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for the Collector to show that the two extra Kárkuns, or one of them, were necessary to ensure the performance of the Deshmukh's usual services; and this he has not even attempted to show.

I would allow the claim to the extent of Rs. 216 per annum (the pay of two Kárkuns at Rs. 9 per mensem) for the six years preceding the institution of the suit. I would also allow interest at nine per cent., and costs in proportion.

KEMBALL, J. :—I concur.

Decree accordingly.

August 10.

Regular Appeal No. 45 of 1870.

RU'PCHAND HINDU'MAL......................*Appellant.*
RAKHMA'BA'I ....*Respondent.*

Hindú Law—Adoption by Widow—Consent of Kinsmen of Husband—Consent of person in whom Husband's Estate is vested.

Although, as a general rule, the adoption by a Hindú widow of a son to her deceased husband is in the Maráṭhá Country good, without the consent of her husband's kinsmen, when the estate of her husband is vested in her or in her and her co-widow jointly, yet when such adoption has the effect of divesting an estate already vested in a third person, (*e. g.*) the widow of her husband's deceased brother, the consent of such third person would appear to be necessary to give validity to such an adoption.

Rakhmábái v. *Rádhábái* (*a*) and *The Collector of Madura* v. *Muttu Ramalinga Sadhupathy* (*b*) commented on and compared.

THIS was an appeal from the decision of Madaṇ Shríkrishṇáji, First Class Subordinate Judge of Puṇá, in Original Suit No. 39 of 1869.

The plaintiff, Rúpchand Hindúmal, obtained a decree against one Badridás Anandrám, and attached certain immoveable property and 500 Rs. in cash in execution of that decree. The attachment, however, was raised on the application of the defendant, Rakhmábái, under Sec. 246 of the Civil Procedure Code. The plaintiff thereupon brought this suit to establish the right of his judgment-debtor (Badridás)

(*a*) 5 Bom. H. C. Rep., A. C. J. 181.
(*b*) 12 Moo. Ind. App. 397; S. C. 10 Calc. W. Rep., P. C. 17.

to the property. He alleged in the plaint that the property in question had belonged to two brothers, Anandrám and Sobhárám, who were undivided in interest, and that Badridás was adopted by Sarjábái, the widow of Anandrám, and that Badridás, therefore, was the owner of the property.

Rakhmábái answered that she, and not Badridás, had had the possession and management of the property; that on the death of Anandrám the property vested in her husband, Sobhárám, and as widow of Sobhárám she was the sole heir to his property after his death.

It appeared that Anandrám and Sobhárám were two undivided brothers; that Anandrám predeceased Sobhárám, leaving a widow, Sarjábái; that Sobhárám subsequently died leaving a widow, the defendant, Rakhmábái; and that, after the death of Sobhárám, Sarjábái adopted Badridás as the son of Anandrám.

The Subordinate Judge held that the property in dispute belonged to the estate of the deceased Sobhárám; that Rakhmábái, and not Badridás, was the heir of Sobhárám; and, therefore, that the property could not be sold in satisfaction of a decree obtained against Badridás. From this decision the plaintiff appealed to the High Court, and the appeal was argued before MELVILL and KEMBALL, JJ.

Nánábhái Haridás, for the appellant:—No partition of the family property having taken place, and the adoption of Badridás being admitted, the Subordinate Judge was wrong in law in holding that Badridás was not the heir of Sobhárám, and, therefore, owner of the property in dispute. The decree No. 393 of 1865 ought not to be regarded as a decree against Badridás individually, but one binding on the whole family property. The adoption of Badridás was valid, whether the defendant, Rakhmábái, gave her assent to it or not: *Rakhmábái* v. *Rádhábái* (c).

Dhirajlál Mathurádás, for the respondent:—The adoption of Badridás is invalid, as the respondent did not consent to

(c) 5 Bom. H. C. Rep., A. C. J. 181.

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it. But even supposing she did, the consent was limited to Anandrám's share of the property, as the property was divided between her and Anandrám's widow, Sarjábái. Under that division, Anandrám's share, including the shop at Puṇá, remained in possession of his widow, Sarjábái, and Badridás. Rakhmábái had exclusive possession of the shop at Sirur, and the rest of Sobhárám's property.

MELVILL, J. :—This is a suit to establish the plaintiff's right to attach certain property in execution of a decree against one Badridás.

The decree was sought and obtained against Badridás as heir of Sobhárám and Anandrám, and as manager of two firms, described as the firms of Nensukh Sobhárám and Nensukh Anandrám.

The admitted facts of the case are these :—Anandrám and Sobhárám were brothers undivided in interest. Anandrám predeceased Sobhárám, and both died without issue. Anandrám left a widow, Sarjábái, who adopted Badridás after the deaths of Anandrám and Sobhárám. Sobhárám left a widow, Rakhmábái, the defendant in the present case. Anandrám and Sobhárám had shops at Puṇá, Sirur, and other places, and after their death these shops continued to be carried on, that at Puṇá under the name of Nensukh Anandrám, and that at Sirur under the title of Nensukh Sobhárám. The debt for the payment of which the plaintiff's decree was obtained was incurred by Badridás on account of the Puṇá shop, but the property which has been attached belongs to the shop at Sirur.

In 1868 the plaintiff attached certain property in execution of this same decree. The attachment was raised on the application of Rakhmábái, and the plaintiff brought no suit to establish his right. It has been contended for the defendant that the present suit is barred by the order passed in the former inquiry, under Sec. 246 of Act VIII. of 1859. But as the order for raising the attachment was passed solely on the ground that the property then attached was not proved to be in the possession of the plaintiff's judgment-debtor,

Badridás, it does not affect the question of the plaintiff's right to attach the other property.

The questions for determination are: (1) whether Badridás, as the adopted son of Anandrám, is owner of the attached property; and (2) if not, whether the property is liable to be attached and sold under a decree obtained against Badridás as manager of the firms of Nensukh Sobhárám and Nensukh Anandrám.

On the death of Anandrám the whole family property vested in his brother, Sobhárám, and on Sobhárám's death his widow, Rakhmábái, succeeded to the whole. The legal effect of a valid adoption by Anandrám's widow would be to divest Rakhmábái of the estate. It has been repeatedly held that adoption by a widow has a retrospective effect, and, relating back to the death of the deceased husband, entitles the adopted son to succeed to his estate as the same stood at the date of his death. A son adopted by a widow is in the same position as a posthumous son, and may even set aside an alienation made by the widow to the prejudice of the property, unless made under circumstances of inevitable necessity. It results from this fiction of Hindú law that if the adoption of Badridás was a legal adoption, Badridás must be considered to have been a coparcener with Sobhárám from the date of Anandrám's death, and to have succeeded to the whole estate on the death of Sobhárám.

The question is, whether an adoption by a widow, which has the effect of divesting an estate already vested in a person other than the widow, is a valid adoption.

I should feel very great difficulty in holding that such an adoption would be valid if made without the consent of the kinsman or kinsmen in whom the property of the deceased had vested. It is true that in *Rakhmábái* v. *Rádhábái* (d) it was held that in the Maráthá Country an elder Hindú widow has the power to adopt a son to her deceased husband without the consent of a younger widow, notwithstanding that the younger widow has a vested interest in the property.

(d) 5 Bom. H. C. Rep., A. C. J. 181.

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But the case of two widows is a peculiar one. In his judgment in that case, Couch, C. J., said: "It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish. But, on the other hand, if the adoption is regarded as the performance of a religious duty and a meritorious act, to which the assent of the husband is to be implied wherever he has not forbidden it, it would seem that the younger widow is bound to give her consent, being entitled to a due provision for her maintenance; and if she refuses, the elder widow may adopt without it." In this I entirely concur. The two widows being equally bound to take the measures necessary to secure their husband's future beatitude, the younger widow, who, by withholding her consent, ignores the religious obligation imposed upon her, has no right to complain of injustice if the adoption be made by the elder widow without her consent. But it does not follow that the plea of injustice is to be equally disregarded where it is put forward by a person who is under no such religious obligation. In *Rakhmábái* v. *Rádhábái* it was certainly laid down in the broadest terms that in the Maráṭhá Country a Hindú widow may without the consent of her husband's kindred adopt a son to him, if the act is done by her in the proper and *boná fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. But the Judges by whom that case was decided were not dealing with an adoption which would have the effect of divesting an estate vested in a relative other than a widow, nor in any of the decided cases on which they relied was the validity of such an adoption in issue. It does not appear to me that the authorities quoted would be sufficient to support the validity of an adoption working such manifest injustice.

In the case of *The Collector of Madura* v. *Muttu Ramalinga Sadhupathy* (e), the Judicial Committee of the Privy Council have determined that, according to the law prevalent in the Draviḍá Country, a Hindú widow, not having her husband's permission, may, if duly authorised by his kin-

(e) 10 Calc. W. Rep., P. C. 17.

dred, adopt a son to him. They then go on to say: "The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindú family,—*i.e.*, undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this deputed power of adoption, takes no interest in her husband's share of the joint estate except a right to maintenance. And, though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet if there be no father the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." Their Lordships then proceed to express an opinion that when the family is divided, and the widow has consequently taken by inheritance her husband's separate estate, it is not necessary for her to obtain the consent of reversioners, but it is sufficient for her father-in-law, or some responsible kinsmen whose concurrence in the adoption may be sufficient evidence that the act was done by the widow in the proper and *boná fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In other words, when the estate is vested in the widow, she may adopt without the consent of reversioners, but when the estate is vested in persons other than the widow, and the immediate effect of an adoption would be to defeat the interest of those persons, then justice requires that their consent should be obtained. This proposition seems very reasonable and just; and it is based upon authorities which, though not regarded with so much respect here as in the Draviḍá Country, are not without weight in this Presidency. The decision in *Rakhmábái* v. *Rádhábái*, and the authorities on which it is based, may be accepted without hesitation, as showing that in the Maráṭhá Country a widow in whom the estate is vested may show by other evidence than the assent of a

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responsible kinsman that (to use the words adopted by the learned Judges from the decision of the Privy Council above referred to) the act of adoption was done by her in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. But where the estate is vested in another than the widow, I should be disposed to hold that justice would require us to follow the opinion of the Privy Council as to the necessity of the assent of the person whose interest would be defeated by the adoption. It has not escaped me that in referring to the remark of the Privy Council, Couch, C.J., says: "The interest of the younger of two widows cannot, we think, be regarded in the same light as that of a member of an undivided family, and probably their Lordships would not consider the remark applicable in cases where, by the law which governs them, no consent of kinsmen is required." I, too, think that their Lordships would probably not consider their remark applicable in the particular case of the two widows which the Chief Justice was considering: for, as I have remarked, that was an exceptional case, in which an argument founded on injustice could not be maintained. But in cases in which a deviation from the opinion expressed by the Judicial Committee would work manifest injustice, I am disposed to think that their Lordships would consider their remark applicable.

Although I have thought it necessary to make these observations in order to show that I do not assent to the argument of the appellant's Pleader in this case, who maintains, on the authority of *Rakhmábái* v. *Rádhábái*, that the adoption of Badridás is valid, whether or not Rakhmábái consented to the adoption, yet it is not necessary for me to do more than express an opinion that the adoption would have been invalid without Rakhmábái's consent, because there is sufficient evidence that Rakhmábái did consent to the adoption.

The evidence of the plaintiff's witnesses Nos. 49 and 50 is to the effect that Sarjábái, Anandrám's widow, and Rakhmábái brought Badridás when a boy from Farrakábád; that both ladies proclaimed that he had been adopted as heir

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Anandram
dies before S
= Sayabai
|
adopted
Brindaban

Sobharam
= Rakhmabai
Consented to adoption
& intended that it
sh^d. have full
legal effect.

Held that Bhuban Moyi case does not support the argument that an adoption can in no case operate to defeat an interest once vested

both of Anandrám and Sobhárám; that they gave caste-feasts in honour of the event, and publicly seated the boy on the *gádi* of the shops both at Puṇá and Sirur. It is in evidence that, during Badridás's minority, suits in connection with the Sirur shop were brought in the name of Badridás (exhibits Nos. 11, 13, and 18), and this could hardly have been done without Rakhmábái's knowledge and consent. It is shown that, when he came of age, Badridás managed the shop at Sirur as well as that at Puṇá (witnesses Nos. 50, 52, 53, and 54); that he drew *huṇḍis* in the name of Nensukh Sobhárám (exhibits Nos. 15, 16, and 17), which were duly entered in the books at Sirur (exhibit No. 62 and witness No. 54); that money was paid from the Sirur shop in liquidation of debts incurred by Badridás at Puṇá (witness No. 61); and that after quarrelling with Rakhmábái, who took possession of the Sirur shop, he continued to conduct the Puṇá business until it failed. This evidence shows clearly that Rakhmábái consented to the adoption, and intended that the adoption should have its full legal effect, namely, that of making Badridás the heir of the entire estate of Anandrám and Sobhárám. Some of the evidence is objected to, as being that of interested witnesses; but it would seem to have been easy to disprove it if it had been false, and this the defendant has not attempted to do. It has been suggested to us that Rakhmábái only consented to an adoption so far as it affected Anandrám's share of the property, and that she and Anandrám's widow did, in fact, divide the property, Anandrám's widow and Badridás remaining in possession of Anandrám's share, including the shop at Puṇá, while Rakhmábái had exclusive possession of the shop at Sirur and the rest of Sobhárám's property. But this is quite a new case, and inconsistent with that set up by Rakhmábái in the court below. It is also inconsistent with the admitted fact that Anandrám and Sobhárám were undivided; it is not supported by any evidence of any subsequent division between the widows, and it is contradicted by the evidence which has been already reviewed, and which shows that Badridás was put in possession of the shop at Sirur as well as of that at Puṇá.

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The only circumstance in favour of it is that in 1848, after the death of Anandrám and Sobhárám, their two widows applied for a joint certificate of administration to their estates, and a joint certificate was granted, in which Sarjábái was declared to be the heir of Anandrám, and Rakhmábái to be heir of Sobhárám. This certainly goes to show that Rakhmábái was at that time ignorant of, or indisposed to assert, her strict legal rights: but it also shows that the two widows were acting in complete accord in regard to the management of the whole estate, and so lends confirmation to the evidence that they acted in accord in adopting an heir to the estate.

On the whole, I see no reason to doubt that the adoption was made with the consent of Rakhmábái, and with the intention on her part that it should have its full legal effect. Having been made with such consent and intention, I am of opinion that the adoption is valid, and that the effect of it is to make Badridás the owner of all the estate of Anandrám and Sobhárám, including the property which has been attached by the plaintiff in execution of his decree against Badridás. It follows that the plaintiff is entitled to a decree, and that it is unnecessary to go into the second question of the effect of the plaintiff's previous decree, so far as it purports to be against Badridás, as manager of the firms of Nensukh Sobhárám and Nensukh Anandrám.

The Pleader of the respondent, in support of his argument that an adoption can in no case be held valid which has the effect of divesting an estate once vested, has referred to the case of *Bhoobun Maye Debia* v. *Ram Kishore Acharjee* (c). In that case A claimed, by virtue of adoption, an estate which B had inherited from C. Even if A had been a natural-born son, B, and not A, would have been the heir of C; and it was held that under such circumstances A could not defeat B's estate. There would seem to be no room for doubt on this point, and the decision in that case certainly does not support the argument (which is, moreover, at variance with the decision in *Rakhmábái* v. *Rádhábái*)

(c) Sutherland's Privy Council Judgments, p. 574; also in 3 Calc. W. Rep., P. C. C. 15.

that an adoption can in no case operate to defeat an interest once vested.

I would reverse the decree of the court below, with costs.

KEMBALL, J.:—I concur.

Special Appeal No. 117 *of* 1870.

Feb. 22.

DAYA'BHA'I DI'PCHAND ....*Appellant.*
MA'NIKLA'L VRIJBHUKAN ....*Respondent.*

Shares—Sale for future delivery—Notice by Purchaser that he will not accept—Readiness and Willingness of Vendor to deliver—Pledge of Shares to a third person.

Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he (the purchaser) will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares.

Semble. The mere fact that such shares are pledged to a third person is not sufficient to show that the vendor is not ready and willing to deliver them, if there is nothing to show that the pledgee is not willing to assist the vendor in carrying out his contract, and it being apparently for the advantage of the pledgee that he should do so.

THIS was a special appeal from the decision of the Judge of the District of Súrat, confirming the decision of the Ṣadr Amín of Broach.

Dayábhái Dípchand instituted this action to recover the sum of Rs. 3,825, being the balance due on account of forty shares of the Broach Bank and Finance Corporation, Limited, alleging that the defendant, Máṇiklál, had entered into an agreement with him on Phálgun Vad 7th, Saṁvat 1921 (19th March 1865) to pay for, and take delivery of, the said shares from him on or before the 15th of July following, but that the defendant, Máṇiklál, had refused to take delivery when the shares had been tendered to him on the day agreed on.

The plaintiff, accordingly, sued to recover the contract value of the shares less the proceeds from the sale of the shares.

The defendant, Máṇiklál, admitted the execution of the agreement, but said that it was a *saṭṭá*, or wagering contract,