Privy Council in *Chowdhry Wahed Ali* v. *Mussamut Jumace*[1] and *Abedoonissa* v. *Ameeroonissa*[2], as interpreted in *Punchánun Bundopádhya* v. *Rabia Bibi*[3] and *Kuriyali* v. *Mayan*[4], we are of opinion that the Court which originally rejected the claim made in the execution proceedings had jurisdiction under the words of section 244, clause (*c*). We, therefore, confirm the decree with costs.

Decree confirmed.

(1) 11 Beng. L. R., 149.
(2) L. R., 4 I. A., 66 at p. 75.
(3) I. L. R., 17 Calc., 711.
(4) I. L. R., 7 Mad., 255.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

GAVDA'PPA' AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GIRIMALLA'PPA' (ORIGINAL PLAINTIFF), RESPONDENT.*

1894. *April* 19.

Hindu law—Adoption—Adoption by a mother after the death of her son who has left neither child nor widow—Adoption by a grandmother without the consent of her daughter-in-law—Objection taken for the first time in appeal—Practice.

Under the Hindu law a mother is competent to adopt when her son dies leaving no widow or other heir nearer than herself.

A Hindu of the Shudra class died, leaving him surviving his mother and a paternal grandmother. After his death his grandmother adopted the defendant. Subsequently to this adoption the deceased's mother adopted the plaintiff. Thereupon both plaintiff and defendant claimed the deceased's estate.

Held, that the plaintiff was entitled to succeed. The deceased's mother having succeeded as heir to her son, her mother-in-law could not by any adoption divest her of her rights as such heir without her consent. The defendant's adoption was, therefore, invalid.

An objection based upon a point of law may be made in second appeal, provided it does not involve the taking of any additional evidence on matters of disputed facts.

SECOND appeal from the decision of Venkatráo R. Inámdár, Acting Assistant Judge of Sholápur-Bijápur, in Appeal No. 78 of 1891.

The property in dispute belonged to one Giriáppa Jennáppa.

Giriáppa died leaving behind him his mother Ráchavá and a paternal grandmother also called Ráchavá.

* Second Appeal, No. 768 of 1892

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After Giriáppa's death his grandmother adopted defendant No. 2. Subsequent to this adoption, Giriáppa's mother adopted the plaintiff in 1879.

In 1888 the plaintiff's adoptive mother sold the property in dispute to defendant No. 1, and put him in possession on 1st April, 1889.

In 1890 the plaintiff filed the present suit to recover possession of the property in question, alleging that it had been illegally sold by his adoptive mother to defendant No. 1.

Defendant No. 1 denied the plaintiff's adoption, and contended that the plaintiff had obtained the adoption deed by fraud and misrepresentation, and that the sale to him of the lands in suit was valid and binding on the plaintiff.

Defendant No. 2, who was added on defendant No. 1's application, contended that he had been adopted by Giriáppa's grandmother with the consent of Giriáppa's mother, and that after his adoption plaintiff could not be validly adopted.

The Court of first instance rejected the plaintiff's claim.

On appeal, the Assistant Judge held that on Giriáppa's death his mother succeeded to his estate; that she was competent to take the plaintiff in adoption; that the parties being Shudras the plaintiff's adoption was valid; that the plaintiff's adoptive mother did not give her consent to the adoption of defendant No. 2 by her mother-in-law; that the adoption of defendant No. 2 was, therefore, invalid; that the sale to the defendant No. 1, having been effected after the plaintiff's adoption, was not binding on the plaintiff. He, therefore, awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Ghanashám Nilkanth Nádkarni for appellants (defendants):—The mother of the deceased Giriáppa had no authority to adopt the plaintiff. It appears that Giriáppa left a widow behind him; and though the widow was dead at the time of the adoption, that circumstance would not render the adoption valid. The mother's power of adoption was at an end when the estate passed from the son to the son's widow—*Krishnaráv Trimbak Hasabnis*

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v. *Shankarráv*[1]. Even if the son had left no widow, the mother would not have been in a better position. The ownership of the estate together with the right of adoption having once descended to the son, the right to adopt could not go back to the mother. If she were allowed to adopt under such circumstances, the son would be placed in a worse position as regards the performance of his *shrádhas* than if there had been no adoption at all—West and Bühler (3rd Ed.), p. 984; *Piddáppa* v. *Gurawa*[2]. If the mother can adopt, why cannot the grandmother? The plaintiff's adoption is, therefore, invalid.

B. A. Bhágvat for respondent (plaintiff):—The objection now taken to the validity of the plaintiff's adoption was not raised either in the Court of first instance or even in the memorandum of appeal presented to the District Court. It must, therefore, be taken to have been waived. Nor is there any finding of either of the lower Courts that the deceased Giriáppa left a widow behind him or ever had a wife. It is not open to the appellant to make a new case in second appeal. The case should, therefore, rest on the same footing here as it did in the Courts below, namely, that Giriáppa died leaving his mother as his only heir. Dealing with the case on that footing, I contend that the mother was competent to adopt a son. In adopting a son she divests no estate but her own, and she may do so when she likes—*Rája Vellanki Venkata* v. *Venkata Ráma*[3]. The ruling in *Hasábái's*[1] case does not apply, as in that case the son's widow had survived him; while in the present case the son left no widow behind him. The bar created by the *upanayan* ceremony in the case of the higher classes does not affect the Shudras. The parties to this suit are Lingáyet Shudras.

RÁNADE, J.:—In this case the respondent (original plaintiff) brought his suit, as the adopted son of Ráchava, to recover possession of certain lands which Racháva had sold to appellant (defendant No. 1) in October, 1888. The appellant No. 1 denied the alleged adoption, and contended that respondent had obtained an adoption-deed by fraud and misrepresentation. There was a

(1) I. L. R., 17 Bom., 164. (2) P. J. for 1889, p. 341,

(3) L. R., 4 [illegible], 1.

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further complication introduced by joining the name of appellant No. 2 (original defendant No. 2), who claimed to have been adopted by Ráchava's mother-in-law, and who stated that Ráchava had sold the land to appellant No. 1 with his consent. The cheif grounds on which respondent's adoption was questioned in the first Court were (1) fraud on respondent's part, (2) his neglect to maintain Ráchava, who, therefore, repudiated the adoption, and alienated the land for her own maintenance, and, (3), the prior adoption by Ráchava's mother-in-law of appellant No. 2.

The Court of first instance held that respondent's adoption-deed, as also the sale-deed in favour of appellant No. 1, were both proved. It held further that as the land in dispute was acquired by Giriáppa, the son of Ráchava, and her husband Jennáppa, and Ráchava succeeded to it as mother and heir of Giriáppa, she was absolute owner of the land, and respondent had no right to it, as it did not form part of Jennáppa's estate. Neither had appellant No. 2 any right to the land, as it formed no part of his adoptive father's estate. The sale was effected for a legitimate necessity, and was, therefore, binding on respondent, whose claim was, therefore, rejected.

In appeal, the Assistant Judge, while agreeing with the Court of first instance on the question of respondent's adoption, held (1) that appellant No. 2's adoption was invalid, (2) that Ráchava did not acquire an absolute interest in Giriáppa's land, and (3) that, as there was no legal necessity for the alienation, he held that the sale to appellant No. 1 did not bind the respondent. The Assistant Judge held finally that the adoption of respondent by Ráchava, as mother and heir of Giriáppa, was not invalid, inasmuch as the ruling in *Krishnaráv Trimbak Hasabnis* v. *Shankarráv*[1] applied to Bráhmins only, and could not apply to Shudras, and this objection was not pressed by the appellants, who were, therefore, held to have waived it. Respondent's claim was accordingly decreed in full.

The appellants' pleader before us chiefly rested his contention on the ground that, as Ráchava's husband Jennáppa had left his son Giriáppa behind him, Ráchava, succeeding as Giriáppa's

(1) I. L. R., 17 Bom., 164.

mother and heir to the land, could not adopt the respondent under the ruling referred to above, which applied both to Bráhmins and Shudras alike. It was also contended on behalf of appellant No. 2 that his prior adoption by Ráchava's mother-in-law was valid. Lastly, it was urged that appellants had never waived their principal objection to the validity of respondent's adoption. The other objections were not seriously pressed in the course of the argument, and need not be noticed here.

As regards the allegation about waiver, it appears from the record of the suit that the appellants did not urge their principal objection in the Court of first instance, but rested their defence solely on the ground of fraud and breach of agreement in respect of Ráchava's maintenance. In the lower Court of appeal, however, this objection appears to have been pressed in the course of argument, and as it was an objection based on a point o law, there could be no bar to the lower Court's taking notice of it, even though it was not pointedly urged. It is certainly open to the appellants to raise the point in second appeal, and we must take notice of it, if it does not involve the taking of any additional evidence on matters of disputed facts.

The next question we have to consider is, whether respondent's adoption by Ráchava was valid as against the appellant No. 2, who claims to have been previously adopted by Ráchava's mother-in-law, and, secondly, whether it was valid as against appellant No. 1, who claims as purchaser from Ráchava, who repudiated the adoption, and alienated the land in her right as sole and absolute owner. In so far as the contest lies between the relative claims of the two adoptions, we entertain no doubt that the finding of the lower Court of appeal is correct. It is true there is no clear finding as to the constitution of the family at the time of the death of the last full owner Giriáppa, the son of Jennáppa, by his wife Ráchava, and the grandson of Mahárudra. It is in evidence that Jennáppa died before Mahárudra, and that, on Mahárudra's death, Giriáppa was the sole owner of the property. It is plain that as between Mahárudra's widow, the adoptive mother of appellant No. 2, and Jennáppa's widow, the adoptive mother of respondent, the latter as mother succeeded as heir to Giriáppa, who had himself acquired the land in dispute, and her mother-in-

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law could not by any adoption divest her of her rights as such heir, unless she consented. There has been an express finding that Ráchava did not give her consent. Appellant No. 2's claim, therefore, was very properly disallowed—*Annammah* v. *Mabbu Bali*[1]; *Rupchand* v. *Rakhmábái*[2]; *Kally Prosonno* v. *Gocool Chunder*[3]; *Bhoobun Moyee* v. *Rám Kishore*[4].

As regards the validity of respondent's own adoption, it was contended before us that it was similarly invalid, inasmuch as Giriáppa, the natural son of Ráchava, had left a widow behind him, who was his heir, and this widow, and not Ráchava, had the right of adoption.

The allegation that Giriáppa was married and had left a widow behind him was made for the first time in second appeal. The judgments of both the lower Courts are silent on this point. If Giriáppa had left a widow as his heir, the appellant No. 1 would not have failed to press the point in the lower Courts. We cannot, under these circumstances, take notice of this allegation, as it involves a question of fact, in respect of which there has been no issue and no distinct finding. We must, therefore, hold that Giriáppa left no other nearer heir save his mother Ráchava at the time of his death.

The appellants' pleader Mr. Ghanashám, however, contended that even if Giriáppa had left no widow, and his mother was his only heir, yet the ownership of the land, together with the right of adoption, having once descended to Giriáppa, the right to adopt could not ascend to his mother Ráchava, and her adoption of respondent was, therefore, invalid under the authority of the ruling in *Hasabnis'* case[5]. In that case, however, the widow of the last heir survived her husband, and it was accordingly held that, under the circumstances, the mother could not adopt even after that widow's death. The facts of this case clearly distinguish it from the authority cited above. Mr. Mayne in his Hindu Law, section 104, recognizes a distinction between a mother adopting after her infant son's death, and adopting

(1) 8 Mad. H. C. Rep., 108.
(2) 8 Bom. H. C. Rep., A. C. J., 114.
(3) I. L. R., 2 Calc., 295.
(4) 10 M. I. A., 279.
(5) I. L. R., 17 Bom., 164.

after the death of that son's widow, and the ground of this distinction apparently rests on the decisions of the Privy Council that an adoption by the mother after the estate has vested in her son's widow is invalid—*Bhoobun Moyee* v. *Rám Kishore*[1]; *Pudma Coomári* v. *The Court of Wards*[2]; *Thayammal* v. *Venkataráma*[3]. If it had been found in the present case that Giriáppa had left a widow behind him, Racháva's adoption of the respondent would clearly have been invalid. The larger proposition which the appellants' pleader asks us to affirm derives no support from the authorities cited before us. If a widow cannot adopt after the death of her natural or adopted son under any circumstances, half the adoptions that take place would have to be declared invalid. Even the learned Editors of the Digest of Hindu Law admit that the widow can exercise her authority to adopt when her son, natural or adopted, dies unmarried, or leaves no child or widow behind him. If this were not so, the husband could not authorize his widow to make successive adoptions, and this power has been expressly recognized by the Courts in India—*Rája Vellanki* v. *Venkata Ráma*[4] and *Rám Soondur* v. *Surbanee Dossee*[5]. In this Presidency no express authorization by the husband is necessary, but the widow's power to adopt, when there are no other vested rights which would be defeated by it, has been fully recognized in *Rámji* v. *Ghamau*[6]. In the higher caste, it is usual to permit such an exercise of power when the son dies before he attains full ceremonial competency, and cases of a second and third adoption under such circumstances have occurred. In this view of the law, we feel satisfied that Ráchava could validly adopt the respondent after Giriáppa's death without leaving any other heir nearer than his own mother.

The lower appellate Court was, therefore, not right in the way it distinguished the present case from the ruling in *Krishnaráv* v. *Shankarráv*[7]; but its view can be supported on other grounds, and we, therefore, see no reason to disturb its finding. Ráchava

(1) 10 M. I. A., 279.
(2) L. R., 8 I. A., 229.
(3) L. R., 14 I. A., 67.
(4) L. R., 4 I. A., 1.
(5) 22 Cal. W. R., p. 121.
(6) I. L. R., 6 Bom., 498.
(7) I. L. R., 17 Bom., 164.

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or her assignee, appellant No. 1, was certainly estopped by her own act from questioning respondent's adoption. She had, at the most, no more than a Hindu widow's estate in the land as heir to Giriáppa, and she could not, after adopting the respondent in 1879 alienate the land without any proved necessity.

We accordingly confirm the decree of the lower appellate Court and dismiss the appeal with costs on appellants.

Decree confirmed.

APPELLATE CIVIL.

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

1894. *April* 19.

JAGMOHANDA'S KILA'BHA'I (ORIGINAL PLAINTIFF) APPLICANT, *v.* ALLU MARIA DUSKAL (ORIGINAL DEFENDANT), OPPONENT. *

Succession Certificate Act (VII of 1889), *Sec.* 4—*Joint family—Suit for family debt—No necessity for certificate—Hindu law—Evidence—Presumption as to nature of property where the family is joint.*

Under the Succession Certificate Act VII of 1889 a plaintiff does not require a certificate where his claim is for family property by right of survivorship.

Where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Ráo Sáheb G. V. Saraiya, Subordinate Judge of Bassein, in a Small Cause Court suit.

The plaintiff sued to recover Rs. 48-4-0 on a money-bond passed by defendant in favour of plaintiff's father on 22nd July, 1891. Plaintiff alleged that he and his deceased father were members of a joint Hindu family, and that the family business was transacted in the name of his deceased father.

Defendant did not appear.

The Subordinate Judge of Bassein with Small Cause Court powers found the bond proved, and that plaintiff and his deceased father were members of a joint family, but following the ruling of the Madras High Court in *Venkatramánna* v. *Venkayya*[1]

* Application No. 177 of 1893 under extraordinary jurisdiction.

(1) 1 I. R., 14 Mad., 377.