

APPELLATE CIVIL.

FULL BENCH.

*Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill,
and Mr. Justice Kemball.*

1879
July 8.

RAMJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* GHAMAU (ORIGINAL
DEFENDANT), RESPONDENT.*

*Hindu law—Adoption—Adoption by widow—Authority to adopt—Consent to adopt
given by husband's family—Adoption in undivided family—Adoption to a husband
separated in estate.*

A Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided co-parceners.

Where the husband of a Hindu widow dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, she may adopt without the sanction of the husband (if he have not, expressly or by implication, indicated his desire that she shall not do so) and without the sanction of his kindred.

N. and J. were two Hindu brothers undivided in estate. N. died first, leaving a widow, K. J. died next, leaving two sons and a widow, G. (the defendant). K. adopted the plaintiff as son to her husband and herself without the consent either of J.'s two sons or his widow, G. On the death of K. and the two sons of J., the plaintiff sued G. (the widow of J.) for possession of the family estate. G. claimed the estate as heir of her last surviving son, and while admitting the fact of the plaintiff's adoption by K. denied its validity, on the ground that the members of the family had given no assent to the adoption. It was admitted that K. had not received from her husband N. any permission or direction to adopt a son.

Held that the plaintiff's adoption by K. was invalid, inasmuch as she had not the authority of her husband or the consent of his undivided co-parceners to adopt, nor did she hold any estate in the property.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District Court of Poona, reversing the decree of the Second Class Subordinate Judge.

The facts of the case are fully stated in the judgment of the High Court.

The case first came before Melvill and Kemball JJ., who referred it to a Full Bench.

* Special Appeal No. 392 of 1875.

The question argued before the Full Bench was whether the plaintiff's adoption was valid.

The Hon. Rao Saheb *V. N. Mandlik* for the appellant.

Pandurang Balibhadra for the respondent.

The authorities cited are mentioned in the following judgment of the Full Bench delivered by

WESTROPP, C. J.—There were two brothers, Narayan and Jivaji, undivided in estate. Of these, Narayan died, leaving a widow named Kondai. Jivaji died next, leaving two sons and a widow, the defendant Ghamau. The plaintiff, Ramji, alleges that Kondai, having requested Ghamau to give to her one of Jivaji's sons in adoption, and Ghamau having refused so to do, she (Kondai) adopted the plaintiff as son to Narayan and herself. One of Jivaji's sons died, and subsequently Kondai died. The defendant Ghamau alleged that her then surviving son, Sawlia, performed the funeral ceremonies of Kondai. Sawlia next died. His mother Ghamau claimed to be his heir, and at the commencement of this suit was in possession of the family estate (lands in Kasar village), which had belonged to Narayan and Jivaji jointly, and of which Jivaji, from the death of Narayan until his own death, was in exclusive possession. The plaintiff alleges that, at some time subsequently to his adoption, he had been in possession; that, during his absence at Bombay, the defendant Ghamau obtained possession, but refused, on his return, to admit him into possession; and that hence he brought the present suit to recover the family estate.

The defendant had denied that Kondai had gone through the ceremony of adopting Ramji, the plaintiff; but eventually, on the appeal to the District Court, her pleader admitted that the evidence established the fact of the performance of the ceremony. He, however, controverted its validity, there not being any assent, by the members of the united family, to the adoption. It was admitted, at the bar before us, that Narayan himself had not given to Kondai any permission or direction to adopt.

The Subordinate Judge made a decree in favour of the plaintiff.

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The District Judge, being of opinion that the adoption was invalid by reason of the absence of the assent of Ghamau (which it was found had never been given); and relying on the *dictum* of the Court in *Rupchand Hindumal v. Rakhmabai* (1), reversed the decree of the Subordinate Judge with costs, and made a decree in favour of the defendant. The District Judge found that neither the plaintiff nor, on his behalf, his natural father had ever been in possession of the lands as owner, but that they may have occupied them as tenants of Ghamau. There was neither allegation nor evidence that the sons of Jivaji, (both of whom were living at the time of the adoption), or either of them, had assented to the adoption.

The plaintiff having made a special appeal to the High Court, and that appeal having come on for hearing before Mr. Justice Melvill and Mr. Justice Kemball, they referred it to a Full Bench with the following remarks:—“Having regard to the observations of their Lordships of the Privy Council in their judgment in the appeal of *Shri Virada Pratapa v. Shri Brozo Kishoro Patta Dev* (2) delivered 24th March, 1876, we think that the question at issue in the present case should be dealt with by a Full Bench.”

In that case the father-in-law of the adopting widow had not, nor had any member of the undivided family, to which her husband belonged, consented to the adoption made by her. That adoption was supported by the Privy Council upon an express authority in writing conferred upon her by her husband. Here, as already said, it is admitted that Narayan, the husband of the adopting widow, has not conferred upon her, either in writing or otherwise, any authority to adopt, and it is not pretended that any member of the undivided family, to which he belonged, ever assented to the adoption made by her. It is also found, as a fact by the District Judge, that Ghamau, the widow of Jivaji, never assented. Under these circumstances the learned pleader for the appellant rested the adoption on the authority of *Rakhmabai v. Radhabai* (3), where it was laid down that, in the Maratha Country, a Hindu widow may, without the permission of her hus-

(1) 8 Bcm. H. C. Rep., 114, A. C. J.

(2) L. R., 3 Ind. Apps., 154.

(3) 5 Bom. H. C. Rep., 181, A. C. J.

band and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and *bona-fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. That case, however, was not of adoption in an undivided family, and, therefore, is not in point. There were two widows, of whom the senior adopted—the junior dissenting—which latter was bound by the former's adoption⁽¹⁾. Couch, C.J., expressly distinguished the case from that of an undivided family, and based the decision on the precedence of the elder widow in acts of religion, and on the act of adoption by a widow being the performance of a religious duty. We do not feel ourselves at liberty to carry the authority of that case beyond what its facts actually warrant⁽²⁾. It was not an adoption in an undivided family and, therefore, does not necessarily rule the present case.

There has not been any text quoted to us from the books to the effect that the widow of a parcener in a Hindu undivided family may adopt without the authority of her husband or the assent of his co-parceners. The authorities in relation to the taking in adoption by a Hindu widow in this Presidency are so fully collected and discussed in *Bayabai v. Bala Venkatesh* ⁽³⁾, *Rakhmabai v. Radhabai*⁽⁴⁾, and *Narayan Babaji v. Nana Manohar*⁽⁵⁾, that it is unnecessary to set them forth here. In the last of these cases the effect of the Hindu authorities is briefly recapitulated thus ⁽⁶⁾: “ We find Manu and the Mitakshara silent as to adoption by any woman ; Vasishtha allowing adoption by a woman with the consent of her husband ; Devanda Bhatta reciting the text of Vasishtha, and, if our opinion be right, leaving that text uncontroverted and unexplained so far as it relates to a taking in adoption by a woman ⁽⁷⁾ ; Nanda Pandita reciting the same text, and admitting that a wife may, with the assent of her husband, adopt, but denying that a widow can adopt at all,

(1) West and Buhler (2nd ed.), p. 139.

(2) A petition of appeal to the Privy Council was presented in *Rakhmabai v. Radhabai*, but was not prosecuted to a hearing.

7 Bom. H. C. Rep. Appx., 1.

(4) 5 Bom. H. C. Rep., 181, A. C. J.

(5) 7 Bom. H. C. Rep., 153, A. C. J.

(6) 7 Bom. H. C. Rep., 174, A. C. J.

(7) Acc., 3 Beng. L. R., 145, A. C. J. ;

S. C., 11 Calc. W. R., 463.

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because she cannot, as he says, obtain the consent of her husband; and Nilakantha, whose authority, amongst those who have actually written on the point, stands highest here, also reciting the text of Vasishtha, and requiring the order or command of the husband to the wife, but dispensing with it in the case of the widow, and substituting for it the consent of kinsmen". A passage (1) from the Nirnaya Sindhu has been quoted to us by Mr. Mandlik which he translates thus: " ' No woman shall give or receive a son without the permission of her husband,' this (applies) during the life-time of the husband; for [otherwise] the texts of Vatsa and Vyasa, which say ' the son giving by the father or the mother is a given son', will be departed from." The reason assigned in that passage is limited to the give in only, and there is nothing to show that the passage itself is applicable to an adoption into an undivided family. A passage in the Viro Mitrodaya(2) (relating to the same text of Vasishtha), to which passage Mr. Mandlik also referred, still less aids his argument for the appellant. His translation is as follows:—

" So similarly, while the husband is alive, the wife should not, on her own authority, adopt a son not approved by him [*i. e.*, the husband]. This is the sense of the words ' without the husband's permission.' After he is dead, the permission of those alone will be necessary upon whom [the widow is] dependent. In this way the prohibition is for worldly reasons. Therefore, even though the husband died without giving permission, an adoption by the widow would not be objectionable"(3).

This passage shows that Mitra Misra, the author of the Viro Mitrodaya, insisted upon the necessity, if the husband were dead, of the assent of those upon whom the widow is dependent, and they, in the case of an undivided family, would clearly be the co-parceners from whom she obtains her maintenance. The necessity for the sanction of the husband's kindred, as existing in the Maratha School, is mentioned by Sir Thomas Strange(4) and by Mr. Colebrooke(5).

(1) Oblong ed. of Nirnaya Sindhu, lithographed at Bombay in Shake 1784; Parishchheda, III, 1st half leaf, 9, lines 3 and 4.

(2) Calc., 4th ed., l. 183, page 2; and l. 189, page 1.

(3) See also Galapchandra Sarkar's Translation, p. 116, Calc., 1879.

(4) 1 Stra. H. L., 79, 80.

(5) 2 Stra. H. L., Appx., p. 92.

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Accepting, however, the view which the cases seem to establish, viz., that the widow, where the husband dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, may adopt without the sanction of the husband, (if he have not expressly, or by implication, indicated his desire that she shall not do so), and without the sanction of his kindred, we are not (as has been previously said in this Court) (1) disposed to carry the deviation from ordinary Hindu law further than it has been already established by precedents. The only case that has been cited to us as justifying the contention of the appellant is *Gopal v. Naro* (2), which was a suit to recover possession of a fourth share of family property. It is not, however, at all clear in the report that the property was undivided: inasmuch as it appears to have been found there as a fact that Savitri, the adoptive mother of the appellant, had exclusive possession of the share in question for some time. Nothing is said by the High Court as to the property being undivided, nor is there any reference to the case of *Mt. Bheebun Mayee Debia v. Ram Kishore* (3), decided by the Privy Council in the previous year. Moreover, the Court in *Gopal v. Naro* expressly evaded the question as to whether the consent of relatives was essential to the validity of the adoption, being of opinion that at least the consent of one male relative, (which was passed), was sufficient, although another, who did not consent, was in possession of the property—a view which, if the consenting relative were not the father-in-law of the adoptive widow or the family manager (neither of which he was) and the family were undivided, would be inconsistent with the doctrine of the Privy Council in the more recent cases of *The Collector of Madura v. Moottoo Ramalinga Sathupathey* (4) and *Shri Raghunadha v. Shri Brozo Kishore* (5). Assigning to the Maratha deviation from ordinary Hindu law the limit which we have above suggested, viz., that the widow of a Hindu, dying without leaving male issue, may, if her husband were separated from his family in estate (or, in other words, when she is his heir), adopt without any express

(1) 7 Bom. H. C. Rep., Appx., xvii. (3) 10 Moore's Ind. Apps., 279.

(2). 7 Bom. H. C. Rep., Appx. p. xxiv. (4) 12 Moore's Ind. Apps., 397, 441, 443.

(5) L. R., 3 Ind. Apps. 154, 119.

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authority from him, (if he have not prohibited her from so doing, or otherwise implied his intention that she should not adopt); and without the consent of his relatives, and believing that there is not any sufficient text or precedent for conceding any wider range to that deviation, and concurring in the remarks of Melvill, J., in *Rupchand Hindumal v. Rakhmabai* (1), we feel ourselves at liberty to adopt the following passages from the judgment of the Privy Council in *Shri Raghunadha v. Shri Brozo Kishoro* in which, after approving of "the principle recognized by the Travancore case (2), viz., that the requisite authority is, in the case of an undivided family, to be sought within that family," their Lordships say: "The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint, not only in estate but in food and worship; therefore, not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly, or by implication, delegated the task of regulation. The Hindu wife, upon her marriage, passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that she must presumably find such counselors and protectors as the law makes requisite for her. There seem to be strong reasons against the conclusion that, for such a purpose as that under consideration, she can, at her will, travel out of that undivided family and obtain the authorization required from a separated and remote kinsman of her husband" (3); and again: "It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious

(1) 8 Bom. H. C. Rep., 114, 118 to 120.

(2) 5Mad. Jur., p. 53.

(3) L. R., 3 Ind. Aps., 191.

ious influences which interested advisers are too apt in India to exert over women possessed of, or capable of, exercising dominion over property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

For these reasons we concur with the District Judge in holding that the attempted adoption of the plaintiff by Kondai in this case was invalid. Kondai was not authorized by her husband to adopt, and did not hold any estate in the property or interest beyond her right to maintenance. She did not obtain the consent of the manager or other members of the undivided family to which her late husband belonged. We affirm the decree of the District Judge with costs of suit and of both appeals.

Decree affirmed.

APPELLATE CIVIL.

FULL BENCH.

*Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill,
and Mr. Justice Kembhall.*

DINKAR SITARAM PRABHU AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. GANESH SHIVRAM PRABHU (ORIGINAL PLAINTIFF),
RESPONDENT.*

July 8.

Adoption—Undivided Hindu family—Adoption by widow without the consent of her husband or his undivided co-parceners and without the authority of her husband to adopt.

A Hindu widow, who has not the estate vested in her, is not competent to adopt a son to her husband, without his authority or the consent of his co-parceners with whom he was united in estate at the time of his death.

K. and V. were two Hindu brothers. K. had a son who died in 1849 in the life-time of his father, but who was then united in interest with him (K.) K. died in 1856, leaving him surviving his two nephews, S. and P. (the sons of his brother V.), and his daughter-in-law, Y. (the widow of his predeceased son). At the time of his death, K. was united in estate with his nephews, S. and P. In 1871, Y. adopted the plaintiff as son to her husband and herself. In 1873 the plaintiff sued P. and the sons of S. (who died in the meantime) for a share in the

* Second Appeal, No. 343 of 1877.