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property, still he put himself into possession and must be treated as if he had received such rent.

The decree of the lower Appellate Court will be confirmed, but as held in the Madras case, above referred to, execution in respect of the rent now in question will issue against only one set of the defendants, *viz.*, 1, 2, 3 and 9 on the one hand, and defendant 11 on the other.

Defendant 11 must pay the costs of this appeal.

Decree confirmed.

R. R.

APPELLATE CIVIL.

*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Aston.*

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March 13.

BHIMAPPA BIN SHIVBASAPPA AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3), APPELLANTS, v. BASAWA KOM SHIVBASAPPA AND ANOTHER (ORIGINAL DEFENDANT 1 AND PLAINTIFF), RESPONDENTS.*

Adoption by the widow of a Hindu who predeceased his father—Presence of the widowed mother-in-law at the ceremony of adoption—Acquiescence—Consent.

The widow of a Hindu who predeceased his father made an adoption. At the ceremony of adoption the widowed mother-in-law of the widow was present. A question having arisen as to whether the presence of the widowed mother-in-law was equivalent to consent on her part to the adoption,

Held, that mere presence is not necessarily equivalent to consent, for consent in this connection implies an intelligent concurrence on due consideration, and it is for the Court to determine whether the whole circumstances of the case invite the inference that such a consent had been given, bearing in mind that the consent required is a matter, not of form, but of substance.

SECOND APPEAL from the decision of T. Walker, District Judge of Belgaum, confirming the decree of W. O. Alcock, Assistant Judge.

One Basappa had two sons, Shivlingappa and Balappa, the plaintiff. Shivlingappa had a son Shivbasappa who died before

* Second Appeal No. 640 of 1904.

his father in the year 1897 leaving a widow Basawa II, defendant 1. Shivlingappa died in October 1899 leaving him surviving one Basawa I, who was either his widow or a mistress. Shivbasappa's widow Basawa II adopted Bhimappa, defendant 2, on the 20th June 1900 under a registered adoption-deed. The adoption ceremony was performed in the presence of Basawa I, who, four days later, consented to the adoption by a document. Subsequently on the 12th August 1903 Basawa II, defendant 1, and Bhimappa, defendant 2, sold a field to Gavsu valad Ghudumiya, defendant 3. Thereafter Balappa brought the present suit during the year 1903 to recover a moiety of two fields (which had been sold to defendant 3) and a house from the defendants 1 and 2 on the ground of survivorship to his elder brother Shivlingappa whose son Shivbasappa had predeceased his father.

Defendants 1 and 2 resisted the claim on the strength of the latter's adoption.

Defendant 3 relied on his title as vendee from defendants 1 and 2.

The Assistant Judge found that the adoption of defendant 2 was not proved, and even if it had been proved, it was not valid on the grounds that (1) Basawa I was not the proper person to consent to the adoption, she being only the kept mistress of Shivlingappa; (2) supposing that she was the widow of Shivlingappa she was not the proper person to validate the adoption by her acquiescence, the plaintiff's consent being necessary, as he "was the dispossessed heir"; and (3) the acquiescence of Basawa I was not proved. He, therefore, held that the sale to defendant 3 was *ultra vires*.

On appeal by the defendants the Judge confirmed the decree holding that the ceremony of adoption of defendant 2 by defendant 1 was proved, but the adoption was invalid owing to the absence of the consent of the plaintiff in whom the estate vested as the next heir of his deceased brother Shivlingappa who was divided from him; that the sale to defendant 3 by defendants 1 and 2 was, therefore, invalid; and that the plaintiff became the heir of Shivlingappa on his death which took place on the 3rd October 1899.

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Defendants 2 and 3 preferred a second appeal.

K. H. Kelkar appeared for the appellants (defendants 2 and 3):—The Judge did not frame proper issues. Before holding that Balappa was the heir of his deceased and separated brother Shivlingappa, it must be expressly found whether Basawa I was or was not the widow of Shivlingappa.

G. S. Mulgaumkar appeared for respondent 2 (plaintiff):—The Judge has found by implication that Basawa I was the mistress of Shivlingappa, otherwise he would have held that she was his heir and not Balappa. In this connection the Judge has adopted the reasons given by the first Court, *Chandra v. Gojarabai*.⁽¹⁾

Next we contend that the adoption of defendant 2 is invalid because Basawa I, assuming that she is the widow of Shivlingappa, gave her consent four days after and not at the time of the adoption. Under the Hindu Law, as the widow of her husband, she was the heir of Shivlingappa, and as the adoption divested her of her estate, her consent was necessary contemporaneously with the adoption. An adoption without such contemporaneous consent would be void *ab initio*, therefore consent subsequently given cannot validate it. Further, it must be shown that the consenting party knew that without his or her consent the adoption would be worthless, and that he or she consented to the adoption not as a lawful but as an unlawful act, Mayne's Hindu Law, p. 250, sixth edition.

Mere acquiescence is not equivalent to consent, *Vasudeo Vishnu v. Ramchandra* ⁽²⁾; *Payapa v. Appanna* ⁽³⁾.

The evidence in the case, no doubt, shows that Basawa I was present at the ceremony of adoption. But this circumstance cannot prove knowledge on her part that without her consent actually given, the adoption would be invalid. Presence is nothing more than acquiescence, and according to law what was required was express consent.

JENKINS, C. J.:—The decision of this case depends upon whether Bhimappa, the 2nd defendant, was validly adopted by Basawa, defendant No. 1. But the lower Appellate Court has

(1) (1890) 14 Bom. 463.

(2) (1896) 22 Bom. 551.

(3) (1898) 23 Bom. 327 at p. 331.

failed to find the facts on which alone that point can be determined.

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There must first be a definite finding by the lower Appellate Court as to whether Basawa the first was or was not the wife of Shivlingappa: and in case that is determined in the affirmative, it will be necessary to consider whether Basawa the first consented at the time of the adoption of Bhimappa by Basawa the second. It has been urged before us that on the facts of this case there can be no room for discussion on this point; and for this purpose reliance is placed upon a remark in the head-note in *Wasudeo v. Ramchandra*,⁽¹⁾ to the effect that mere presence at the ceremony, in the absence of any objection, might imply an acquiescence, but mere acquiescence is not equivalent to consent.

It is urged that this is directly applicable here, for, though it is found by the first Court that Basawa the first was present at the adoption ceremony, her actual consent, it is said, was not given until the execution by her, four days later, of the deed of consent.

This passage in the head-note is taken from the judgment of Mr. Justice Ranade; but it is a dictum not necessary for the decision of the case, and if it bears the meaning that has been ascribed to it in the argument before us, we think it is not borne out by the cases on which it professes to be based.

Consent need not be by word, it may be by act, and this was clearly the view of the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha*,⁽²⁾ where they adopt the reasoning of the words of the House of Lords in *Cairncross v. Lorimer*.⁽³⁾ It was there said: "The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained . . . to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct." And if consent can be intimated by

(1) (1896) 22 Bom. 551.

(2) (1892) 19 I. A. 203 at p. 216.

(3) (1860) 3 Macq. H. L. Cas. 827 at p. 829.

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conduct as well as by acts, it is clear that acquiescence may, under certain circumstances, be taken to be consent.

That is made clear by the following passage in the same judgment where it is said: "I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and *acquiesces in it, so as to induce a reasonable belief that he consents to it,*⁽¹⁾ and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had if it had been done by his previous license." Mere presence is not necessarily equivalent to consent, for consent in this connection implies an intelligent concurrence on due consideration, and it is for the Court to determine whether the whole circumstances of the case invite the inference that such a consent has been given, bearing in mind that the consent required is a matter, not of form, but of substance.

We, therefore, are of opinion that for the decision of this case it will be necessary to send down for determination in the light of these remarks the following issues:—

(1) Was Basawa the first wife of Shivlingappa?

(2) If so, then was she present at the ceremony of adoption, and did she thereby consent to the same?

Additional evidence may be adduced on the point of consent if the Judge thinks fit.

To be returned in two months.

Issues sent down.

G. B. R.

(1) These words are not in italics in the original judgment from which the passage is quoted. Ed.