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[463] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

CHANDRA BIN BHAU (*Original Plaintiff*), *Appellant v.* GOJARABAI (*Original Defendant*), *Respondent.** [19th March, 1890.]

Hindu law—Adoption—Widow with express authority from her husband to adopt, adoption by—Such adoption cannot divest estate vested by inheritance from a lineal heir of the husband—Adoption—Adoption by elder brother's widow after younger brother's death.

Krishnaji and his two sons, Bhau and Nana, were members of an undivided family. Bhau died first, leaving a widow. Then Krishnaji died. On his death, Nana succeeded to the family property. Nana afterwards died, leaving him surviving his widow, the defendant, Gojarabai, who then got possession of the said property. After Nana's death, however, Bhau's widow adopted the plaintiff as son to her husband, and he brought this suit against Gojarabai to recover the property from her. He alleged that Bhau in his lifetime with the concurrence of Krishnaji, had given express authority to his wife to adopt a son after his death. The Court of first instance gave the plaintiff a decree. On appeal, the District Judge rejected his claim. The plaintiff appealed to the High Court.

Held, confirming the decree of the lower Court, that the plaintiff was not by virtue of his adoption entitled to oust the defendant Gojarabai from the estate of her husband. At the time of his death, Nana was full owner as last survivor of the joint family. The property then devolved as his, and a subsequent adoption, however well authorized, to Bhau, a collateral heir of Nana, could not divest the defendant Gojarabai, who did not claim through Bhau at all.

If the question had arisen between the plaintiff and Nana, the plaintiff would have been entitled to succeed: see *Sri Raghunada* v. *Sri Brojo Kishoro* (1).

Adoption by a widow under her husband's authority has the effect of divesting an estate vested in any member of the undivided family of which the husband was himself a member. But it does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband.

This rule, however, must be supplemented by the addition that the adoption, though authorized by the husband, cannot divest the estate vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime.

[R., 20 B. 250 (257); 22 B. 416 (420); 22 B. 551 (556); 23 B. 250 (255); 23 B. 327 (330); 29 B. 410=7 Bom. L R. 436; 33 M. 228=4 Ind. Cas. 386=7 M.L.T. 236; 13 Ind. Cas. 7=22 M.L.J. 85=10 M.L.T. 463=(1911) 2 M.W.N. 539; 24 Ind. Cas. 999.]

THIS was a second appeal from a decision of W. H. Crowe, District Judge of Satara.

[464] Krishnaji and his two sons, Bhau and Nana, were members of an undivided family. Bhau died first, leaving a widow, to whom he had in his lifetime given authority to adopt a son. Then Krishnaji, the father, died and, lastly, the brother Nana died, leaving his widow Gojarabai, the defendant, who got possession of the family property on her husband's death. Subsequently, however, to Nana's death, Bhau's widow adopted the plaintiff, who now, as such adopted son, brought this suit to recover the property from the defendant, alleging that in his lifetime Bhau had given his widow express authority to adopt a son, and that Krishnaji had consented to her being given the power.

* Second Appeal, No. 760 of 1888.

(1) 1 M. 69 (83)=3 I. A. 154 (193).

The defendant denied that Bhau had any right to the property, or that he or Krishnaji had given any authority to Bhau's widow to adopt. She contended that her husband Nana being the last male survivor of the family, the property in dispute had vested in him, and on his death had vested in her as the heir of her husband.

The Subordinate Judge, who tried the suit, awarded the plaintiff's claim.

The defendant appealed to the District Judge, who reversed the lower Court's decree.

The plaintiff preferred a second appeal to the High Court.

Ghanashám Niklanth Nadkarni, for the appellant.—The lower appellate Court was wrong in holding that the adoption could not divest the estate of the respondent. The widow here was expressly authorized by her husband to adopt. Such an adoption displaces the vested interests of the kinsmen: see West and Buhler, 986, (3rd ed.). The capacity of a person to adopt is not affected by the existence of his brothers or other kinsmen, nor does their disapproval invalidate the adoption: see West and Buhler, 954, 955, (3rd ed.); Mayne's Hindu Law, s. 171, (4th ed.). The power of the widow to adopt is subject to one limitation, *viz.*, she cannot adopt where she is expressly prohibited by her husband. The case of *Ramrav* v. *Ganpatrav* (Reg. App. 18 of 1879) is a distinct authority for the divesting effect of adoption where such adoption is effected under an express authority from the husband.

[465] *Mahadev Chimnaji Apte* for the respondent:—In the present case the property had vested in Nana, who became the sole owner of it, and after his death the defendant succeeded to it as his heir. It was then no longer an undivided property. The plaintiff's adoption could only be held valid if the defendant consented to it, and that consent she never gave. The case of *Sri Raghunadha* v. *Sri Brojo Kishoro* (1) no doubt lays down that an adoption under an express authority from a husband divests the property from an undivided co-parcener, but here the property descended by inheritance, and was no longer undivided property in the hands of the defendant. The lower Court rightly relied on the case of *Bhoobunmoyee* v. *Ram Kishore* (2). The plaintiff by virtue of his adoption, therefore, cannot oust the defendant.

JUDGMENT.

The judgment of the Court (SARGENT, C. J., and TELANG J.), was delivered by

TELANG, J.—The facts of this case are briefly as follows:—One Krishnaji and his two sons Bhau and Nana were members of an undivided Hindu family. Bhau died first, leaving a widow, to whom, as found by both the Courts below, he had during his lifetime given authority to adopt a son. It is alleged that such authority was given with the concurrence of the father Krishnaji; but though the Subordinate Judge held this allegation proved, the District Judge has recorded no finding upon it. Subsequently the father died, and then the brother Nana, leaving him surviving the defendant Gojarabai. Until the death of Nana no adoption had been made by Bhau's widow, but she adopted the plaintiff subsequently and the plaintiff then sued Gojarabai to recover the whole of the family property. The Subordinate Judge gave him a decree for the whole property; the District Judge has rejected his claim altogether.

(1) 1 M. 69 (83)=3 I. A. 154 (193). (2) 10 M. I. A. 279 (307—311).

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The District Judge, in coming to the conclusion at which he arrived, relied on the cases of *Rupchand* v. *Rakhmabai* (1) and *Bhoobunmoyee* v. *Ram Kishore* (2). Both these cases, however, [466] appear to us, on the facts, to be clearly distinguishable from the case before us. In *Rupchand* v. *Rakhmabai* there was no allegation of the husband having authorized the widow to make the adoption. It is obvious that that circumstance constitutes an element of great importance in the decision of the case. There can be no doubt that the husband himself might have made an adoption, to which the co-parceners, even including the father himself, could have taken no objection. (See West and Buhler, 954-5 (3rd ed.)). And the widow acting under the husband's authority is merely acting as an instrument (Mayne's Hindu Law, plac. 105 (4th ed.) and *per* Sir J. Colville in *Raja Vellanki Venkata* v. *Venkat Rama* (3). Her act, so authorized, is hardly open to the observations of the Privy Council in *Sri Raghunadha* v. *Sri Brojo Kishoro* (4), adopted by a Full Bench of this Court in *Ramji* v. *Ghamau* (5). And, therefore, it may well be that where the existence of the husband's authority is proved, the rule in *Rupchand* v. *Rakhmabai* should not be applicable. "The principle ..... that a widow cannot adopt so as to defeat a vested interest is not to be found in that form in the Hindu authorities" (West and Buhler, 982). And although it must be treated as a principle too generally received to be now departed from, still such a vested interest has not "yet been held to involve a right to defeat an express authority to adopt given by the deceased owner to his widow" (West and Buhler, 1007). Besides the older authorities at 2 Macn. H. L. 180 (3rd ed.), (*Govind Soondurree Debia* v. *Juggodumba Debia* (6), which are referred to at West and Buhler, pp. 960, 964, 986, (3rd ed.)) but which are not, perhaps, conclusive on the point, the case of *Sri Raghunadha* v. *Sri Brojo Kishoro* (4) seems distinctly to lay down a contrary principle. There the plaintiff, who was adopted by the widow of Adikonda, was allowed to recover from the defendant, an undivided brother of Adikonda, all the property to which the brother had on Adikonda's death succeeded, and which he had [467] taken possession of by suit filed against the adopting mother before the adoption. That seems to be a distinct authority that an adoption under the husband's authority may divest the estate vested in an undivided co-parcener of the husband. Mr. Apte, no doubt, endeavoured to distinguish that case, on the ground that the property there in dispute was of the nature of property held in severalty. And he argued, on the opinion of Holloway, J., to that effect, that the estate there divested by the adoption was that of the adopting widow, not the undivided brother. This was apparently also the view taken by the Calcutta High Court in *Kally Prosonno Ghose* v. *Gocool Chunder Mitter* (7). But not only is no such point made in the judgment of the Privy Council, they actually exclude it from their *ratio decidendi* by saying (p. 191) that it is unnecessary to consider the correctness of the view thrown out by Mr. Justice Holloway in regard to it; while they expressly proceed on the ground (pp. 170—193), that but for the adoption the property would unquestionably have gone to the defendant. That case, therefore, is a clear authority for the proposition (see p. 188 of the Report) that if the question here had arisen between the plaintiff and Nana, the plaintiff would have been entitled to succeed.

(1) 8 B. H. C. R. A. C. J. 114. (2) 10 M.I. A. 279.
(3) 1 M. 174 (183)=4 I. A. 1 (6). (4) 1 M. 69 (83)=3 I. A. 154 (193).
(5) 6 B. 498 (504, 505). (6) 15 W.R. P.C. 5. (7) 2 C. 295 (309).

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But Mr. Apte has relied on *Bhoobunmoyee's case* mentioned by the District Judge as an authority for the opposite view. It is to be remarked, however, at the outset that *Bhoobunmoyee's case* was relied on in the argument in the case of *Sri Raghunadha* v. *Sri Brojo Kishoro*, but the judgment does not deal with it, as one would expect it to have been dealt with, if the same point had been involved in the two cases. In *Bhoobunmoyee's case* a man having a son alive died after giving his wife authority to adopt in the event of such son dying. That son came to full age and died, leaving a widow upon whom the inheritance devolved. The Privy Council held, under those circumstances, that the authority to adopt was not then capable of exercise. They said (at p. 310) "in this case Bhavani Kishore had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father. [468] He had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property. On the death of Bhavani Kishore his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers if he had had any. She took a vested estate, as his widow, in the whole of his property. It would be singular, if a brother of Bhavani Kishore made such by adoption could take from his widow the whole of his property when a natural born brother could have taken no part." The reasons thus stated may be applicable to cases where the person giving the authority to adopt leaves a lineal heir surviving him, who, by his very existence, prevents the authority to adopt being legally acted upon during his life, and upon his death becomes a fresh starting point for devolution; but they must be held to be inapplicable in such a case as the present, where the natural born legitimate son of Bhau (and, according to *Brojo Kishoro's case*, the adopted son) certainly would, during Nana's lifetime, have prevented him from taking Bhau's joint share by survivorship, and would on Nana's death without a son have succeeded by survivorship to the whole estate.

Bhoobunmoyee's case was explained in *Raja Vellanki Venkata* v. *Venkat Rama* (1). The judgment of the Privy Council was there delivered by Sir J. Colville, who was also the mouthpiece of the Privy Council in the case of *Sri Raghunadha* v. *Sri Brojo Kishoro* (2), decided only a few months before. Yet the judgment makes no reference to the earlier case, although the arguments of counsel alluded to it. *Bhoobunmoyee's case* was again explained and followed in *Pudma Coomari Debi* v. *The Court of Wards* (3), and the principle deduced from it again applied in *Thayammal* v. *Venkatrama* (4) and *Tarachurn Chatterji* v. *Soreschunder Mukerji* (5) by the same tribunal. Yet neither in the judgments nor in the [469] arguments is any reference made to the case of *Sri Raghunadha* v. *Sri Brojo Kishoro* (2). We think it must be taken that the Judicial Committee itself does not consider that decision inconsistent with the views enforced by it in the catena of cases referred to. And we think there is no real inconsistency, if the explanation above suggested is adopted, and the rule is taken to be this—that adoption by a widow under her husband's authority has the effect of divesting an estate vested in any

(1) 1 M. 174=4 I. A. 1. (2) 1 M. 69=3 I. A. 154. (3) 8 C. 302=8 I. A. 229.
(4) 14 I. A. 67. (5) 17 C. 122.

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member of the undivided family of which the husband was himself a member; but it does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband. The grant of a *rule nisi* for a review of judgment in the case of *Ramrav* v. *Ganpatrav*, referred to by Mr. Ghanasham—Regular Appeal No. 18 of 1879—assuming it to have involved a decision such as he indicated, would be fully justified by the rule above laid down. The question there was between the adopted son of Hanmantrav Rajguru (alleged to have been adopted by Hanmantrav's widow under his authority) and Hanmantrav's undivided brother Ganpatrav. That case is distinctly covered by the authority of *Sri Raghunadha* v. *Sri Brojo Kishoro* (1).

The rule as above stated—if in its latter part not extended beyond the limits expressed—would seem to be decisive of this case in favour of the plaintiff. But it appears to us that the Privy Council has also laid down another principle which does further extend the second branch of the rule, and which we must now proceed to consider. In *Bhubaneshwari* v. *Nilkomul* (2) it was laid down that "an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral." In that case, there were three brothers, Rammohan, Shibnath and Kali. Of these Shibnath died last, in 1861, having given authority to his wife to adopt after his death. Rammohan had died before, leaving a widow, who died in 1867. No adoption having been made at that time, defendant Nilkomul was entitled to succeed as heir to Rammohan and did in fact succeed. The plaintiff claimed by virtue of his subsequent adoption to Shibnath, and the Privy Council appears to have held—independently [470] of other facts existing in that case, and which were also relied on by their Lordships—that an adoption to Shibnath could not be allowed to divest the estate of Nilkomul as heir of Rammohan.

The rule deduced from *Bhoobunmoyee's case* and the other cases in the Privy Council above referred to must then be supplemented by this addition, that the adoption, though authorised by the husband, cannot divest the estate which has already vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime. The rule, as thus stated, would disentitle the plaintiff here from succeeding. His right, certainly in such a case as the present, commences with his adoption—see *Bamundoss Mookerjea* v. *Mussamut Tarinee* (3). That adoption does not take place till after the death of Nana, the husband of the defendant Gojarabai. At the time of his death, Nana was full owner as last survivor of the joint family. The property then devolved as his, and a subsequent adoption, however well authorised, to Bhau, a collateral relation of Nana, cannot divest the defendant Gojarabai, who claims under Nana and does not claim through Bhau at all.

The only question, then, is whether *Bhubaneswari* v. *Nilkomul* (4) is an authority in Western India. It is said in West and Buhler's Digest (see p. 994(3rd ed.)) that "within a group of united brethren, the widow of one may adopt so as to divest an estate wholly or in part." And, again, it is said (p. 994) that "an adoption made by the widow of a separated collateral after the estste has passed to another collateral will not serve to create for the adopted son an estate in possession in which his father had no more than a contingent interest. When it has passed to a collateral

(1) 1 M. 69=3 I.A. 154. (2) 12 I. A. 137 (141)=12 C. 18 (23).
(3) 7 M. I. A. 169. See also W. & B. p. 983. (4) 12. I.A. 137.

separated in interest it has passed for good as against a collateral who, when it passed, had no share or interest. There is in the last case a break in the succession as contrasted with the ideal continuity of interest amongst all the members of a united family. A right in possession is kept alive by the widow's constant capacity to adopt, so as to blend an additional element retrospectively with the united family, but a mere [471] possibility once extinguished cannot be revived. Thus adoption in a separated branch cannot divest the estate which the law gave to the then nearest collateral, and which has passed *unshared* to him who has it." According to this view the decision of the Privy Council in the case cited must be limited, at least in Western India, to the case of a divided family. And in West and Buhler, p. 1195, the case is expressly treated as illustrating the doctrine that "the estate which has once passed away to a *separated collateral* cannot be affected even in part by a subsequent adoption." The reports of the case, however, both in the High Court and before the Privy Council, fail to show anything as to the status of the family, the succession of Chandmoni to her husband Rammohan being not conclusive on that point by Bengal law, though by the Mitakshara law it would conclusively establish the status of division. On the other hand, Mayne's Hindu Law, plac. 175—9, (4th ed.), appears to lay down the proposition broadly without reference to the status of the family, in the same way as it is laid down in the judgment of the Privy Council. It seems to us, however, unnecessary to decide that question in the present case. When the inheritance devolved from Nana upon his widow Gojarabai, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated householder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption. And, therefore, even assuming that the view which is expressed in West and Buhler's Digest, and which is there supported by very cogent reasons, can be upheld, not withstanding the decision in *Bhubaneswari* v. *Nilkomul* (1), the case now before the Court does not fall within the limits stated in the Digest.

We may further remark that a conclusion opposite to that here expressed would certainly lead to much inconvenience and embarrassment. If the adoption of a son, like that of the plaintiff, can be allowed to divest Gojarabai, questions may arise as to the right of Gojarabai herself hereafter to make an adoption without the [472] leave of the plaintiff, and as to the rights of such an adopted son. Again, if the adoption of the plaintiff had been made during the lifetime of Nana, Nana might have divided the estate with the adopted son, and thus enabled his widow after him to take a moiety thereof. This adoption after his death would have the effect of depriving Gojarabai of the whole estate, and reducing her claim to one for maintenance only. Such difficulties as these would arise if the adoption of the plaintiff were upheld as against Gojarabai; and although the possibility of such difficulties arising is not to prevent the rule of law from being enforced, it is entitled to weight in the consideration of the question whether the rule does really extend as far as has now been indicated. We find no authority, either of text books or decided cases, going to the full extent necessary for sanctioning the claim of the plaintiff. On the other hand, we do find some

(1) 12 I. A. 137.

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decided cases, at least, pointing the other way; we find also certain principles laid down by the Privy Council which militate against the plaintiff; and we have the general tendency of the Courts, from the Privy Council downwards, in favour of limiting the exercise of the power of adoption by women after the death of their husbands. Taking all these considerations together, we have come to the conclusion that the plaintiff is not by virtue of his adoption entitled to oust the defendant Gojarabai from the estate of her husband, and we must, therefore, dismiss the appeal, and confirm the decree of the Court below with costs.

Decree confirmed.

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Before Mr. Justice Birdwood and Mr. Justice Jardine.

HERAMBDEV DHARNIDHARDEV (*Original Defendant*), *Appellant* *v.* KASHINATH BHASKAR (*Original Plaintiff*), *Respondent.**

[31st March, 1890.]

Registration—Endorsement on a sanad returning the sanad to the grantor—Evidence —Admissibility—Evidence Act (I of 1872), s. 92, Proviso 4.

The plaintiff sought to attach a certain *hak* as belonging to his judgment-debtor K. The defendant, who was the original grantor of the *hak*, pleaded a re-grant of the *hak* to himself. In support of this plea, the defendant produced from his [473] possession the original *sanad* bearing the following endorsement by K.,—"You have passed me a receipt for the *sanad*. I have, accordingly, given you the ownership of the *sanad*. Therefore over the said *sanad* I have no right or title." The defendant offered to put in this endorsement, and also tendered the evidence of K.'s brother. This evidence was rejected by the Court, on the ground that the endorsement, which had the effect of extinguishing the grant, was not registered.

Held, that the endorsement did not require registration. It did not itself rescind the grant to K. nor constitute a re-grant to the defendant. It was simply an endorsement returning the *sanad* to the defendant, and, therefore, passed no interest in any property.

Held, further, that the alleged re-grant was a transaction entirely distinct from the original grant, and, therefore, not one falling under proviso 4 to s. 92 of the Evidence Act (I of 1872). The defendant was at liberty to adduce evidence to prove this transaction.

[**Appr.**, U. B. R. (1902) 4th. Qr. Evidence 92; **R.**, 129 P. W. R. 1908; **D.**, 24 B. 615.]

APPEAL from the decision of E. T. Candy, Agent for Sardars in the Deccan, at Poona, in original suit No. 2 of 1888.

The facts of this case were as follows:—In 1867 the defendant granted by a *sanad* a certain *sirdeshmukhi hak* to Kakaji Ganesh and his heirs in perpetuity.

In 1881 the defendant alleged that the grant was rescinded and the *sanad* returned by the grantee with an endorsement to the following effect:—"You have passed me a receipt for the said *sanad*. In accordance with that receipt, I have given you the ownership of the *sanad*. Therefore over the said *sanad* I have no right or title. This I have written, 2nd June, 1881."

* Appeal No. 10 of 1889.