

1869
March 24.

Special appeal No. 443 of 1868.

Babaji Jivaji..... : *Appellant*
Bhagirhibai widow of Wamnaji Man-
keshvar..... *Respondent*

Declaratory decree—Injunction—Suit to restrain widow from adopting.

Where B sued for a decree to declare that he would be heir to the property of the defendant, a Hindu widow, after her death, and for an injunction to restrain her from adopting any other than a member of his family, he being the nearest relative of her husband and the fittest subject for adoption according to the Hindu Law.

It was held that the suit would not lie, as, in the former case, the right was contingent and defeasible by adoption, and, in the latter, the adoption of a stranger was not illegal.

This was a Special Appeal from the decision of A. C. watt, Acting Senior Assistant Judge of the District of Satara, in Appeal Suit No. 672 of 1867, confirming the decree of Ganesh Amrit, Munsif of Maini.

The plaintiff alleged that he and his kinsman, the defendant's husband, were hereditary Kulkarnis of four villages in the District of Satara; that by an arrangement between them the plaintiff was to have the management of two of those villages, and the defendant's husband the management of the remaining two, alternately for a period of eight years; that by an agreement entered into between the plaintiff and the defendant herself, after her husband's death, he was to maintain her and become her heir after her death, but that the defendant in violation of that agreement was going to adopt a stranger. As therefore sued to obtain an injunction restraining the defendant from adopting a stranger, and to obtain a declaratory decree to be proclaimed heir after her death.

The Munsif found the agreement not proved and rejected the claim.

The Appellate Court upheld his decision.

The Special Appeal was argued on the 3rd of December 1868, before WARDEN and GIBBS, JJ.

Vishwanath Narayan Mandlik for the Appellant:—The plaintiff is entitled to succeed because the defendant, who is a female, cannot alienate or manage by Deputy a Kulkarni *watan* which is in the nature of entailed property. The defendant by trying to adopt a stranger will defeat the plaintiff's rights. If she adopts at all she should select a boy from within the family: Steele's Summary, page 50 para. 38, I Mor. Dig. N. S. p. 27 para 6. [GIBBS, J.—Admitting that the defendant ought to adopt a boy from the family, the question here is whether, if she does not do so, we can grant a prohibitory order. Your case is "Here is a person who is going to do an illegal act which will injure me; prevent it."] The boy in the family has the right to be adopted.

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Dhirajal Mathuradas for the Respondent :—The result of the authorities seems to be that the choice of a boy is a matter of conscience : 1 Strange 84; 2 Strange 98, 99. Mr. Ellis' opinion.

Shantaram Narayan in reply. A boy in the family has certainly the right of being preferred. If the adoption of a stranger takes place, Hindu Law, by its doctrine of *factum valet*, may prevent its disturbance, but, before such adoption we can ask the Court to prevent it, if not to enforce the rights of the proper person. The case of a marriage shows that what cannot be undone after it has been done can be prevented beforehand.

Cur ady vult.

24th March 1869.—Gibb's J.—In this case we adjourned the argument as to the adoption in order to consider whether a suit would lie for the injunction sought for in the plaint, and, after a consideration of the cases which are alluded to in Braughton's Edition of the Code of Civil Procedure, we are of opinion that a suit for the injunction now asked for will not lie.

In Special Appeal it has been urged that the Special Appellant can obtain a declaratory decree to be proclaimed heir after the Special Respondent's death, and also for an

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injunction to prevent the Special Respondent adopting a stranger; but the former is a contingent right, as by Hindu Law the Special Respondent can adopt, and, if she does, the right of Special Appellant to be heir would fail. *Pranputti Korr v. Lalla Futteh Bahadoor.** On the 2nd point we decline to grant an injunction, as, even if the widow adopt a stranger, such adoption is not illegal and we cannot therefore bar her so doing. We must therefore confirm the decree of the Court below with costs.

Decree confirmed.

*8 Sevestre's Rep. p. 277.

Special Appeal No. 19 of 1859.

Bapuji Balwant.....Appellant.

Raghunath Vithal.....Respondent.

*Jurisdiction—Boundaries—Encroachment—Act (Bombay)
 II. of 1866.*

April 5.

Where boundaries are removed or destroyed and when new ones are to be fixed, or where a question arises where boundaries run, the case falls under sec. III. of Bombay Act II. of 1866; but where the question between the parties is whether there has been an encroachment by the defendant on the lands of the plaintiff the Civil Courts have jurisdiction.

This was a Special Appeal from the decision of A. Lyon, Assistant Judge at Thanā, in Appeal Suit No. 45 of 1867, reversing the decree of the Munsif of Mahad.

Bapuji Balwant in his plaint alleged that in the village of Vile Tarf Nizampur in the Rajpura Talukā, certain land (survey No. 371), measuring in all six acres and 30 chains, was entered in his name; that out of this land in the Eastern direction four acres and two chains belonged to him by proprietary right, for which he paid the Government assessment, but that the defendant Raghunath Vithal, in July 1865, took possession of the said land and obstructed the plaintiff's management. He therefore sued for possession of it.

The defendant answered that the land in dispute belonged to him by proprietary right and had been in his management as proprietor for more than twelve years: that there was a plot of land of six acres and 30 chains lying to the west