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Before Mr. Justice Birdwood and Mr. Justice Candy.

VITHOBA AND ANOTHER (*Original Defendants*), *Appellants v.* BAPU (*Original Plaintiff*), *Respondent.** [2nd September, 1890.]

Hindu law—Adoption—Adoption in a united family—Consent of the head of the family sufficient.

The widow of a deceased co-parcener in a joint Hindu family can adopt with the sole assent of her father-in-law if he is the head of the family and natural guardian of the widow, whatever may be her motives, or the effect of the adoption on the interests of the undivided kinsmen.

B. and his two sons, N. and V., were members of a joint Hindu family.

In 1883 B. and N. commenced to live separately from V., but the family estate was not divided.

In 1886 N. died, leaving a widow without male issue.

In 1887 N.'s widow adopted the plaintiff with the consent of her father-in-law B. with whom she was living. B. died shortly after the adoption. Thereupon the plaintiff, as adopted son, sued V., to recover a moiety of the family estate.

The defence to this suit was that the plaintiff's adoption was invalid, on the ground that the adoption had not been made with the assent of all the co-parceners.

Held, that the adoption was valid. As B., who was the head of the family and natural guardian of the adoptive mother, had given his assent to the adoption, the consent of other co-parceners was not necessary.

[R., 15 B. 565 (576); 22 B. 199 (204); 22 B. 206 (211); 22 B. 558 (572); 23 B. 250 (255); 23 B. 789 (798); 29 B. 51 (65); 26 M. 143 (152)=12 M.L.T. 197; D., 29 B. 410=7 Bom. L.R. 438.]

THIS was an appeal from the decision of Rav Bahadur Anandrao Krishnarao Kothare, First Class Subordinate Judge of Dhulia, in suit No. 2953 of 1887.

This was a suit for a declaration of plaintiff's title as the adopted son of one Nana Babu and for partition of certain property in the defendants' possession. The defendants were the brother and widow of the said Nana Babu. The two brothers (Nana and defendant Vithoba) were members of a joint and undivided Hindu family, and until 1883 both lived with their father Babu. In that year Vithoba began to live separately, but the ancestral estate was not divided. The other two remained together.

In 1886 Nana died, leaving a widow, the second defendant Lakshmi, but without male issue.

On Nana's death, Vithoba took forcible possession of the property in the hands of Babu and Lakshmi. Thereupon Babu [111] instituted criminal proceedings against Vithoba, and regained possession through the Criminal Courts.

On the 7th January, 1887, pending these proceedings, Lakshmi adopted the plaintiff, with the consent of her father-in-law Babu.

In March, 1887, Babu died. Shortly afterwards Vithoba gained Lakshmi over to his side, and they both turned the plaintiff out of the house, and entered into an agreement prejudicial to his rights as adopted son. This led to the present suit.

* Appeal No. 4 of 1889.

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The defendants denied the plaintiff's adoption and disputed its validity, on the ground that Lakshmi, the adoptive mother, was not competent to adopt without the consent of all the co-parceners.

The Subordinate Judge found the plaintiff's adoption proved, and held that Lakshmi having obtained the consent of her father-in-law, who was the head of the family, the adoption was valid. He, therefore, decreed the plaintiff's claim, and ordered the joint property in the possession of the defendants to be divided, half and half, between the plaintiff and defendant No. 1.

Against this decision the defendants appealed to the High Court.

Shantaram Narayan, for appellant.—The question in this case is whether the plaintiff's adoption, made without the consent of all the co-parceners, is valid. It is alleged that the widow obtained the consent of her father-in-law to the adoption, but this allegation is not proved. Even if it be held to be proved, the question remains whether his sole assent would be sufficient. I submit it is not. He was old and infirm. He was not, in fact, the manager of the family. He could not, therefore, give his assent to the adoption on behalf of the whole family. Moreover, on Nana's death the estate had passed by right of survivorship to his father and brother.

The effect of the present adoption would be to divest the estate which had already vested in both. The consent of both was, therefore, necessary, —*Rupchand Hindumal* v. *Rakhmabai* (1); *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (2). The last case shows that the assent of every co-parcener whose rights [112] would be injuriously affected by the adoption, is necessary—*Chandra* v. *Gojarabai* (3); *Keshav Ramkrishna* v. *Govind Ganesh* (4); West and Bübler, 3rd ed., p. 1004. The observations of the Privy Council in *The Collector of Madura* v. *Mootoo Ramalinga Sathuputhey* (5) about the father's assent to the adoption being alone sufficient are *obiter dicta*, and ought not to override a Full Bench ruling of this Court.

The Privy Council case came from the Dravida country, where the consent of the husband's *sapindas* is necessary to show merely the *bona fides* of the adoption. In this Presidency the consent of all the *sapindas* in a united family is held necessary, because the adoption has the effect of divesting an estate which had already vested in them.

Branson (with him *Dhondo Shamrao Garud*), for respondent.—We contend that Babu, the father-in-law, had the power to sanction the adoption. He was both *de facto* and *de jure* manager of the family. As guardian of the widow and as head of the family he could assent and his assent is sufficient. The *Ramnad case* (5) is in point. The observations of the Privy Council in that case are adopted in West and Bühler's Digest (3rd ed.), at p. 1001. The Full Bench case of *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (2) does not show that our Court dissents from the Privy Council on this point. The case of *Rupchand Hindumal* v. *Rakhmabai* (1) has no application to the present case. There the co-parceners were all brothers. In *Gopal Shridhar Patvardhan* v. *Naro Vinayak Patvardhan* (6) it is held that the consent of all the

(1) 8 B.H.C. A.C. 114. (2) 6 B. 505. (3) 14 B. 463.
(4) 9 B. 94. (5) 12 M.I.A. 397 (441). (6) 7 B.H.C. Appx. 24.

co-parceners is not necessary—West and Bühler, pp. 982 and 986 (3rd ed.).

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Shantaram Narayan in reply.—The doctrine laid down in *Gopal* v. *Naro* is now repudiated. That case is practically overruled by a long course of decisions of this Court.

JUDGMENT.

BIRDWOOD, J.—The two principal questions for consideration in this appeal are (1) whether the plaintiff was adopted by defendant [113] No. 2, the widow of Nana Babu, with the consent of her father-in-law, Babu, who was a co-parcener with Nana and with Nana's brother, Vithoba, defendant No. 1; and (2) whether, without Vithoba's consent, the adoption was valid.

The evidence shows that the ceremony of adoption was performed by defendant No. 2 in the family house, and that Babu was present in the house, or, at all events, in the verandah of the house, and that many respectable persons were present as guests on the occasion. The ceremony was performed with due publicity; but evidence has been adduced to show that Babu, who was a very old man at the time and died about two months afterwards, was not really a consenting party. Some of the witnesses who say this do not, however, say that any express objection was actually made by Babu. It is not shown that he was incapable, from weakness of health, of giving his consent. He was able apparently to carry on some business after the adoption took place. The Subordinate Judge points out that the verandah of the house was the place where the guests were assembled, and the proper place, therefore, for the host. Inside the house were the women and the priests, reciting hymns. The reasons set forth in the Subordinate Judge's judgment seem to be good reasons for holding that Babu gave his consent to the adoption; and there are no sufficient grounds for setting aside his decision on that point.

The question, then, is, whether Babu's consent was sufficient. The case is one where the consent of the father-in-law of the widow could not be dispensed with, as her deceased husband was not a separated member of a Hindu family. In *Ramji* v. *Ghamau* (1) it was held by a Full Bench of this Court that "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." In that case, no consent by the head of the family was relied on. The widow who made the adoption "was not authorized by her husband to adopt, and did not hold any estate in the property or interest beyond [114] 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," and the adoption was, therefore, disallowed. It would appear, from the remarks at pp. 502 and 504 of the Report, that the reason why the widow should seek for authorization of the adoption within her husband's family and not from separated and remote kinsmen of her husband is based on the consideration that the widow is dependent on the co-parceners for maintenance. But though she is dependent on all the co-parceners and though the introduction of a new member into the co-parcenery would necessarily affect the interests of all existing members,

(1) 6 B. 498 (505).

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the Full Bench seems, by adopting the passages from the judgment in *Sri Raghunadha* v. *Sri Brojo Kishore* (1), set out at p. 504 of the Report, to have recognized as applicable to an adoption made by the widow of an undivided member of a Hindu family, the principle that "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." If, therefore, the widow's father-in-law, Babu, can be held to have been the managing member of the family, it would apparently be consistent with the ruling in *Ramji* v. *Ghamau* (2) to hold that his consent to the plaintiff's adoption was sufficient to render it valid. As the head of the family he would presumably have been the manager; and there is nothing to show that he had been deposed or was absolutely disqualified. The Subordinate Judge remarks, however, that, being an old man, Babu could not strictly be said to be the manager; and it may be that, as he and Vithoba were not on good terms, each managed his own affairs.

But even if that was so, Babu would apparently, as head of the family, have had the requisite authority to consent to the adoption. The doctrine of the Privy Council, as laid down in *The Collector of Madura* v. *Mootoo Ramalinga Sathuputhey* (3), is to the effect that the father of the deceased husband ought to give his consent in his character of the head of the family and the [115] natural guardian of the widow. That case was decided according to the law of the Dravida country, and related to an adoption in a divided family; and the law as regards an adoption by a widow whose husband was separate is not uniform in all parts of India. (See *Bayabni* v. *Bala Venkatesh Ramakant* (4) and West and Bühler Hindu law, 3rd ed., p. 959.) But the Judicial Committee discussed also in that case the question as to the assent necessary to validate an adoption in an undivided family; and from the manner in which their expression of opinion is referred to in the judgment of the late Chief Justice in *Ramji* v. *Ghamau* (2) it would appear that the doctrine affirmed by the Judicial Committee was not regarded by the Full Bench as inapplicable to undivided families in this Presidency. The following passage occurs in the judgment of the Privy Council:—"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 Hindu 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 disputed 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 authorize 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 co-parcener against their will" (3). As, in the present case, the father was alive and assented to the adoption, which is not proved to have been prohibited by the deceased husband, it must be held to be valid.

(1) 3 I.A. 154 (193) = 1 M. 69 (81).
(2) 6 B. 498 (505).
(3) 12 M. I. A. 397 (441, 442).
(4) 7 B.H.C.R. App. i (xvii).

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The question now remaining for consideration has reference to the ornaments to be divided between the parties. We see no reason to interfere with the Subordinate Judge's decree so far as it awards to the plaintiff one-half of the ornaments found to be [116] in the possession of defendant No. 1, or one-half of their value. We think, however, that the plaintiff's cross-objection is good as to some of the ornaments redeemed by defendant No. 1 from Vithoba Malhari. The value of these ornaments can be deduced from the information contained in Ex. 108 which is proved by Vithoba Malhari (No. 104). The plaintiff having paid the stamp duty on his memo. of cross-objection in respect of the value of one-half of the ornaments included in Ex. No. 108, we amend the Subordinate Judge's decree by directing that, in the list prepared by him, one *gof*, worth Rs. 440, and silver ornaments, worth Rs. 413-12, be substituted for one *gof*, worth Rs. 250, and silver ornaments, worth Rs. 275-12, and that one *kara*, worth Rs. 200, be added to the list. The value of the ornaments of which a partition is awarded will, therefore, be increased by Rs. 1,053-12 *minus* Rs. 525-12=Rs. 528 ; the half value to be paid by the defendant No. 1, if the ornaments are not forthcoming, being Rs. 264. The plaintiff having been allowed to sue as a pauper, the Court will calculate the amount of Court fees which would have been paid by him if he had not been permitted to sue as a pauper. Such amount will be a first charge on the subject-matter of the suit. The defendant Vithoba to pay the costs of this appeal. The costs of the plaintiff's cross-objection to be paid in proportion.

CANDY, J.—The parties in the case, residents of Khandesh, are Lingayet Wanis by caste and are, therefore, Sudras. Babu had three sons, Vithoba, Nana and Rama. Rama was separated in estate from his father and brothers. About 1883 Babu and his son Nana commenced to live separately from Vithoba, managing the properties in their possession, while Vithoba managed the property in his possession ; but there was no partition of estate. On the 10th December, 1886, Nana, who with his wife Lakshmi was living with this father Babu, died. Nana left two daughters, but no son.

On the 5th January, 1887, Vithoba made an application to the District Court, under Act XIX of 1841, making Lakshmi, the widow of Nana, opponent, and asserting that his father Babu was in his dotage, and that there was danger of the family property being wasted. Two days afterwards, on the 7th January, [117] 1887, a ceremony of adoption was performed, by which Lakshmi purported to adopt Bapu, the son of her husband's divided brother Rama. Mr. Shantaram, for Vithoba, does not deny that the ceremony of adoption was performed, and it is admitted that the person taken in adoption was suitable according to the Shastras ; but it is contended that the father, Babu, did not consent to the adoption. It is, however, clear from the evidence that he was present, and certainly did not actively dissent. If he had forbidden the adoption, it would not have been performed. It must be taken, therefore, that he assented.

In reply to Vithoba's application under Act XIX of 1841 Lakshmi pleaded the adoption of Bapu, which had just taken place, and which she asserted had been performed at the request of her father-in-law, Babu. The District Judge, for reasons which do not affect the present case, refused to make any order in Vithoba's favour, under Act XIX of 1841. The relations between the parties still continued strained. On the 3rd February, 1887, Babu and Lakshmibai brought a possessory suit in the

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Mámlatdar's Court against Vithoba regarding certain immoveable property from which they said Vithoba had wrongly dispossessed them on 13th December, 1886, three days after Nana's death. There was also a criminal complaint by Lakshmi against Vithoba for assault. But the aspect of affairs was soon changed. On 15th March, 1887, Babu died. Lakshmi was won over by Vithoba. The possessory suit was compromised. On 23rd April, 1887, Lakshmi passed a release to Vithoba, and agreed to accept maintenance from him. In a suit brought by one Vithaldas against herself for a debt due from Nana, Lakshmi replied (July, 1887) that Vithoba should be made a party, and she repudiated the idea that she had adopted her husband's nephew, Bapu. She had, indeed, turned him out of her house on Babu's death, if not before. Accordingly, in August, 1887, Bapu applied to bring the present suit in *forma pauperis* to obtain possession of a moiety of the family estate. The plaint was eventually admitted in December, 1887. Lakshmi continues to be on Vithoba's side; but the Subordinate Judge has utterly discredited her, and there is nothing to show that the Suberdinate Judge has not rightly appreciated the facts. But Mr. Shantaram, for Vithoba, has contended that, even **[118]** admitting that Babu may be taken to have assented to the adoption of Bapu by Lakshmi, still this was not such an assent as would validate the adoption.

The development in the Bombay Presidency of the law regarding the right of a widow, not having the permission of her husband, to adopt a son to him may be easily traced. The earlier authorities were collected by Westropp, J., in 1866 in *Bayabai* v. *Bala Venkatesh Ramakant* (1). That decision was not reported till 1870, and the only point decided by the Court was that where fraud or cajolery was practised upon the widow to induce her to adopt, or where there has been suppression or concealment of facts from her, the Court will refuse to uphold the adoption. But Westropp, J., took the opportunity to discuss all the authorities regarding the doctrine as to the right of a Hindu widow to adopt of her own accord, which, he said, "may perhaps be sustainable in this Presidency or in those parts of it in which the Maratha school of law is in the ascendant and in Southern India." He was, however, careful not to give a decided opinion on the question whether a Hindu widow, without express authority from her husband, could in this Presidency make a valid adoption. Apparently his inclination was to answer this question in the negative. It is to be noticed that in the above case there was no mention of the question whether the husband of the widow was a member of a divided or undivided family.

The case of *Gopal Shridhar Patvardhan* v. *Naro Vinayak Patvardhan* (2), to which allusion was mode in the above case, does not require lengthy consideration. The Court expressly evaded the question as to whether the consent of the relatives was essential to the validity of the adoption, and the report of the case is so meagre that it is not at all clear that the property was undivided (see *Ramji* v. *Ghamau* (3), while another authority thinks that the property was "apparently undivided," West and Bhûler, p. 1004, 3rd ed.)

Then we come to the decision of the Privy Council in the *Ramnad case*, judgment in which was delivered in May 1868 (4). **[119]** Their

(1) 7 B.H.C.R. Appx. i (iv).
(2) 7 B.H.C.R. Appx. xxiv.
(3) 6 B. 498 (502).
(4) 12 M.I.A. 397 (441, 442).

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Lordships after reviewing the authorities, and coming to the conclusion that in the Dravada country a Hindu widow could without express authority from her husband adopt a son to him then dealt with the question, who are the kinsmen whose assent will supply the want of positive authority from the deceased husband. They said:—

"Where the husband's family is in the normal condition of a Hindu 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 disputed 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 natural guardian of the widow, be competent by his sole assent to authorize 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 co-parcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to [120] show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

In August 1868, shortly after the decision of the Privy Council was given in the *Ramnad case* (1), judgment was given by Couch, C. J., in the case of *Rakhmabai* v. *Radhabai* (2). The Chief Justice adverted to the judgment of the Privy Council just delivered in the *Ramnad case*, and dwelt on the importance attached by the Committee to the opinions of the Shastris. He said:—

"Upon the review which we have made of the authorities applicable in this part of India, we are of opinion that in the Maratha country, wherein the property in question in this suit is situate, a Hindu widow may, without the permission of her husband, 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."

Subsequently, in October 1870, Westropp, C. J., discussed the question in *Narayan Babaji* v. *Nana Manohar* (3). The point actually decided in

(1) 12 M.I.A. 397 (441, 442). (2) 5 B.H.C.R. A.C.J. 181 (191).
(3) 7 B.H.C.R. (A.C.J.) 153 (171, 172).

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that case was that the adoption was invalid, because the husband was alive at the time. But the learned Chief Justice went into the question as to the right of a widow without the permission of her husband to adopt a son to him repeating much of his judgment in *Bayabai* v. *Bala Venkatesh Ramakanta* (1). He referred to the "now apparently (though not without considerable opposition) judicially established usage, as well as juridically established doctrine, among the Marathas," which permits the widow, even without the order or command of her husband to adopt for him, provided he has done nothing to destroy the implication of his consent. He also alluded to the decision in *Rakhmabai* v. *Radhabai* (2) " which lays down that, in the Maratha country, even the consent of the kinsmen of the husband is not essential to adoption by a widow, provided the act of adoption is done in the proper and *bona fide* performance [121] of a religious duty and neither capriciously nor from a corrupt motive. How this may be, it is quite unnecessary for us now to express any opinion."

The next authority is the judgment of Melvill, J., in August, 1871, in *Rupchand Hindumal* v. *Rakhmabai* (3). That was a case where there were two undivided brothers, A and S. A died, so the whole estate vested in S. Then S died, and the whole estate vested in Rakhmabai, the widow of S. A's widow then adopted a son, and the opinion was expressed, (it was not necessary to the decision), that an adoption by a widow, which has the effect of divesting an estate already vested in a person other than the widow, is not a valid adoption, if made without the consent of the kinsman or kinsmen in whom the property of the deceased had vested. *Rakhmabai* v. *Radhabai* was distinguished, as " the case of two widows is a peculiar one..... 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." The effect of the decision of the Privy Council in the *Ramnad case* was thus expressed :—" When the estate is vested in the widow, she may adopt without the consent of the 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."

The next case in the order of time is *Bhagubai* v. *Kalo Venkaji Kulkarni* (4) in which West and Pinhey, JJ., said :—

"It is not necessary to say that the assent of any particular person is absolutely necessary to validate an adoption by a Hindu widow, and thus make the right dependent on the will of a person whose interest would, in many cases, be opposed to its exercise. It is sufficient that the adoption must not, according to the case of *Rakhmabai* v. *Radhabai*, be made capriciously but in the discharge of a duty to the deceased husband."

Regarding this case it must be noted that it was merely a summary proceeding under Act XX of 1864, and their Lordships said: — " It is not to be understood that we pronounce definitely [122] against the adoption if it should come into question in a regular suit." Also it appeared that the widow, on the death of her son, adopted a remoter kinsman than one who was available, and the consent of the nearer heirs was considered necessary to rebut the presumption of caprice arising from the facts. (West and Buhler, p. 1021.) No question was raised in the case as to whether the family was divided or united.

(1) 7 B. H. C. R. (Appx. i).
(2) 5 B. H. C. R. (A.C.J.) 181.
(3) 8 B H. C. R. (A. C. J.) 114 (118).
(4) P. J. for 1875, p. 45.

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In 1876 in *Sri Raghunadha* v. *Sri Brozo Kishore* (1) the Judicial Committee commented on and explained their decision in the *Ramnad case*, which their Lordships remarked, "had pointed out that on the question who are the kinsmen whose assent will supply the want of a positive permission from the husband, the authorities are extremely vague; that there exists a broad distinction between cases in which the deceased husband was a member of a joint and undivided Hindu family and those in which he being separated, the widow has taken his estate by right of inheritance; but that even in the latter case, the assent of some person who stands to her in the relation of protector may be requisite." Further on their Lordships said:—

"Positive authority then does not do more than establish that, according to the law of *Madras*, which in this respect is something intermediate between the stricter law of *Bengal* and the wider law of *Bombay*, a widow, not having her husband's permission, may adopt a son to him, if duly authorised by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognized by the *Travancore case*, *viz.*, that the requisite authority is, in the case of an undivided family, to be sought within that family. 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 [123] 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 in the strict contemplation of law she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her."

And then with reference to the assent of the kindred:—

"It is admitted on all hands that an authorization by some kinsman of the husband is required. To authorize an act implies the exercise of some discretion whether the act ought or ought not to be done. * * * * * * * * * Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which before the decisions in the *Ramnad case* had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of *Madras*. 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 influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over

(1) 3 I. A. 154.

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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."

In the latter part of 1876 in *Rajah Vellanki Venkata* v. *Venkata Rama* (1), the Judicial Committee again explained their decision in the *Ramnad case*. The Madras High Court, from whose decision the appeal lay, had held that though the fact of the [124] adoption was proved "it was not made out that there had been such an assent on the part of the kinsmen as to show, to quote the words of the judgment of the Privy Council in the *Ramnad case*, that the act was done by the widow in the proper and *bona fide* performance of a religious duty." The Judicial Committee held that this was giving an interpretation and meaning to what was said by the Committee in the *Ramnad case* which the particular passage in that judgment did not fairly support. They said:—

"The passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of authority of the kinsmen that was required. After dealing with the *vexata quæstio* which does not arise in this case, whether such an adoption can be made with the assent of one or more *sapindas* in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of a father-in-law would probably be sufficient, they said:—'It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence, not, be it observed, of the widow's motives, but of the assent of kinsmen, as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bona fide* attained.' Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was that there should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that *sapinda*, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

[125] In 1879 in *Ramji* v. *Ghamau* (2) the matter was dealt with by a Full Bench of this Court, when it was shown that *Rakhmabai* v. *Radhabai* was expressly distinguished from the the case of an undivided family; that the authorities, who permitted the adoption by a widow without the express assent of the husband, insisted upon the assent of those upon whom the widow is dependent; that supposing the view taken in *Gopal* v. *Naro* was that the consent of one male relative was sufficient, then if such consenting relative were not the father-in-law of the adoptive widow or the family manager, and the family were undivided, that view would be inconsistent with the doctrine of the Privy Council in the *Ramnad case* and in *Sri Raghunadha's case*; and concurring in the remarks of Melvill, J., in *Rupchand* v. *Rakhmabai*, and adopting some passages from the judgment of the Privy Council in *Sri Raghunadha's*

(1) 4 I. A. 1.

(2) 6 B. 498.

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case, the Full Bench held that, as the widow in the case before them did not obtain the consent of the manager or other members of the undivided family to which her husband belonged, the adoption was invalid. The question, as to whose assent among the kinsmen is necessary, was not dealt with directly.

The next case to be noted—*Gayabai* v. *Sridharacharya* (1)—in 1881 was peculiar. The son had died before his father, but leaving a widow who adopted a son thirty-five years after her father-in-law's death. On the death of the son before his father his proprietary right had wholly merged in his father's. He had never had separate *sacra*, and it might perhaps be contended that, therefore, the widow never had a right to adopt. (See West and Buhler, 995). Therefore, the subsequent case of *Govind* v. *Laxmibai* (2) is of but little value. The report is very meagre, and the case was apparently made to rest entirely on *Gayabai* v. *Sridharacharya*.

Such has been the course of decisions on this important point. It is not difficult to realize that between the doubt expressed in *Bayabai* v. *Bala*, whether according to the Maratha school a widow can adopt without the authority of her husband given prior to his decease, and the ruling in *Rakhmabai* v. *Radhabai* [126] that in the Maratha country a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him, the latter decision being qualified by the subsequent rulings in *Rupchand* v. *Rakhmabai* and *Ramji* v. *Ghamau*, these latter being influenced by the *Ramnad case* and the explanations given by the Judicial Committee of their decision in that case, some apparent inconsistencies may be found.

For Vithoba, the brother-in-law of Lakshmi, who in the present case contests the adoption made by her, the argument may be thus summarized :—

If in the case of divided families, where the widow does take an estate by right of inheritance, it is the duty of the Courts to keep the power of adoption, claimed by the widow, strictly within the limits which the law has assigned to it, it is still more necessary to do so in the case of undivided families, in which the widow takes no interest in her husband's share of the joint estate except a right to maintenance. If in the case of divided families there must be evidence of the assent of kinsmen as suffices to show that the act was done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive, nor in order to defeat the interest of this and that relative, but upon a fair consideration by what may be called a family council, it is far more necessary that there should be such evidence in the case of undivided families, in which the widow has no estate and is wholly dependent on her relatives. In the *Ramnad case* their Lordships did not rule that in undivided families, the sole assent of the father-in-law would necessarily be sufficient, and they did rule that, if there be no father, the consent of *all* the brothers would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will. In the present case there was no pretence of a fair consideration by a family council. Vithoba had no chance of giving or withholding his assent. The adoption was obviously performed in order to defeat Vithoba's interests and to afford an answer to his application made to the District Judge under Act XIX of 1841. Babu, even if he be taken to have given his assent to the adoption, was not competent by such

(1) P. J. for 1881, p. 145. (2) P. J. for 1882, p. 12.

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sole assent to [127] authorize the adoption: he was admittedly not the manager of the estate; he was in his dotage, and was not a fit councillor and protector. There is nothing to show that he exercised any discretion: in fact, he was admittedly on bad terms with Vithoba, and if he assented to the adoption, his object, no doubt, was to defeat Vithoba's interests. Thus Vithoba's sole right to the property, to which in default of the adoption he would have succeeded, will be lost by the caprice of a woman and the senile acquiescence of Babu.

The above is the argument for Vithoba, put in its strongest light, but it must fail. In the first place, it is necessary to accurately determine the position of Babu. Admittedly he was not the manager of the whole undivided property, but that was not because he had abdicated, or been removed from his position as head of the family (see West and Buhler p. 639, and the authorities quoted in note (*g*)), but because owing to differences between himself and his son Vithoba, he and Vithoba lived apart, each managing that portion of the undivided property in his possession. Possibly, as long as Nana was alive, Nana was the active manager of that portion in the possession of Babu and Nana; but Vithoba himself in July, 1887, stated (see Ex. 181) that Babu managed Nana's shop after Nana's death. It may be taken, therefore, that Babu, both before and after Nana's death, was the head of the undivided family, and, as such, the natural guardian and protector of Nana's widow.

In the next place, with regard to the important decision in *Rakhmabai's case*, it must be remembered that this judgment was delivered before the decision in the *Ramnad case* had been commented on and explained by the Privy Council in later cases. Too much stress, therefore, must not be laid upon the remarks of Couch, C. J., as to the sole requisite being proof of the fact that the act of adoption was done by the widow in the proper and *bona-fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In *Narayan* v. *Nana*(1) Westropp, C. J., was careful not to express any opinion on the point (at p. 172). In *Sri Raghunadha's case* (2) the Privy [128] Council did not absolutely dissent from the principle which Holloway, J., had strenuously insisted upon his decision in the *Ramnad case*, *viz.*, that the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it. With certain obvious limitations (quoted above) their Lordships adopted the principle, and, as pointed out in a later case —*Raja Vellanka Venkata* v. *Venkata Rama* (3)—the requisite is not proof of the widow's motives, as it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow. The need of the kinsmen's sanction does not arise from their right in the property, but from their family relations to the widow (West and Buhler, 986). As was remarked by Westropp, J., in *Bayabai* v *Bala* (4), the foundation underlying every adoption among Hindus is the consent of the husband, and (*idem*, p. xx) the reason for some authorities requiring the assent of kinsmen is, no doubt (not because the adoption will divest them of any estate, but), that they are after the husband's decease considered sufficiently to represent him to give on his behalf that assent which death prevents

(1) 7 B. H. C. R. A. C. J. 153.
(2) 3 I. A. 154 (192, 193).
(3) 4 I. A. 1 (13, 14).
(4) 7 B. H. C. R. App. I at p. XVIII.

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him from giving. As was said in the *Ramnad case* (1), the question is "by whose assent that defect of authority must be supplied." If this be so, then, in the present case, Babu, the head of the family, with whom Nana lived, and with whom after his death Nana's widow continued to live, sufficiently represented Nana; and the additional assent of Vithoba, who was on bad terms with Nana, and lived apart from him, was not necessary.

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This naturally leads us to the important *dicta* of Melvill, J., in *Rupchand* v. *Rakhmabai* with regard to the injustice of supporting an adoption which divests an estate vested in a relative other than a widow. No doubt in the original decision of the Privy Council in the *Ramnad case* the Judicial Committee did say that in an undivided family if there be no father the consent [129] 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 co-parcener against their will; but the same injustice would result if the father were alive. Their interest would still be defeated; and yet it was admitted that 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 authorize an adoption by her. As has been pointed out in a comment on *Rupchand's case* in West and Buhler's Digest, p. 1008, note (*b*), "in this case one of two co-widows it is said must submit to an adoption by another for her husband's beatitude" (see *Rakhmabai's case*), "while to the widow of a united brother such an adoption would work manifest injustice. But as the adoption could be made to the prejudice of the surviving brother, why not to the prejudice of his widow, who, at most, continues his existence? The widow of the first deceased similarly continues his existence, and the Hindu Law contemplates an adoption by the widow of each brother so as to reproduce the united family." And, as was remarked by the same authority (*idem*, pp. 995, 996), in the case of co-sharers standing on an equal footing the Indian lawyers certainly do not recognize any obstacle to adoption by the widow of one arising from the estate on his death having vested in the other; they regard death without male issue as not having occurred until the death of the widow makes the adoption impossible; nor apparently would the Judicial Committee (see *Sri Raghunadha's case*) countenance such a doctrine. There may be no case in which an estate vested in a person *by inheritance* can be divested by the adoption of a son by a widow after her husband's death (*cf.* remarks at I. L. R., 2 Calc., 295, at p. 305); but in an undivided family there is no succession by inheritance. On Nana's death his share in the undivided estate passed by survivorship to Babu and Vithoba, but that interest was always liable to be defeated by an adoption by Nana's widow. It is not regarded as divesting any more than a birth after a long gestation would be so regarded (see West and Buhler, p. 994, note (*c*)). The cases at Printed Judgments for 1875, p. 45, Printed Judgments for 1881, [130] p. 145, and Printed Judgments for 1882, p. 12, have been dealt with above; also the ruling in *Gopal* v. *Naro* (2). No doubt there are passages in the Full Bench ruling in *Ramji* v. *Ghaman* which, if taken alone, might imply that for the adoption by a widow in an undivided family the assent of all the co-parceners is necessary; but there are others pointing the other way. Thus, as to the proposition that the consent of one male relative would be sufficient, it

(1) 12 M.I.A. 397 (432). (2) 7 B.H.C.R. App. xxiv.

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was remarked that if the consenting relative were not the father-in-law of the adoptive widow or the family manager, the view would be inconsistent with the doctrine of the Privy Council in the *Ramnad case* and *Sri Raghunadha's case*. It was not, indeed, necessary in *Ramji* v. *Ghaman* to exactly decide the question as to whose assent would be sufficient, for in that case it was admitted that the widow "did not obtain the consent of the manager or other members of the undivided family to which her late husband belonged."

Now, though the judgment of the Privy Council in the *Ramnad case* does not determine what is the law in this part of India the method followed by their Lordships in arriving at that decision which is applicable to the Dravada country, must be followed by the Courts of this Presidency. That was by an examination of the European authorities, the old treatises accepted in the part of the country to which the case belonged, the opinions of the Shastris, and decided cases. Admittedly, according to Colebrooke in the Maratha school the assent of the husband's kindred is considered sufficient: and Strange's statement of the law is that "according to the doctrine of the Benares and Maharastra schools, prevailing in the Peninsula, the assent of the husband may be supplied by that of *his kindred, her natural guardians*." "The Peninsula" denotes that part of India which is south of the line drawn from Ganjam to the Gulf of Cambay, and thus includes the district of Khandesh.

Next, as to the texts from the treatises which are accepted as authorities in Khandesh; no doubt the Mayukha stands first. The quotation is to be found in chap. IV, s. V. art. 17, and is thus translated by Mandlik (page 57):—

[131] "A woman should neither give nor receive a son except with her husband's permission." This is the text of Vasishtha. Then follows the commentary of Nilakantha, the author of the Vyavahara Mayukha. "The husband's permission is intended only for a woman whose husband is alive, for evident worldly reasons. But a widow may adopt even without it by the assent of her father, or (in his absence) by that of her *jnati* (clansmen.) Hence says Yajnavalkya . . . 'a woman has no independence at any time'." It is noticeable that, according to the above authority the person whose assent is first to be sought is the widow's father, because she is in a state of dependence. This shows that the interference of the persons most interested in the estate cannot be defended on the supposed injustice of their interests being defeated by the adoption.

The next authority to be noticed in Western India (see West and Buhler, p. 9), is the Viramitrodaya of Mitramisra. His statement is to be found at length in Mandlik, p. 463-4. It may be summed up in the words:—

"After he (the husband) is dead, the permission of those alone will be necessary upon whom the widow is dependent." This again strikes the key-note of dependence.

I have not referred to the Mitakshara, which is the first authority on Hindu law in Western India, as it is silent on the point in question. In the same way it is unnecessary to refer to the Dattaka Mimansa of Nandapandita and the Dattaka Chandrika of (Devandabhatta) Kubera, for the former authority is apparently opposed to an adoption by a widow under any circumstances, and the latter simply implies the husband's consent from the absence of prohibition. The arguments derived from the

Smriti Chandrika depend upon a supposed inference for which there is no good ground (see remarks of Westropp, J., at 7 Bom. H. C. Rep., App., p. viii.)

Then we come to the Nirnayasindhu of Kamalakara, who explains the passage of Vasishtha in the same way as Nilakantha. Next there is the Sanskara Kaustubha of Anantadeva. He said (Mandlik, p. 465):

"It cannot at all be objected that a childless widow can have no right to adopt a son, in so far as in the absence of her husband [132] she is dependent on his kinsmen, in accordance with the following words 'there is no independence to a woman' . . . . Thus the meaning of the text (of Vasishtha) as well as the comment (of Yajnavalkya) shows that a female during the several guardianships at different periods of her life is restrained from the doing of something prohibited, and not that there is any restraint on her in respect of the observance of what is commanded by the Shastras." The Dharmasindhu of Kashinath Upadhyaya follows the Kaustubha. The Datta Darpan also follows the Kaustubha, holding that the permission of the widow's father, or if he be not alive, then of the caste, must be obtained (see 2 Borr., 2nd ed., 492). The Dattaka Mimansa of Vidya Narrainsami is an authority in the southern school, not in Khandesh, but it may be quoted as showing that the fact of the reception of the doctrine in question by schools so closely allied to the Maratha school is in favour of the hypothesis that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis. It clearly and explicitly declares the right of the widow to adopt with the authority of her father-in-law and whatever other kinsmen of her husband may be comprehended under the *et cetera* (see Moore's I. A., XII, at p. 438) the passage being—"In the same way the adoption of a son by a widow with the permission of the father, &c., cannot be censurable in the Kali age." The Dattaka Mimansa of Sri Ramapandita, an authority very generally cited in the South of India, also confirms the proposition.

Turning next to the opinions of the Shastris, a perusal of the cases shows, no doubt, that the tendency of the opinions of the Shastris in this Presidency has been to favour the widow's unfettered power to adopt (cf. West and Bühler, p. 973). And in the present case, seeing that the parties are Sudras, that the boy adopted by the widow was the husband's brother's son, that Babu was past begetting a son, and that Vithoba, the only other co-parceners had no son, it is possible that according to the opinions of the Shastris in old cases, the adoption would have been held valid without the consent of any kindred. But it is now established in this Presidency by the Full Bench decision (*Ramji* v. *Ghamau*) and is, therefore, settled law, unless altered by the [133] Privy Council, that this doctrine is inapplicable to an undivided family. Confinding ourselves, therefore, to those opinions in which the assent of some one is mentioned as necessary in default of the husband's direction or permission, we notice that Steele (p. 48) quoting B. S. (Balchandra Shastri) states that "the sanction of her husband's *sapinda* relations or caste (*nyati*) is necessary," See also p. 187. This is the view taken by the Shastris in *Brijbhukanji's case* (1 Borr., 202, 214, 216), but it is now established that the correct translation of "*nyati*" in the passage from the Mayukh should be *sapindas* or gentle kindred. See note 6, 2 Borr., 2nd ed., pp. 492, 493; 7 Bom. H. C. Rep., Appx. xvi. So Colebrooke translated the word (West and Bühler, p. 1006). Mandlik, as shown above, translated it

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clansmen. Further, in *Brijbhukanji case,* the Shastris said p. 216 : "In the commencement of the Shastra it is written a woman who has lost her husband must obtain *the sanction of her father* previous to adopting a son, and if she have no father, then that of the caste." The mention of her father accentuates her dependence on some one who would protect and guide her. As the Shastris said (*idem,* p. 219)—"In the event of her having received no order, she must send for her relations."

In *Mankar's case* (Borr. S. D. A. Cases II, 83) one of the Shastris said : "It is the best way by the consent of the father and other relations within the seventh degree and of the caste."

In *Thakubai's case* (Borr. S. D. A. Cases II, 488), the Shastris quoted the Dattak Darpan (mentioned above) as showing that "the permission of her father, or, if he be not alive, then of the caste (*nyati*) must be obtained." Further on they implied (quoting Katyayana) that a widow who is destitute of all three *legal protectors* (father, husband and son) is mistress, in her own right, of the right of adoption ; and this has been construed as meaning that the widow is subject to control only by near male relatives see West and Bühler, p. 988, note (*d*). In *Bhaskar Bachaji* v. *Naro* (Selected Cases S. D. A., Bombay, 1820—1840, p. 25), the Shastris relied on the passages from the Mayukha and Viramitrodaya, quoted above.

In *Virbhadra's case* (Morris S. D. A. Cases II, p. 1) the Shastri of the Surat Adalat quoted the Dattak Darpan and Dattak **[134]** Mimansa, and referred to the permission of the widow's father, or, in his absence, the permission of the members of her family. As was said by the sitting Judge (p. 8), "if she act under the sanction of those who ought to guide her, and take a proper person," the adoption will be good.

Reference may also be made to the manuscript opinions quoted by West and Bühler at pp. 958, 972 and 1001, in which mention is made of "the permission of her father-in-law or other relative," "the sanction of some senior member of the family ;" "failing this (the expression of her husband's intentions) she must obtain his father's permission ; failing him she must obtain the assent of the relatives (or caste follows) ;" "a widow must have her husband's permission, or that of her father-in-law, or of his widow, her mother in-law." In a Travancore case *Ramaswami Iyen* v. *Bhagati Amal,* 8 Mad. Jur., 58) the Chief Judge, after observing that a woman under Hindu law was in a perfect state of tutelage, passing from the control of her father to that of her husband, and after his death to that of the head of his family, said "it is clear to me, then, that the kinsman whose consent the law requires for this act is the one who would be liable to support her through her widowhood, and to defray the marriage expenses of her female issue..... It seems to be clear that, united as the family is, the natural head and venerable protector contemplated by the Shastras is the surviving brother, or if there be more than one, the eldest of them. It seems to me impossible to affirm that the liability to maintain the widow, and undertake the other duties of the family, is not coupled with a right to advise and control her act in so important a matter as the introduction of a stranger into the family with claims to the family property." This reasoning was approved and followed by the Privy Council in *Sri Raghunadha's case.*

The result of an examination of all these authorities is that, even supposing (as Mr. Mayne, says, p. 128) the motives which influence the widow may be puerile or even malicious (and there can be no doubt in the present case as to Lakshmi's motives and her bad conduct throughout as found by the Subordinate Judge), still if no fraud or deception has been

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practised on [135] the head of the family, who is her rightful guardian and protector, with whom she lives, and to whom she must look for maintenance, and if he has assented to her taking a proper person in adoption, then that son takes the estate of the widow's late husband. Possibly there are, as Mr. Mayne admits (*idem*), passages in the judgments of the Privy Council from which conclusions may be drawn contrary to such a proposition. There are passages in West and Bühler's Digest, which, if taken alone, might seem to show that the consent of all the co-parceners would be necessary (see *e. g.*, pp. 959, 968, 971, 989, 999, 1001, 1007). But the general effect of all the authorities collected in the Digest and of the *dicta* of the Privy Council is in favour of the doctrine that, if there is a father-in-law alive, and he is the guardian of the widow, and no fraud is practised on him, his sole assent is sufficient, whatever may be the motives of the widow, or the effect of the adoption on the undivided kinsmen.

In the present case, therefore, the plaintiff's adoption must be upheld, and he is entitled to the partition claimed in the plaint. Regarding the details of the partition I concur with the judgment just delivered.

Decree varied.

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Before Mr. Justice Birdwood and Mr. Justice Candy.

RAOJI AND OTHERS (*Original Plaintiffs*), *Appellants v.* BALA (*Original Defendant*), *Respondent.** [3rd July, 1890.]

Limitation—Limitation Act (XV of 1877), arts. 131, 62—Suit to establish title to a share in an annual allowance and also to recover arrears.

A suit by a co-sharer to establish his title to a share in an annual allowance received by the defendant from Government is one falling under art. 131, and not 144, of the second schedule of the Limitation Act (XV of 1877).

The plaintiffs sued to establish their title to a half share in the *deshmukhi* allowance annually received by the defendant from the Mamlatdar's treasury, and also to recover six years' arrears. Both the lower Courts found that the plaintiffs had not received their share of the allowance at any time within twelve years before suit, and, therefore, rejected the plaintiffs' claim as time-barred.

[136] *Held*, in second appeal, that the plaintiffs' claim for a declaration of their title to the allowance was governed by art. 131 of the Limitation Act (XV of 1877), under which article it would not be barred by the mere fact of the plaintiffs' exclusion from enjoyment of their share for twelve years before suit, unless it were shown that such exclusion was the result of refusal made upon a demand. The period of twelve years provided by that article would run from the time when the plaintiffs were first refused the enjoyment of the right.

Held, further, that the claim for arrears of the allowance fell under art. 62 of the Limitation Act (XV of 1877).

Held, also, that if the claim for a declaration of title to the allowance were barred, the claim for arrears would also be barred.

[**R.**, 22 M. 351 (352); 26 M. 291 (313); 5 Ind. Cas. 615=7 M.L.T. 278 (280); 8 Ind. Cas. 512 (514)=21 M.L.J. 21=9 M.L.T. 3; 15 Ind. Cas. 394=15 O C. 111; 9 M.L.J. 57 (59); **Cons.**, 34 B. 349 (353)=12 Bom. L.R. 157=5 Ind. Cas. 869.]

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* Special Appeal No. 488 of 1889.