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appellant, but of a deceased respondent. Section 368 enables the plaintiff to have the representatives of a deceased sole defendant placed on the record, so that he may continue his suit against them, but there is no section in Chapter XXI which provides for the representatives of a sole defendant who has died being placed on the record on their own request, and, therefore, section 582 can supply no such procedure in the case of the death of a sole respondent. The application should, therefore, have been refused on the ground that it was not one authorized by the Civil Procedure Code. We must, therefore, reverse the order of the Assistant Judge, and disallow the application, with costs throughout.

Decree reversed.

APPELLATE CIVIL.

August 18.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

GIRIOWA (ORIGINAL DEFENDANT), APPELLANT, *v.*
BHIMA'JI RAGHUNA'TH (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption by widow without consent of kinsmen—Adoption of a brother's son in pursuance of express authority of husband to adopt—Execution of such authority after a long time since death of husband—Agreement by widow to enjoy property for life, effect of—Acquiescence—Estoppel.

Báláji and Raghunáth were brothers and *vatandár kulkarnis* of a village in the Kaládgi District. Báláji died leaving him surviving his widow the defendant. On the death of Báláji, Raghunáth endeavoured to appropriate the whole *vatan* estate so as altogether to exclude the defendant. The defendant appealed to the Revenue authorities and Raghunáth admitted her right to a moiety of the *vatan*. Subsequently in 1856 the defendant passed a document to Raghunáth to the effect that in consideration of receiving certain property as her share, she would not trouble Raghunáth in the enjoyment by him of the rest of the *vatan*, and that she was to hold and enjoy this property for her life. The arrangement continued till 1881. In the meanwhile the defendant adopted her brother's son and made a gift to him of the property held by her under the agreement of 1856. Raghunáth having died, his son the plaintiff brought a suit against the defendant for a declaration that the adoption was invalid as also the gift to the adoptee, and that he was entitled to the property after the death of the defendant. The Court of first instance

*Second Appeal, No. 404 of 1883.

held that the husband of the defendant and the father of the plaintiff were undivided; that the alleged adoption was not proved; that it was invalid having been made without the consent of the plaintiff, and that after the death of the defendant the property in the possession of the defendant should revert to the plaintiff.

On appeal the lower Appellate Court found the fact of adoption proved, but held that the adoption was invalid, and upheld the decree of the Court of first instance as to the right of the plaintiff as reversioner, to the property in the possession of defendant. On appeal to the High Court,

Held (reversing the decrees of the lower Courts) that the document passed by the defendant to the father of the plaintiff implied a previous separation between the husband of the defendant and the father of the plaintiff. The expression that she was to hold and enjoy for life, merely described the ordinary estate of a Hindu widow and did not impose any restriction on the exercise of her powers. As a widow of a Hindu separated from his brother in worship and estate she could adopt a son which right even if she could forego she did not by the document which was a family settlement and recognized the right of defendant as that of a widow of a separated brother. The fact of separation having thus become distinct and having been acted on for about twenty-eight years the plaintiff was not at liberty to impeach it.

Held also that as the widow of Báláji separated in interest from Raghunáth the defendant was at liberty to adopt a son without the previous sanction of Raghunáth or the plaintiff. The fact that the adoptee was son of the brother of the defendant did not render the adoptee unfit for adoption as it was a case from the Southern Marátha Country.

Held further that though so long a period as twenty-five years had been allowed to pass between the date of the death of her husband and that of adoption, that circumstance did not in any way extinguish the right of the defendant to adopt under circumstances calling for adoption.

THIS was a second appeal from the decision of G. Druitt, Senior Assistant Judge of Belgaum at Kaládgi.

Two brothers Báláji and Raghunáth were the *vatandár kulkarnis* of the village of Rabinal in the Kaládgi District. Báláji died leaving him surviving his widow Giriowa the defendant. On the death of Báláji, Raghunáth appropriated the share of Báláji in the *vatan* so as to exclude the defendant. The defendant appealed to the Revenue authorities whereupon Raghunáth in 1856 admitted her right to a separate moiety of the estate, and by an agreement then made between them it was settled that each was to enjoy certain parts of the property.

Subsequently Giriowa took her brother's son in adoption and made a gift to him of the property in her possession.

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In 1881 the plaintiff who was the son of Raghunáth then deceased, sued Giriowa to obtain a declaration restraining her from wasting the property which she held under the agreement; to set aside the adoption and her gift to her adopted son and for a declaration that after the death of Giriowa the plaintiff was entitled to the property in the possession of Giriowa.

The defendant Giriowa alleged that her husband and Ragunáth the father of the plaintiff were divided in interest, that in obedience to the wish of her deceased husband, she had adopted the son of her brother, and that the Court had no power under Act X of 1876 to determine the rotation by which the *vatandárs* held the office of *kulkarni*.

The Subordinate Judge of Muddebihál in the Kaládgi District who tried the suit found that the father of the plaintiff and the husband of Giriowa were members of an undivided family and that no adoption had taken place, and he held that Giriowa as a widow of an undivided householder, could not adopt without the consent of the plaintiff, even if the fact of adoption were proved. He further held that any alienation of property in the possession of Giriowa was void as against the plaintiff.

Giriowa appealed to the Assistant Judge of Belgaum, who found the fact of adoption proved, but that the adoption was invalid, and held that Giriowa could not give away the property in her possession by gift to the adoptee as she was bound to act up to the agreement passed by her to the father of the plaintiff, and that the plaintiff was entitled to have the property back after the death of Giriowa.

Giriowa appealed to the High Court.

Ghanashám Nilkanth for the appellant.—The agreement is a clear evidence of separation. Besides this the husband of the defendant left her an express authority to adopt. Even if she had no such authority she could have adopted—*Rupchand* v. *Rakhmábái*[1]. To make such an adoption valid the consent of her kinsmen was not necessary. See West and Bühler, pp. 1000, 1003;

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

sec. 115, Mayne's Hindu Law; *Rámji* v. *Ghamau*[1]. In a divided family consent of kinsmen has been held to be not necessary on this side of India. Nor is it necessary that an authority to adopt should at once be carried out. See Mayne's Hindu Law, sec. 104.

Shámráv Vithal for respondent.—An adoption made without the consent of kinsmen is invalid—*Shri Raghunandha* v. *Shri Brojo Kishore*[2]. The family was not a divided family; and if the appellant gave away anything, the grantee could take only the life-interest of the widow in the thing given.

WEST, J.—In this case it appears that after the death of Báláji Kulkarni, husband of the defendant Giriowa, his brother Raghunáth endeavoured to appropriate the whole of the *vatan* estate. Giriowa appealed to the Revenue authorities, and then Raghunáth yielded to an assertion of her right to a separate moiety of the estate. The terms of their agreement are embodied in the document (exhibit No. 55) which was produced at the trial by the plaintiff Bhimáji, son of Raghunáth. By this agreement it is settled that on account of her share Giriowa is to enjoy certain parts of the property while Raghunáth retains his. It is further said that she is to enjoy the part specified during her life, and not to trouble Raghunáth by any further complaints. This document cannot be reasonably construed otherwise than as fully admitting Giriowa's separate right as owner on an equality, for the time at least, with Raghunáth himself; and her ownership implies a previous separation between her husband Báláji and Raghunáth. The language which sets forth that she is to hold and enjoy for life, merely describes, according to the notions of the parties, the ordinary estate of a Hindu widow; it does not impose any restriction on the exercise of her powers. As a widow she could not deal with the estate beyond her own life, save under special circumstances; but as a widow of a Hindu separated from his brother in Sacra and estate, she could adopt a son, and this right, even if she could validly resign it, she does not by exhibit 55 resign. That document being a settlement of a family dispute must, according to a recognized principle, be supported, as far as possible, by the Courts, and we think that it embodies, as a part of the compro-

(1) I. L. R., 6 Bom., 498. (2) L. R., 3 Ind. Ap., 155.

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mise arrived at, a perfectly distinct, though not express, recognition of Giriowa's right as that of a widow of a brother separated in interest from Raghunáth. The fact of the separation thus became an element of the conclusion arrived at and of the jural relation between the parties. It has been acted on for about twenty-eight years, and Raghunáth's son is not at liberty now, after so long a subsistence of a state of things resting on the agreement, to set up a right contradicting it—*The Collector of Madura* v. *Veeracamoo Ummal*(1); *Bruce* v. *Bainbridge* (2).

Giriowa, as the widow of Báláji separated in interest from Raghunáth, might adopt a son without the sanction of Raghunáth, or of his son Bhimáji, the plaintiff. Her motives are not so plainly spiteful towards her husband's family, so tainted with unconscientiousness, that the boy adopted (Pándurang) could not properly be given or taken by her. The ordinary presumption in favour of honesty and proper feeling where a duty has apparently been done must prevail. The fact that the boy Pándurang is son of the adoptive mother's brother is not relied on as unfitting him for adoption, the case being one from the Southern Marátha Country. A long period was allowed to pass (25 years or more) from the husband's death before she adopted, but this would not extinguish her power, or rather her duty, to adopt in circumstances calling for an adoption. During Raghunáth's life he had a son to continue the family. Now Bhimáji is sonless and a leper. The family, therefore, might well have become extinct had not Giriowa replenished it, as she has done, by adopting Pándurang.

The adoption thus appears in all respects above question by Bhimáji, and rejecting his claim, we reverse the decrees of the lower Courts, with all costs on the respondent.

Decrees reversed.

(1) 9 M. I. A., 446.

(2) 2 B. & B., 128.