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[630] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

RAMBHAT (*Original Defendant*), *Appellant v.* LAKSHMAN CHINTAMAN MAYALAY (*Original Plaintiff*), *Respondent.**

[27th June and 5th July, 1881.]

Hindu law—Conveyance by a Hindu without male issue—Adoption pendente lite*—Adoption from improper motive—Will—Gift.*

A conveyance by a Hindu, without male issue at the date thereof, will bind his subsequently born or adopted male issue. Such issue at birth takes a vested interest in such property only as is that of their father at that time.

C, a Hindu Brahmin without male issue, executed, on the 10th September, 1856, a *bakshishpatra* (a deed of gift) to M containing words to the following effect: "I have given to you as gift and charity my property at———, together with my moveable property. (Here follow the particulars of the property). The garden and house, &c., &c., I have given to you as gift this day of my own accord, and I have made the same over to you. You shall pay the Government assessment and village expenses, and you and your grandsons should enjoy the same property generation after generation, and live in peace there. As long as I live I will take the profits, and you should maintain me as if I were one of the members of your family * * * * I have no ownership whatever in the property; the ownership belongs to you from this day. This day I owe no money to anybody. Whatever property there may be after the death, other than that described above, is all given to you. No person has any claim thereto; the entire ownership belongs to you. I have given in writing this deed in sound mind of my own accord. The document was registered on the 4th October, 1856. M was put in possession of the property, and managed it for some time. He paid the Government assessment, and held receipts for the same. On the 6th January, 1858, C addressed a letter to the Assistant Magistrate of the place, purporting to revoke the *bakshishpatra*, and he (C) was restored to possession by that officer. In 1859, M brought a suit (No. 446 of 1859) against C for the property. Before any decree was passed in it, C, on the 6th June, 1859, adopted the plaintiff, who was then eight years of age. The plaintiff was not made a party to that suit. On the 2nd April, 1860, the Munsif made a decree in favour of M, holding that C had executed the *bakshishpatra* and given possession of the property to M under it. He directed the property to be restored to the possession of M to be held according to the terms of the *bakshishpatra*. C appealed but subsequently withdrew his appeal, admitting the execution of the *bakshishpatra* and agreeing to give over the property to M according to the terms of the Munsif's decree. M accordingly obtained possession of the property. On the 16th March, 1874, the plaintiff brought the present suit against the grandson of M (M then being dead) for moiety of the property, on the ground that C, his adoptive father, could not alienate more than one-half of the property. Both the lower Courts allowed the plaintiff's claim,—the Court of first instance being of opinion that the document was a gift, and did not bind the plaintiff, and the appellate Court holding that it was not a gift but a will, and that it had been revoked by the testator before his death. On appeal to the High Court.

[631] *Held* that the document was a conveyance and not a will, and that it vested the property in M, the donee, subject to a trust regarding any surplus that remained of the income after payment of the Government assessment and village expenses in favour of C as long as he lived, and that the donor could not revoke it, inasmuch as the document contained no power of revocation.

Held also that inasmuch as the plaintiff had been adopted before the hearing and decree in suit 446 of 1859, and might have been made a party to it, but was not, he could not be bound by the proceedings in that suit, and that he was, therefore, at liberty to re-open the question whether the *bakshishpatra* was intended by C, when executing it, to operate as a deed or as a will. An adoption *pendente lite* is not to be regarded in the same light as an alienation *pendente lite*. If a legitimate son had been born to C during the suit, such son to be bound by

* Second Appeal No. 412 of 1879.

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a pending suit affecting his father's ancestral property must have been made a party, and a son adopted during the suit was in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's property according to the Hindu law in the Presidency of Bombay. The circumstance that C might have adopted the plaintiff for the purpose of endeavouring to defeat the *bakshishpatra*, did not alter the case. As a sonless Hindu he had a right to adopt a son, and he was not under any obligation to M not to adpot; and even if he had so contracted, *quœre* whether such a contract would affect the validity of the adoption.

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THIS was a second appeal from the decision of A. L. Johnstone, Acting Assistant Judge at Ratnagiri, affirming the decree of Makundrav Bhaskar, Second Class Subordinate Judge at Dapoli.

The plaintiff brought this suit for possession of certain immoveable property. The defendant Rambhat, *inter alia*, relied upon a *bakshishpatra* (Ex. No. 44) executed in favour of his grandfather by the plaintiff's adoptive father, Chintaman, on the 10th September, 1856. The facts of the case are fully stated in the judgment of the High Court.

The Subordinate Judge allowed the plaintiff's claim, holding that the *bakshishpatra* (Ex. 44) was a gift made for no valid reason and that it did not bind the plaintiff, because the donor had no right to alienate the whole of his ancestral property. In appeal, the decision of the Subordinate Judge was upheld by the Assistant Judge, who was, however, of opinion that the *bakshishpatra* was a will and not a gift, but that it was revoked by the testator before his death. Both the lower Courts held that the proceedings in suit No. 446 of 1859 were not binding upon the plaintiff.

The defendant appealed to the High Court.

[632] The Hon'ble Rao Saheb *V. N. Mandlik*, for the appellant.—Exhibit No. 44, as its name signifies, is a gift and not a will, as wrongly held by the Assistant Judge. The donee was actually put in possession and himself managed the property for some time. The gift was irrevocable. The plaintiff was adopted during the pendency of the suit No. 446 of 1859. His adoption, therefore, was *pendente lite*, and he was bound by all the proceedings in that suit. It was not necessary to make him formally a party to them. The learned pleader cited *Chittar Lalsing* v. *Shewakram* (1); *Kalee Dass Roy* v. *Khiroda Sundree Debia* (2); Mayne's Hindu Law, pl. 179 (2nd ed.); The Indian Evidence Act I of 1872, s. 13.

Shantaram Narayan, for the respondent.—The document is a will, as it distinctly states that Chintaman was to enjoy the proceeds of the property till his death. Morbhat was to take no beneficial interest in the income of the property during the lifetime of Chintaman. Morbhat managed the property as Chintaman's agent. Taking it to be a will, it was revoked by Chintaman by his letter of the 6th January, 1858. The plaintiff's right was not affected by the decree in suit No. 446 and all the subsequent proceedings therein, as Morbhat did not choose to make him (plaintiff) a party to them.

JUDGMENT.

WESTROPP, C.J.—On the 10th of September, 1856, Chintaman (*alias* Chinto) Mayalay, a Konkani Brahmin, advanced in years, and then without male issue, executed in favour of Morbhat Ramkrishnabhat Upadya (a Brahmin of the same caste) a document, which, after describing itself as

(1) 5 B.L.R. 123. (2) 16 W.R.C.R. 300.

a *bakshishpatra*, and after stating its date and the names of the donor and donee and the name of the village of the former, proceeded thus: "Deed of gift is given in writing as follows: I have become old and have no male issue. You are a Brahmin and a fit object of charity (*sat patra*), and you are my protector. Up to this day you and your ancestors protected me. As I have no male issue, I have given to you, as gift and as charity (*dharmast*), my property at the Kasba aforesaid, together with my movable property. The particulars thereof are as follows: My own *thikan* (garden, or field) [633] situate at, &c., there is my house standing thereon—a cowshed adjacent—warkas and grass land. The garden and house, &c., &c., I have given to you as gift this day of my own accord, and I have made the same over to you. You shall pay the Government assessment and village expenses, and you and your grandsons should enjoy the same property, generation after generation, and live in peace there. As long as I live I will take the profits and you should maintain me as if I were one of the members of your family. The property I have mentioned above I have given to you of my own accord, and I have made the same over to you. I have no ownership whatever therein; the ownership belongs to you from this day. This day I owe no money, &c., to anybody. Whatever property there may be after my death, other than that described above, is all given to you. No person has any claim thereto; the entire ownership belongs to you. I have given in writing this deed in sound mind and of my own accord." This document was in the handwriting of Balaji Hari Sathye, a Brahmin of the same caste as the donor and donee. It was duly signed by the donor, and attested by several witnesses. On the 4th October, 1856, it was registered. Possession was given to the donee Morbhat. He for some time managed the property, and paid the Government assessment of the garden, &c., and held receipts for the same. About fifteen months after the execution of the *bakshishpatra*, Chintaman, the donor, appears to have repented his act, and he, on the 6th January, 1858, addressed a *yadi* or letter to the Assistant Magistrate, purporting to revoke the *bakshishpatra* of the 10th September, 1856, and he was, by the Assistant Magistrate, restored to possession. Morbhat brought a civil suit (No. 446 of 1859) in the Munsif's Court to recover the property. Upon the 6th of June, 1859, and before any decree was made in that suit, Chintaman adopted Lakshman (the plaintiff in the present suit) then a child in his eighth year. Lakshman was not made a party to Morbhat's suit. The Munsif made his decree on the 2nd of April, 1860, in the suit (446) of *Morbhat* v. *Chintaman* in favour of Morbhat, and found that Chintaman executed the *bakshishpatra* when in his full senses and that possession had been given by him to Morbhat under that document. The Munsif directed the property to be [634] restored to the possession of Morbhat to be held in accordance with the *bakshishpatra*, and ordered Chintaman to pay the costs of the suit. Chintaman appealed against that decree, but subsequently, on the 12th July, 1860, withdrew his appeal, admitted the execution of the *bakshishpatra*, and stated that he was willing to give over the *thikan*, and the rest of the property, to Morbhat in accordance with the terms of the Munsif's decree. This was done. The natural father of Lakshman then, upon an alleged mortgage to himself by Chintaman, and on the ground that Morbhat had fraudulently obtained a decree against Chintaman in his own favor, instituted a suit against Morbhat, but was defeated by him in the Munsif's Court, the Assistant Judge's Court, and the High Court successively.

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Lakshman, within three years after attaining his majority, instituted the present suit, on the 16th March, 1874, to recover, from Rambhat, the grandson of Morbhat (who is dead), a moiety of the property, on the ground that Chintaman could not, as against his adoptive son Lakshman, alienate more than one-half of the property. The Subordinate Judge and the Assistant Judge have respectively decreed in favour of Lakshman.

The main question is whether the *bakshishpatra* was by Chintaman, at the time he executed it, intended to operate as a deed or merely as a will? The preliminary question, however, arises whether Lakshman, not being a party to Morbhat's suit, No. 446 of 1859, is bound by the decree therein made against Chintaman and by Chintaman's withdrawal from his appeal in that suit.

The date, on which the plaint in that suit was presented, is not in evidence in this suit. Assuming, however, most favourably to the defendant Rambhat, that the filing of that plaint was (as is probable) anterior to the adoption of Lakshman, we are of opinion that, inasmuch as Lakshman was certainly adopted before the hearing and decree in that suit, and might have been made a party to it, but was not, the proceedings therein do not bind him, and that, accordingly, he is at liberty to re-open the question whether the *bakshishpatra* was intended by Chintaman, when executing it, to operate as a deed or as a will. We cannot regard the adoption *pendente lite* as in the same predicament as an alienation [635] *pendente lite* (1). If a legitimate son had been born to Chintaman during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must be made a party, and we think that a son adopted during the suit would have been in the same position. The one at his birth, and the other at his adoption would take a vested interest in his father's ancestral property according to the Hindu law in this Presidency (2). We do not think that the circumstances, that Chintaman may have adopted Lakshman for the purpose of endeavouring to defeat the *bakshishpatra*, alters the case. Whatever evil motive may have influenced Chintaman, he was doing that which, as a sonless Hindu, he had a right to do, and he was not under any obligation to Morbhat not to adopt; and even if he had so contracted with Morbhat, we doubt that such a contract could affect the validity of the adoption, although the right of Morbhat to retain the property, under the *bakshishpatra*, if it be a deed and not a will, may not be disturbed. Lakshman, an infant in his eighth year, was an innocent party, and the ceremony of giving and taking being duly performed by persons with full authority, he cannot be relegated to the family of his natural father. Taking this view of the adoption, we permitted Lakshman's pleader to argue that the *bakshishpatra* must be regarded as a will, and not as a deed. If that proposition could have been maintained, we may observe that Lakshman should have sued for the whole and not for a moiety only of the property, inasmuch as Chintaman, being a member of an undivided family at the time of his death, could not have devised away any part of the property from his co-parcener, *i.e.*, his adopted son, according to the Hindu law of this Presidency (3).

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(1) 11 B.H.C. R. 64, 24, 139; 7 M.H.C.R. 104; 1 DeG and J. 566.

(2) Mitak., ch. i, sec. 1, pl. 23, 27; Vyav. May., ch. iv, sec. 1, pl. 3; Datt. Mim., sec. vi, pl. 8; Suth. Syn. iv, pl. 4; 7 M.I.A., 169, 184, *et seq*; Mayne's H.L. (2nd ed.), pl. 178, 179. The Viramitrodaya transl. by Golapchandra Sarkar Sastri, ch. i, pl. 49 to 54.

(3) *Vide* cases cited 5 B. 637, note (2).

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The question remains to be solved—Was the *bakshishpatra* intended by Chintaman, when executing it, to be a conveyance by [636] way of deed or to be only a will to operate from the time of his death? In favour of its being intended to be only a will, is the circumstance that Morbhat could not beneficially enjoy any portion of the income of the property until after the death of Chintaman. The true construction of the document evidently is that Morbhat was to pay the Government assessment and village expenses out of the income, and to make over to Chintaman or to apply, in his maintenance and for his benefit, the residue of the income. On the other hand, the name of the document, given in itself, "*bakshishpatra*," indicates a deed and not a will. This, *per se*, is not much. If the conduct of Chintaman or the provisions of the document showed that his intentions were purely testamentary, the name of the document would not be very important. But Chintaman not only caused it to be registered within a month after its execution, but actually gave over the management and possession of the property to Morbhat, who could not, indeed, pay the Government assessment and village expenses, or maintain Chintaman out of the income of the property, as the document required him to do, unless Morbhat received that income for the purpose. Finding that the document contemplated the management of the property by Morbhat, and that Chintaman, being then old, should be relieved of that trouble, and that possession of the property itself was fully given to Morbhat, we think that the Munsif was right, when, in his decree of 1860, he held the *bakshishpatra* to be a conveyance and not a will.

Therefore, we must hold that it vested the property in Morbhat on the 10th of September, 1856, subject to a trust as regarded the income, left after payment of the Government assessment and village expenses, in favour of Chintaman so long as he lived. It did not contain any power of revocation, and Chintaman's attempted revocation in 1858 was futile in law. Chintaman having in 1856, nearly three years before the plaintiff's adoption, conveyed all of his estate in the property to Morbhat except a life interest, had not, at the time of the adoption, any estate of inheritance in the property, a share of which could vest in Lakshman at the time of his adoption. A conveyance by a Hindu, without male issue at its date, will bind his subsequently born or [637] adopted male issue (1). Such issue at their birth take a vested interest in such property only as is that of their father at that time. Here Chintaman had parted with his inheritance before the adoption, which, in the case of an adopted son, occupies the same position as birth with a natural born son. If the *bakshishpatra* had been executed *after* the adoption or birth of a son to Chintaman, it could not prevail to any extent against such a son, inasmuch as an alienation by a member of an undivided family without valuable consideration does not, in this Presidency, any more than a will, bind, even to the extent of such member's own share,

(1) *Krishnarav Ganesh* v. *Rangrav*, 4 B. H. C. R. A. C. J.: 14, *Kusture Bhavani* v. *Appa*, 5 B. 621. And see 1 Stra. H. L., 261, cl. 1; West and Buhler (2nd ed.), pp. 372, 382; 2 Norton, L. C., 424; 2 M. I. A., 54, *Mt. Goura Chowdhrain* v. *Chummun Chowdhry*, W. R. Special No. for 1864, p. 340; and the decision of the High Court of Calcutta as to *Mahabeer Pershad*, mentioned in *Girdharee Lall* v. *Kantoo Lall*, 1 I. A., 321, (322, 326, 329.) and not appealed against; *Bamundos Mookorjea* v. *Mt. Tarinee*, 7 M. I. A. 169; Mayne's H. L., (2nd ed.), pl. 178, 179; *Sri Raghunadha* v. *Sri Brozo Kishoro*, 3 I. A. 154, (193.)

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his co-parceners (1). They, in such cases, take the whole property by survivorship. But here the adoption came after the alienation.

We must reverse the decrees of the Courts below, and make a decree for the appellant, the defendant. The parties respectively must bear their own costs of the suit and of both appeals.

Decrees reversed.

5 B. 638.

[638] TESTAMENTARY JURISDICTION.

Before Sir Charles Sargent, Kt., Justice.

IN THE MATTER OF THE WILL OF PITAMBER GIRDHAR.
SOORJI JIVANDAS *(Petitioner)*. [27th July, 1881.]

Probate—Revocation—Indian Succession Act (X of 1865), s. 234—Practice—Review in testamentary matters.

Section 234 of the Indian Succession Act (X of 1865) applies to Hindus, and an application to revoke probate of the will of a Hindu may be made under that section.

When once probate in solemn form has been granted, no one who has been cited or has taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled : *Quære*—whether a review may not be granted.

The practice in India in testamentary matters previously to Act V of 1881 was the same as that of the Ecclesiastical Court in England, except so far as that practice might be inconsistent with the Civil Procedure Code.

[R., 11 C. 492 (494) ; 18 C. 45 (47) ; 27 C. 927 (935) ; 17 M. 373 ; 11 C.L.J. 623 (630) = 6 Ind. Cas. 301 ; 13 C.L.J. 547 (549) = 15 C.W.N. 1021 (1022) = 10 Ind. Cas. 434 (435) ; 10 Ind. Cas. 717 (718) = 14 C. C. 77.]

IN this case the petitioner, on the 7th March, 1881, obtained a rule *nisi* calling upon one Navivahoo to show cause why a citation should not be issued calling upon her to bring in to the Registry the probate of the last will and testament of the said deceased granted to her on the 9th August, 1880, and to show cause why such probate should not be revoked and cancelled.

The testator, Pitamber Girdhar, died on the 10th August, 1879, while on pilgrimage, having left Bombay on the 8th February, 1879.

On the 14th January, 1880, Navivahoo applied for probate of the will of the testator dated the 5th February, 1879, and on the 12th February, 1880, Soorji Jivandas, the petitioner, entered a caveat. He alleged that the will propounded by the applicant was a forgery ; and he produced a will made by Pitamber Girdhar and dated 1st February, 1879, whereby the petitioner and three other persons were appointed executors. The petitioner stated that on the 8th February, 1879, just before the testator's departure from Bombay, he (the testator) had handed over this will for safe custody to Kuverji Narsi, one of the executors, in whose possession it had ever since remained. He also stated that several letters had been received by the said executors, written shortly before the testator's death, in which he had referred to the will which he had left with Kuverji Narsi.

(1) *Gangubai* v. *Ramanna*, 3 B. H. C. R. A. C. J. 66; *Vrandavandas* v. *Yomunabai*, 12 B. H. C. R. 229 and see 3 B. H. C. R. 9; 11 B. H. C. R. 80; 2 Stra. H. L. 261. cl. 2.