiff's suit with costs. From this decision the plaintiff appealed to Her Majesty in Council.

The facts of the case are fully disclosed in their LORDSHIPS' judgment.

Mr. *Doyne* for the appellant:—The written authority to adopt set up by the plaintiff is a forgery, and even if it were genuine it is invalid. [Sir J. COLVILE.—What interest have you which entitles you to bring this suit?] The plaintiff has a reversionary interest. But for this adoption she would be heir to her son on Bamasoondari's death. She sues on her own behalf and on behalf of her daughter. [Sir J. COLVILE.—You are suing for a declaration of rights which are remote and contingent, does not the case of *Kathama Natchiar* v. *Dorasinga*

(1) 15 W. R., 548.

Teval apply? (1).] Our suit was brought under an apprehension that if delayed it might become barred under the Limitation Act, No. IX of 1871, which by article 129 of schedule II, allows only twelve years from "the date of the adoption or, at the option of the plaintiff, the date of the death of the adoptive father," within which to bring a suit to set aside an adoption.

Assuming that the alleged authority to adopt was in fact executed by Govind Chunder Mozoomdar, he was at the time a minor and incapable of granting such a power without the consent of his guardian. According to the plaintiff's witnesses, Govind, at the time of his death, was not more than twelve or thirteen years of age, but taking his age to have been between sixteen and seventeen as deposed to by the defendant's witnesses, the case falls under s. 33, Reg. X of 1793, and s. 2, Reg. XXVI of 1793, the effect of which is to declare that no adoption by a landholder under the age of eighteen shall be deemed valid without the previous consent of the Court of Wards. [Sir J. COLVILE.—Reg. XXVI of 1793 does not alter the general law as to the minority of Hindus, but says that in particular cases the age of eighteen shall be the age of majority.] Had Govind Chunder been under the Court of Wards he must have had the consent of the Court of Wards; on the same principle we contend that not being under the Court of Wards he could not validly adopt without the consent of his guardian. [Sir M. SMITH referred to the observations made by their Lordships in their judgment in *Ameeroonnissa Khatoon* v. *Abadoonnissa Khatoon* (2). Sir J. COLVILE.—The Regulations of 1793 referred to seem only to apply in respect of estates of which possession has been taken by the Court of Wards. The disqualified persons under the Regulations are owners of the estates of which the Court of Wards has taken charge. Here the minor was not under the Court of Wards. We cannot extend positive law by analogy or parity of reasoning. Moreover, Reg. X only says that an adoption by the minor shall not be valid. Does that prevent his giving a valid authority to adopt?] I would say *a fortiori* it does. [Sir J. COLVILE.—There may be reasons why a minor

(1) 15 B. L. R., 83; S. C., L. R., 2 Ind. Ap., 169.
(2) 15 B. L. R., 81; S. C., L. R., 2 Ind. Ap., 108.

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should not be himself allowed to adopt, which would not extend to his giving a power to another.] It is submitted that no person can give a power to another to do that which he cannot do himself. The late Sudder Court held that the Regulation applied as well to a power to adopt, as to an adoption—*Anundmoyee Chowdrain* v. *Sheeb Chunder Roy* (1). [Sir M. SMITH.—The case does not seem to have been argued before the High Court on the question whether Govind Chunder was a minor by statutory enactment. The Judges do not notice that point. They consider the question of minority under the Hindu law. If it is a question of statutory law, it does not matter whether Govind was twelve or seventeen, if he was not eighteen.] The Judges of the High Court say that Govind was not of full age. An adoption by a minor has no civil effect. See Vyavastha Darpana, sec. 521, p. 770, and secs. 206, 207 at pp. 396, 397.

Mr. *J. D. Bell* for the respondent.—There can be no argument from analogy in respect of statutory law, and Reg. X of 1793 only applies where the minor is under the Court of Wards. In Bengal a Hindu who has attained fifteen years of age has an uncontrolled power to adopt—*Rajendro Narain Lahooree* v. *Saroda Soonduree Dabee* (2). But if a guardian's consent were necessary, the evidence is that it was given. The question of minority does not however really arise in the case. If Govind Chunder was only twelve years of age, the defendant's case was false from the beginning.

Mr. *Doyne* replied.

Their LORDSHIPS' judgment was delivered by

SIR J. COLVILE.—This is an appeal against the decree of the High Court of Calcutta, which, reversing a decree of the Subordinate Judge of Zilla Rajshahye, dismissed the plaintiff's suit.

The suit was brought by a Hindu widow, Jumoona Dassya, against her daughter-in-law, Bamasoondari Dassya, who was sued in her own right, and also as the guardian of Giris

(1) S. D. A., 1855, p. 218. (2) 15 W. R., 548.

Chunder Mozoomdar, whom she had adopted under an authority alleged to have been executed by her deceased husband. The object of the suit, which may be taken to be a suit between Jumoona Dassya and the infant adopted, was to set aside that adoption, and to have it declared invalid. Jumoona was the widow of Guru Pershad, who died in the year 1851. He left, besides his widow, two sons, Govind Chunder and Gopal Chunder, and three daughters. On his death-bed he executed a wasiutnamah, the effect of which was to constitute his widow the guardian of the two sons, and manager of his property during their minorities, with a direction that, on their attaining majority, the elder should take a nine-anna share, and the younger only a seven-anna share of his estate. Govind Chunder, the eldest son, died in the year 1853. He had, according to the custom of Hindus, been married in his father's lifetime, whilst yet a child of tender years, to another child some years younger than himself. It is alleged on the part of the defendants that on his death-bed, the day before his death, he executed a document authorising his widow to adopt a son; and the truth of this allegation is the principal question in the cause.

If the adoption stands good, the adopted son is not only entitled as actual possessor to the share of Govind Chunder, his adoptive father, but upon the death of Jumoona, will, if then living, become entitled to take the share of the other brother, who died unmarried, and whilst still a child, in preference to the sisters of his father. On the other hand, if the adoption is invalid, Jumoona, if she survives Bamasoondari, will become entitled on the death of the latter to the share of her eldest son. This contingent interest is the only *locus standi* which she has in the present suit; although the desire to strengthen the future and contingent claims of her daughters may have been an additional motive for bringing it.

Various questions were raised in the suit which are now of no moment. The only substantial issues are, first, whether Govind Chunder did execute the alleged authority to adopt; and, secondly, if he did so, whether he was by reason of his age capable of executing such a document.

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Their Lordships think it will be desirable, in the first place, to come to a clear conclusion upon a question which has been very much disputed in the cause, namely, the age of Govind Chunder at the time of his death, because it is one which bears upon both the issues to be now determined. It bears of course directly upon the latter of them, and it bears indirectly upon the former, inasmuch as the older Govind Chunder was, the more probable is it that he would desire to execute such a document as that in question.

The contention in the present suit is, that although Bamasoondari was, at the time of her husband's death, 11 or 12 years old, he was only between 13 and 14; that there was not a difference of more than two years between them. That there can be any doubt now as to the age of Bamasoondari, is, their Lordships think, impossible. (After stating an admission of Jumoona that there was a difference of about four years between the age of Bamasoondari and that of her husband, his Lordship continued:) The question of Bamasoondari's age was solemnly tried and determined between her and her mother-in-law in the suit of 1860. The horoscope of Bamasoondari was then produced, and the finding of the Judge made it perfectly clear that she must have been, at her husband's death, of the age of 11 or 12 years. The result of that suit, no doubt, has been the *consensus* of the witnesses on both sides in the present suit as to the age of Bamasoondari. But the effect of the admission of Jumoona remains, and there is no reason why we should come to any conclusion other than that the difference of age between Bamasoondari and her husband was that which was originally stated. Their Lordships, moreover, think there is great force in the observations of Kemp, J., a Judge admittedly of large experience as to native usages and customs upon this point. He thinks that Hindu marriages are usually arranged so that there is a difference considerably more than one or two years between the age of the husband and wife; and their Lordships think this is probable and reasonable. The foundation upon which marriages between infants, which so many philosophical Hindus consider one of the most objectionable of their customs, are supported,

is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. Therefore, it is to be expected, both for physical and moral reasons, that marriages should be arranged so that the husband, when called upon to receive his wife for permanent cohabitation, should have attained the full age of adolescence, and also the age which the law fixes as that of discretion.

Their Lordships, therefore, upon the evidence, have no difficulty in coming to the conclusion that Govind Chunder was, at the time of his death, of the age of 15 or 16, and, therefore, of an age which, according to the law prevalent in Bengal, is to be regarded as the age of discretion.

(His Lordship then examined the evidence bearing on the execution of the authority to adopt, the conclusion being that the decision of the High Court was not to be disturbed. He then continued):—

The only remaining point is that taken by Mr. Doyne, to the effect that although Govind Chunder may have been of the age of discretion according to the Hindu law as prevailing in Bengal, he was still a minor under the 2nd section of Reg. XXVI of 1793, and that under the 33rd section of the prior Reg. X of 1793 he could not make the adoption without the consent of his guardian. The last-mentioned enactment prohibits a disqualified proprietor from making an adoption, except with the sanction of the Court of Wards; and it has been determined by the Sudder Court in the case cited, *Anundmoyee Chowdrain* v. *Sheeb Chunder Roy* (1), a case which afterwards came here, though not on the same point (2), that the prohibition applies equally to an authority to adopt and to an actual adoption. But the words of the 33rd section of Reg. X of 1793 would seem to confine its operation to persons who are under the guardianship of the Court of Wards. And we have the judgment of Mitter, J., to

(1) S. D. A., 1855, p. 218. (2) See 9 Moore's I. A., 287.

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the effect that where a minor is not under the Court of Wards, but has attained years of discretion according to the Hindu law, he is capable of executing such an instrument as this—*Rajendro Narain Lahooree* v. *Saroda Soonduree Dabee* (1). If then the case actually turned upon this point, their Lordships' opinion would have been that Govind Chunder was not incapacitated from executing this instrument by reason of his not having attained the age of 18 years. If, however, the consent of Jumoona was, as their Lordships think they must take it to have been, given to the execution of the instrument, the particular objection thus taken by Mr. Doyne would not arise.

Their Lordships have dealt with this case as if the question were one fairly open for trial between the parties. They give no opinion as to what the effect of a decree in such a suit may be, whether one in favour of the adoption is binding against any reversioner except the plaintiff, or whether, on the other hand, a decision adverse to the adoption would bind the adopted son as between himself and anybody except the plaintiff. All their Lordships can do on the present occasion is to say that Jumoona has not made out her right to have this adoption declared invalid, and they must humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. *T. L. Wilson.*

Agents for the respondent: Messrs. *Nichinson, Prall* and *Nichinson.*

(1) 15 W. R., 548.