1895.

GHELLA'BHAI ATMA'RA'M v. NANDUBA'I.

I ought to add (at the request of Mr. Kirkpatrick) that counsel for defendant objected to plaintiff's adducing any evidence with a view to explain or contradict the written submission paper or award (section 92, Evidence Act). In the view which I have taken of the case it is unnecessary for me to make any remarks on this point.

Suit dismissed.

Attorneys for the plaintiff:—Messrs *Chitnis, Motilál and Málvi.*

Attorney for the defendant:—Mr. *K. J. Mantri.*

APPELLATE CIVIL.

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

1895. *January* 24.

SHRI DHARNIDHAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* CHINTO (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Adoption—Adoption by a daughter-in-law—Adoption divesting an estate which had already vested in another person—Consent of such person to adoption.

One Shri Dharnidhar, a separated Hindu, died in 1852 childless, leaving three widows and a daughter-in-law Venubái, the widow of a predeceased son Chintáman. Dharnidhar's estate was taken, on his death, by his widows and ultimately became vested in Laxumibái, the survivor of them. In 1871, while she was in possession, Venubái adopted the plaintiff. In 1874 a decision was passed against Laxumibái, in execution of which a large portion of her deceased husband's property passed into the possession of one Chinto. In 1886 the plaintiff filed this suit against Chinto, claiming, as the adopted son of Venubái, to be entitled to all the estate of his adoptive grandfather Shri Dharnidhar (Venubái's father-in-law).

Held, that he could not recover. His adoption by Venubái, which could only be to her husband Chintáman, could not divest Laxumibái of the estate which had come to her as heir of her husband Shri Dharnidhar.

On Dharnidhar's death the estate had vested in his widows with remainder to his collateral heirs, and even if Laxumibái had assented to the subsequent adoption of the plaintiff by Venubái, his claim would not stand against the rights of Dharnidhar's collaterals who would succeed on Laxumibái's death.

From the moment that Dharnidhar died, and his estate vested in his widows, the right of his daughter-in-law Venubái to adopt for the purposes of representation was at an end.

* Appeal No. 9 of 1890.

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona.

Shri Moraya Gosávi was the founder of a religious and charitable institution called the "Chinchvad Savasthán," which was afterwards managed by his descendants in the male line.

In 1852, Shri Dharnidhar, the then manager, died leaving surviving him three childless widows, *viz.*, Bayábái, Bahinábái and Laxumibái, and the widow (Venubái) of a predeceased son named Chintáman.

On his death disputes arose as to the right to the management of the savasthán. The claimants were (1) Ganesh, who alleged himself to be the adopted son of Shri Dharnidhar, and (2) Bajáji, who was Shri Dharnidhar's nearest kinsman and reversionary heir.

In 1863 Bajáji filed a suit to recover possession of the savasthán property from Laxumibái, the survivor of the three widows. Pending the suit he died, and his son and heir Chinto continued the suit and ultimately succeeded in obtaining a decree in his favour. In accordance with this decree, Chinto took possession of the savasthán property in August, 1874.

In the meantime, however, Venubái, the daughter-in-law of Shri Dharnidhar, adopted the plaintiff, who was the second son of Chinto. This adoption took place in December, 1871, when Laxumibái was still in possession of the estate and before Chinto had taken possession.

In 1883 a suit was filed with the consent of the Advocate General under section 539 of the Code of Civil Procedure (Act XIV of 1882)—known as the "Charity Suit"—for the removal of Chinto and his eldest son A'ppáji from the management of the savasthán.

In 1886, while the Charity Suit was pending, the plaintiff filed the present suit against his father Chinto to recover possession of the savasthán property as well as the private estate of Shri Dharnidhar, alleging that, as the adopted son of Venubái, he was entitled to succeed to Shri Dharnidhar's property.

1895.

SHRI DHARNIDHAR v. CHINTO.

In 1888 the "Charity Suit" was finally decided on appeal by the High Court, which ordered the removal of Chinto and his eldest son A'ppáji from the management of the savasthán, and the appointment of new trustees in their place[1].

Shortly after this decision of the High Court, Chinto died, and the plaintiff continued this suit for possession of the savasthán property against the new trustees appointed by the Court.

Both Laxumibái and Venubái died pending this suit.

The Court of first instance rejected the plaintiff's claim, holding that his adoption could not divest the estate which had already vested in Laxumibái, the surviving widow of Shri Dharnidhar.

Against this decision the plaintiff appealed to the High Court.

Shámráo Vithal, with him *P. P. Khare*, for appellant (plaintiff):—The plaintiff was adopted by Venubái with the consent of her mother-in-law Laxumibái, who attested the adoption-deed. At the time of the adoption Shri Dharnidhar's estate was fully represented by Laxumibái. She was, therefore, competent to authorize her daughter-in-law Venubái to adopt the plaintiff. She could have herself adopted a son to her deceased husband Shri Dharnidhar and thereby divested herself of the estate in favour of the son so adopted. She could, therefore, authorise her daughter-in-law to adopt the plaintiff. Her consent renders the adoption valid. Even without such consent, the adoption by the daughter-in-law would not be wholly invalid. Adoption is essentially a religious act, and it is valid for all spiritual purposes, such as performing her husband's *shrád*, &c. And as a matter of fact, ever since his adoption the plaintiff has been performing all the religious duties which devolve on the spiritual head of the Chinchwad Savasthán. He has acted as the chief ministrant at the shrine of Shri Mangal-Murti from 1871 to 1890. Laxumibái and other members of the family have recognized his status as the legally adopted son of Venubái. It is now too late to dispute his adoption. Laxumibái died shortly after the institution of the suit. On her death Shri Dharnidhar's estate passed to her daughter-in-law Venubái—*Vithaldás* v. *Jeshubái*[2]. Venubái, too, has recently died. The plaintiff as her adopted son is now the only person who can

(1) *Vide* I. L. R., 15 Bom., 612. (2) I. L. R., 4 Bom., 219.

inherit Dharnidhar's property, being now nearer in descent than any other of his kinsmen deceased. Lastly, there is evidence to show that it was the intention of Dharnidhar that his daughter-in-law Venubái should adopt, and that he had given his permission to her to make an adoption. Adoption by her made with the previous consent and authority of her father-in-law, is valid: see West and Bühler (3rd Ed.), 987.

Ganpat Sadáshiv Ráo for the respondent (trustees):—It is not proved that Laxumibái gave her consent to the plaintiff's adoption, or that she attested the adoption-deed. Even if she attested the deed, her mere attestation would not necessarily imply her concurrence in the act of adoption—*Rájlukhee Debia* v. *Gokool Chunder*(1). In the absence of such consent, the adoption is invalid. It is settled law that an adoption which has the effect of divesting an estate already vested in a third person is invalid unless such third person has given his assent to the adoption—*Rupchand* v. *Rakhmabái*(2); *Keshav Rám Krishna* v. *Govind Ganesh*(3); *Chandra* v. *Gojrábái*(4); *Dhoromoyee* v. *Shámа Churn*(5). Plaintiff's adoption by Venubái cannot, therefore, divest the estate which was already vested in Laxumibái. It is urged that Laxumibái is now dead, and that upon her death, at all events, plaintiff is entitled to succeed to Dharnidhar's estate. But plaintiff's adoption was void *ab initio*. It cannot become valid after Laxumibái's death. If it was invalid before, it is invalid after her death. It cannot affect the right of reversionary heirs who come in on the widow's death.

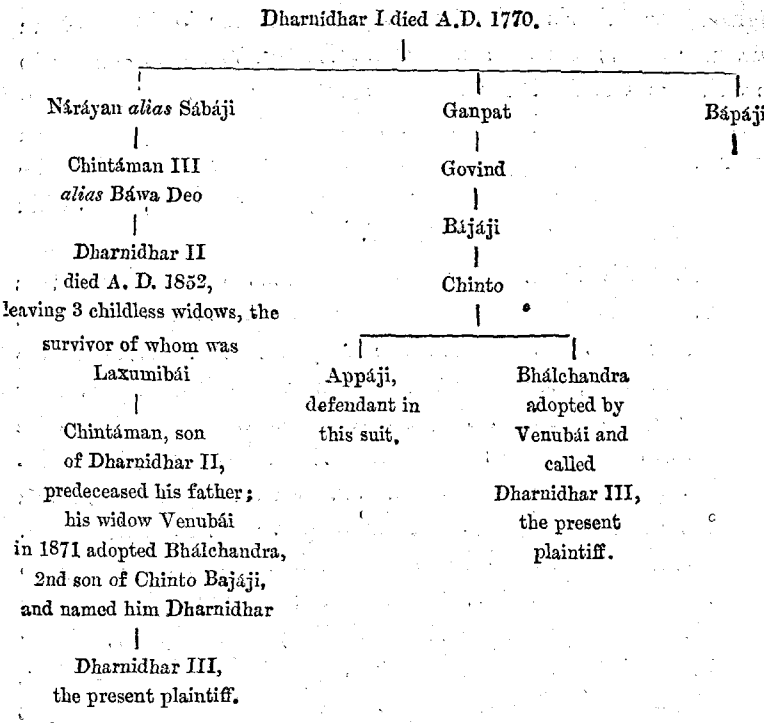
CANDY, J.:—This is one of the numerous suits which have been filed in the litigation connected with the Chinchwad Savasthán: see *Chintáman* v. *Dhondo* (6); *Shri Ganesh* v. *Keshavráv* (7); *Shri Dhundiráj* v. *Ganesh* (8).

Taking the "tree" given by the District Judge in the appendix to his judgment in what is known as the "Charity Suit" (9), the position of the parties may be thus shown:—

(1) 12 Cal. W. R., 47, P. C.
(2) 8 Bom. H. C. Rep., 114, A. C. J.
(3) I. L. R., 9 Bom., 94.
(4) I. L. R., 14 Bom., 463.
(5) I. L. R., 12 Cal., 246.
(6) I. L. R., 15 Bom., 612.
(7) *Ibid.*, 625.
(8) I. L. R., 18 Bom., 721.
(9) I. L. R., 15 Bom., 612.

1895.

SHRI DHARNIDHAR v. CHINTO.



On the death, in 1852, of Dharnidhar II, the last representative of the eldest branch of the founder's family, disputes arose regarding the right to manage the savasthán and to succeed to the whole estate. One Ganesh claimed to have been adopted by Dharnidhar II; but Bajáji, and after Bajáji his son Chinto, the nearest collaterals, succeeded in establishing their title, and in 1874 obtained possession of the whole, or nearly the whole, of the estate.

In 1871 Ganesh had sued Chinto and Venubái, the widow of Dharnidhar's son Chintáman, who had predeceased his father, for a declaration of his title as adopted son of Dharnidhar. He succeeded in obtaining a decree in his favour from the Subordinate Judge; but on Chinto appealing to the District Court, Ganesh was persuaded to withdraw his suit without obtaining leave to bring a fresh one; and up to the present time he has never succeeded in removing this bar. In 1881, while he was endeavouring by other proceedings to establish his title against Chinto, he and Chinto came to terms, and made

an amicable settlement, by which Ganesh was put in possession of part of the savasthán property, Chinto remaining as the recognised trustee and manager.

To return to Dharnidhar's death in 1852—at first the widow Laxumibái after the death of her co-widows succeeded in retaining possession of the whole estate for several years; and the way in which Chinto obtained possession from her was this. In 1863 Chinto's father Bajáji sued her to recover the estate. This suit, after several decisions and remands, eventually became Suit No. 12 of 1873 in the Court of the Agent for Sardárs, and was decided by the Agent on 31st July, 1874, in favour of Chinto and against Laxumibái, on the ground that as she claimed to hold the estate for the adopted son Ganesh, but Ganesh had on 20th July, 1874, withdrawn his suit to establish his title as Dharnidhar's adopted son, it followed that Laxumibái's title also failed. Accordingly in 1874 Chinto obtained possession of all the estate.

But while the litigation had been proceeding, and before Chinto had prevailed on Ganesh to withdraw his suit for a declaration of title as adopted son, Chinto had prepared a second string to his bow, and in December, 1871, he had given his second son in adoption to Venubái, the widow of Chintáman, who had predeceased his father Dharnidhar II. The *factum* of that adoption was not seriously contested before us at the hearing of the present appeal; and as between the present parties it may be taken as proved. At the time of that adoption (December, 1871) Laxumibái was in possession of all the savasthán property. At that time there was no distinction recognised between the religious and the private estate. That distinction was first brought out in the "Charity Suit." That suit (No. 2 of 1883) was filed in 1883 under section 539 of the Civil Procedure Code (Act XIV of 1882) with the sanction of the Advocate General by certain kinsmen of the Dev family against Chinto and his son A'ppáji to have them removed from their position as managers and trustees of the savasthán. A preliminary issue, decided by the District Judge on 2nd January, 1886, in the affirmative, was whether the property in suit constituted a public

1895.

SHRI DHARNIDHAR v. CHINTO.

charitable or religious trust within the meaning of section 539, and whether plaintiffs had any direct interest therein. That issue having been decided in the affirmative against Chinto and his son A'ppáji, Chinto's second son at once brought the present suit against his natural father Chinto and against the kinsmen, who were plaintiffs in the Charity Suit, to recover the whole savasthán estate on the ground that, having been adopted by Venubái, he, as grandson of Dharnidhar, was entitled to succeed to Dharnidhar's property.

By consent the hearing of the present suit was postponed till the final decision in the Charity Suit. The decision of the High Court in that case was given in 1888: Chinto and his eldest son were removed from the management, and the case was sent to the District Judge to take accounts and to frame a scheme for the future management of the devasthán. That scheme has been framed; and the present trustees of the savasthán have now been brought on the record of the present case as respondent-defendants with Chinto's eldest son A'ppáji, Chinto having died subsequently to the filing of the suit. But the present plaintiff does not now seek to recover the whole of the savasthán property, religious and private. In the "Charity Suit" the High Court reserved to Chinto and A'ppáji the right, in execution of the decree in that suit, to show that certain of the lands mentioned in the plaint in that suit as belonging to the savasthán were not included in the property appropriated to the savasthán by the Peshwa's award or in subsequent grants. In short, it permitted Chinto and A'ppáji to remain in possession of Dharnidhar's private estate; and it is in regard to this only that the present plaintiff now urges his claim.

But it is clear that in 1871, when the present plaintiff was adopted by Venubái, Laxumibái was in possession of the private estate of her husband Dharnidhar. It is true that in the suit brought against her by Chinto she rested her right to retain possession on the ground that Ganesh had been adopted by Dharnidhar. That ground, which would be fatal to the present plaintiff as Venubái's adopted son, failed in the litigation in 1874; and it has failed in the present case; for we sent back the case for a finding on the issue—"Was Ganesh adopted by

Dharnidhar?"—and the kinsmen of the Dev family and the trustees of the savasthán and Chinto's son A'ppáji who are the defendants on the record apparently do not care to attempt to defeat Venubái's son by asserting that Ganesh is Dharnidhar's legally adopted son. The finding on the issue was, therefore, returned in the negative. So far, then, as regards the alleged adoption of Ganesh there is no obstacle to plaintiff's claim.

But though Laxumibái, being a female, and thus unable in her own right to be manager and trustee of the savasthán, resisted Chinto's claims between 1863 and 1874, on the ground that she was acting for the adopted son Ganesh, it does not follow that, failing the adopted son, she would not have claimed in her own right to hold the private estate of her husband Dharnidhar, had the distinction between the religious and private estate been then clearly recognised. It is clear that, as regards the private property, Dharnidhar died separated from his kinsmen, and on his death, no son of his loins having survived him, and no adoption by him being proved or by his widows being asserted, the private property of Dharnidhar at once became vested in Dharnidhar's three childless widows with remainder to his kinsmen. Two of the widows died many years ago, without having made any adoption. The whole of the private estate was, therefore, vested in Laxumibái alone in 1871. No adoption by Venubái (which must have been to Venubái's husband Chintáman) could possibly divest Laxumibái of the estate, which had come to her by inheritance from the last owner Dharnidhar. It is unnecessary to quote at length the authorities for this proposition which is now well established. They are all set out by Mr. Mayne in his work on Hindu Law and Usage. We entirely agree with the conclusion at which he arrives (3rd edition, section 179, page 210) that, except under certain circumstances, which have not arisen in the present case, an adoption made to one person will not divest the estate of any one who has taken that estate as heir of another person. Here the adoption made by Venubái to Chintáman will not divest the estate of Laxumibái who took that estate as heir of Dharnidhar. The same principle is to be found in the judgment of this Court in *Chandra* v. *Gojarábái* [1], in which it was laid

(1) I. L. R., 14 Bom., 463 at p. 469.

1895.

SHRI DHARNIDHAR v. CHINTO-

down that adoption by a widow, even under her husband's authority, does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband. Here Venubái, even if she had the authority of her husband to adopt (which admittedly she had not), could not divest the estate of Laxumibái which came to her as heir of Dharnidhar. If Venubái had adopted with Dharnidhar's consent before his death in 1852, then the adopted son would have been Dharnidhar's heir. But whatever Dharnidhar may have intended, the plaintiff's case is that Dharnidhar died without anything being carried out. The adoption by Venubái nineteen years after Dharnidhar's death could not divest Dharnidhar's widows of the estate which then became vested in them with remainder to Dharnidhar's collaterals. Strictly speaking (to adopt the language of the judgment of this Court in *Chandra* v. *Gojarábái* quoted above, see p. 471), according to the view taken by our Courts, there was at Dharnidhar's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption. Therefore, even if Laxumibái assented to the adoption of plaintiff by Venubái, the plaintiff's claim would not stand against the rights of Dharnidhar's collaterals who come in now that Laxumibái has died. (She died in 1886 and Venubái died in 1891 or 1892.) It is not even the question whether Laxumibái could have divested herself of the estate by adopting a son; for she is not the person who has made any adoption; and though she may have assented to Venubái taking a son in adoption for spiritual purposes, and agreed to recognise him as the principal ministrant at the Chinchwad shrine, whether as Venubái's adopted son, or as the son of Chinto, who established his title as trustee, it is clear that these facts could not validate for the purposes of inheritance an adoption which as regards the right to property was *ab initio* invalid. But we may remark that we agree with the Subordinate Judge that it is not proved that Laxumibái did assent to the adoption. Her "mark" on the deed of adoption, which was not exhibited as it was not registered, and the documents Exhibit 156, said to have been executed by her "mark" on the same day, which latter document was not produced till a very late stage of the case, are quite insufficient to establish the assent, which would

show that she recognised plaintiff as the heir succeeding to Dharnidhar's estate.

It was ingeniously contended that as Laxumibái died in 1886 and Venubái in 1891 or 1892, the plaintiff, who was actually adopted in 1871, has now no obstacles in his way, and being nearer in descent to Dharnidhar than A'ppáji or the other kinsmen, is now entitled to succeed. But the contention is bad. Supposing that the assumptions on which it is founded are good, still the plaintiff must fail. Either his adoption in 1871 was good or it was bad. If good, he succeeded at once to his grandfather's estate: if bad, he cannot now succeed any more than he could have succeeded before. There is no suspension of the right to adopt (see remarks of this Court in *Krishnaráv* v. *Shankarráv* [1]). From the moment that Dharnidhar died, and his estate was vested in his widows, the right of his daughter-in-law Venubái to adopt, for the purposes of inheritance, was at an end. (See judgment of West, J., in *Keshav* v. *Govind*[2].) In whatever way the case is regarded, the plaintiff is not entitled to succeed, and we must, therefore, confirm the decree of the Subordinate Judge with costs.

Decree confirmed.

(1) I. L. R., 17 Bom., 164 at p. 168. (2) I. L. R., 9 Bom. 94.