parties as members of the Kharwa community. That law is annexed to the status.

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On these grounds the decree of the District Court passed in appeal must be varied by adding the following words after: "defendant 1 do return to the plaintiff and live with him as his wife and that defendant No. 2 do refrain from prohibiting her from doing so":—

"Upon the plaintiff securing re-admission into the Kharwa community of Mahomedans of which he and defendant No. 1 were members at the time of marriage."

The appellant must pay to the respondents the costs throughout.

Decree varied.

R. R.

PRIVY COUNCIL.

BACHOO HURKISONDAS (PLAINTIFF) *v.* MANKOREBAI AND OTHERS (DEFENDANTS).

P. C.*
1907.
February 14.
May 7.

[On appeal from the High Court of Judicature at Bombay.]

Hindu Law—Adoption by widow with authority of husband—Adoption after birth of posthumous son to sole surviving co-parcener—Joint family—Mitakshara Law—Gift to daughter out of joint property—Gift out of income—Right to partition.

Two brothers formed a joint family governed by the Mitakshara law as in force in Bombay and were possessed of considerable ancestral property. One of them died on 14th September 1900 without male issue but leaving his widow pregnant. The other brother died on 17th December 1900 leaving a will dated 30th November by which he purported to make certain dispositions of the family property, and also authorised his widow to adopt a son with the consent of persons specifically mentioned in the will: "such adoption to be made even though a son is born to my brother's widow." On 18th December his brother's widow gave birth to a son, the plaintiff. On 17th February 1901 the testator's widow adopted a son to her husband with the consents directed in the will. It was contended that on the face of the will the adoption was illegal and void because the power to adopt was part of a plan for the disposi-

* *Present*:—LORD MACNAGHTEN, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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tion of the family property which was in contravention of the law, and the power was dependent on that plan having effect.

Held on the construction of the will that the dispositions made were within the testator's competence at the date of the will and at the date of his death; they were only liable to be defeated in one event (which in fact happened) namely his brother's widow giving birth to a son, and the will expressly said that, in that case, the adoption should still be made.

It was also contended that at the time the adoption took place the family property had become vested absolutely and exclusively in the plaintiff, and that the adoption could not divest it.

Held that the adoption being made with the authority of the husband was valid, and under the circumstances the plaintiff took the property subject to the adoption, and the adopted son became on his adoption a co-parcener with the plaintiff in the family property.

Sri Virada Pratapa Raghunada Deo v. *Sri Brozo Kishoro Patta Deo* (1) followed.

Held also that a sum of Rs. 20,000 given to his daughter, one of the defendants, by the testator and transferred to her in his life-time, was a valid gift and justified by the circumstances of the case, and as being made not out of capital but out of income.

Held further that partition of the property which was asked for in case the plaintiff had no exclusive right to it was rightly refused by the Courts in India.

APPEAL from a judgment and decree (25th January 1904) of the High Court at Bombay which partly affirmed and partly varied a decree (4th October 1902) of a Judge of the same Court sitting in exercise of its original civil jurisdiction.

The principal questions arising on this appeal were whether the second respondent Nagurdas was validly adopted, and so became by the adoption a member of a joint family with the appellant and entitled to share in the family estate; and whether a gift of Rs. 20,000 made to the third respondent, Navalbai, was within the power of the donor, her father.

The facts are sufficiently stated in the report of the case before the High Court which will be found in I. L. R. 29 Bom. 51.

On this appeal,

Jardine, K. C., and *G. E. A. Ross* for the appellant and Gangabai, the fourth respondent, contended that the power to

(1) (1876) L. R. 3 I. A. 154; 1 Mad. 69.

adopt which was given by the will and the adoption of Nagurdas following it were illegal, as Bhagwandas had by the will attempted to make a disposition of his property which the Hindu Law did not allow. In this view the adoption was invalid as not having been made from a proper motive. The Full Bench case of *Ramchandra* v. *Mulji Nanabhai* (1) lays down that the motive is irrelevant; but with reference to the case of *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (2) the Bombay case, it was submitted, stated the proposition too broadly. At the date of the adoption the joint ancestal property had become vested in the appellant as the sole owner thereof, and the High Court had erred in deciding that such property became divested as the effect of the adoption of Nagurdas. There was no such divesting as to give any share to the adopted son. Reference was made to *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (3); *Thayammal* v. *Venkatarama* (4); *Rupchand* v. *Rakhmabai* (5); *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (6); *Surendra Nandan* v. *Sailaja Kant Das Mahapatra* (7); (the two last cases were distinguished on the ground that the property there was impartible, and could be disposed of by will) *Bapuji* v. *Pandurang* (8); and *Kalidas Das* v. *Krishan Chandra Das* (9). [*Cohen, K. C.*—No case had been so decided according to Mitakshara law; see Mayne's Hindu Law, 7th Ed., 814; and *Krishna* v. *Sami* (10)]. The property having become vested in the appellant, the widow of Bhagwandas had no power to make the adoption without the consent of the appellant.

It was also contended that the gift of Rs. 20,000 to Navalbai was not a valid gift; it was not given for her marriage; it was made very shortly before Bhagwandas' death; it was not an ordinary gift of affection; and there was no special reason or

(1) (1896) 22 Bom. 558.
(2) (1876) L. R. 4 I. A. 1 (14); 1 Mad. 174 (190, 191).
(3) (1865) 10 Moo. I. A. 279 (309).
(4) (1887) L. R. 14 I. A. 67; 10 Mad. 205.
(5) (1871) 8 Bom. H. C. R. (A. C. J.) 114 (119).
(6) (1876) L. R. 3 I. A. 154 (193); 1 Mad. 69 (83).
(7) (1891) 18 Calc. 385.
(8) (1882) 6 Bom. 616.
(9) (1869) 2 B. L. R. F. B. 103.
(10) (1885) 9 Mad. 64.

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emergency for making such a gift. *Parvati* v. *Ganpatrao Balal*[1] was referred to.

As to the share of the adopted son if the adoption was held valid *Raghubanund Doss* v. *Sadhu Churn Doss*[2] was cited. That question would only arise if the Court decreed partition which, in such a case, it was submitted should be allowed. *Ramasami Aiyan* v. *Venkataramaiyan*[3] was referred to.

Cohen, K. C., and *L. DeGruyther* for respondents 1, 2 and 3 contended that the adoption of Nagurdas was, as both Courts below had held, valid. It was authorized by Bhagwandas, and consented to by those whom he directed should be asked to give their assent to it. As to the position of the adopted son reference was made to Mayne's Hindu Law, 7th Ed., 370; Markby on Hindu Law, 94; and West and Bühler's Digest of Hindu Law, 994; and to *Appovier* v. *Rama Subba Aiyan*[4]. The effect of the adoption was to make the adopted son a co-parcener in the joint family. The ancestral property on the death of Bhagwandas did not vest absolutely in the appellant. A sole co-parcener was not an absolute owner in such circumstances as those in the present case; the ancestral property remained joint property and his interest in it was subject to the adoption by which another co-parcener was brought into the joint family which did not cease to exist as long as the widow of one of the members had the right to adopt a son; such right existed as well in an undivided family as in a separated family. There was therefore no divesting of the estate, it not having vested absolutely in the appellant. Reference was made to *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[5] and to the fact that Lord Kingsdown's decision in that case was given on the construction of the deed of adoption and not on general principles of Hindu Law; *Katama Natchier* v. *The Rajah of Shivagunga*[6]; *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*[7]; *Sri*

(1) (1893) 18 Bom. 177 (183).
(2) (1878) 4 Calc. 425.
(3) (1879) L. R. 6 I. A. 196; 2 Mad. 91.
(4) (1866) 11 Moo. I. A. 75.
(5) (1865) 10 Moo. I. A. 279.
(6) (1863) 9 Moo. I. A. 543 (589).
(7) (1890) L. R. 17 I. A. 128 (131); 18 Calc. 151.

Virada Pratapa Raghunada Deo v. *Sri Brozo Kishoro Patta Deo*(1); Mayne's Hindu Law, 7th Ed., 241; *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*(2); *Mondakini Dasi* v. *Adinath Dey*(3); *Vithoba* v. *Bapu*(4); *Padmakumari Debi Chowdhrani* v. *Court of Wards*(5); and *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(6).

The gift to Navalbai, it was contended, was a valid gift: Bhagwandas had power to make it, and the state of the property justified it, as also the fact found by the High Court that it was made not out of the capital, but out of the income, of the estate. The partition asked for had been rightly refused by the Courts below.

Jardine, K. C., replied:—When reduced to one member the joint family ceased to exist.

1907, May 9th:—The judgment of their Lordships was delivered by—

SIR ARTHUR WILSON:—In the year 1900 two brothers, Hurkisondas and Bhagwandas, formed a joint Hindu family governed by the Mitakshara law as in force in Bombay, and as such they held large ancestral property.

On the 14th September 1900 Hurkisondas died without male issue, but leaving his widow pregnant. On the 30th November of the same year Bhagwandas made his will, by which he purported to make certain dispositions of the family property, and also directed his widow to adopt a son. The terms of this will will be considered hereafter. On the 17th December following Bhagwandas died, and on the next day Hurkisondas' widow gave birth to a son Bachoo, the present plaintiff and appellant. On the 17th February 1901 Bhagwandas' widow adopted Nagurdas as son to her deceased husband, with the consents prescribed by his will.

(1) (1876) L. R. 3 I. A. 154 (157, 158); 1 Mad. 69 (78, 79).
(2) (1891) 18 Calc. 385 (398).
(3) (1890) 18 Calc. 69.
(4) (1890) 15 Bom. 110.
(5) (1881) L. R. 8 I. A. 229; 8 Calc. 302.
(6) (1876) L. R. 4 I. A. 1 (8); 1 Mad. 174 (182, 183).

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The parts of that will material for the present purpose are the following :—

By clause 2 he appointed executors and trustees.

"4. I have a daughter by name Navalbai. I direct that my executors and trustees shall get her suitably married (if she is not married in my life-time), at an outlay of Rs. 5,000 five thousand or thereabouts. I also direct that they shall on the occasion of her marriage present her with ornaments of the value of Rs. 10,000 ten thousand or thereabouts and wearing apparel and silver pots of the value of Rs. 5,000 five thousand or thereabouts.

"5. I further direct that my executors and trustees shall during her life-time place at her absolute disposal two carriages and two horses and maintain the said carriages and horses out of my estate.

"6. I hereby direct my executors and trustees to set apart for my said daughter so much of my immoveable property at Kasu as will yield a net income of Rs. 200 two hundred per month. I also devise and bequeath to her my house in Bombay which opens on Narayen Dhuru Street and Bibi Jan Street, and bears Nos. 13—23, 61—69. She is to enjoy the said immoveable property and the said house during her life-time, and on her death the said property and house shall belong to such of her children as may be born or conceived in my life-time, but in default of her having any such children I hereby give her power to appoint the said property and house in such manner as she may in her absolute discretion deem fit. In the event of her not making any such appointment, and not leaving any such children as aforesaid, I direct that the said property and house shall after her death be treated as a part of the residue of my estate."

Clause 7 dealt with the contingency of the brother's widow giving birth to a daughter, and purported to make provision for the girl, in a manner somewhat similar to that made for the testator's own daughter.

Clause 8 contained provisions for the two widows, the testator's and his brother's.

Clause 9 said :—

"I hereby direct my wife to adopt a son to me but such adoption must be made with the consent of Sir Bhalchandra Krishna and Rao Bahadur Ghansham Nilkant Nadkarni; such adoption is to be made even though a son is born to my brother's widow. In the event of a son being born to my brother's widow, however, my wife should, before making the adoption, enter into an agreement with the adopted son or his proper guardian that such adopted son shall be bound to accept as valid the provisions hereby made for my daughter Navalbai and my wife."

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These are all the facts relevant to the principal questions arising in the present case.

The plaint was filed in the High Court of Bombay, on the 28th February 1901, immediately after the adoption, on behalf of Bachoo, the posthumous son of Hurkisondas, against a number of persons, amongst whom was the fifth defendant, the adopted son of Bhagwandas. The main controversy in the case lay between those two parties. The plaint asked for a declaration that the plaintiff is exclusively entitled to the ancestral property, that the fifth defendant is not the adopted son of Bhagwandas, and is not entitled to any interest in the estate. In the alternative, in case the exclusive right of the plaintiff should not be established, the plaint asked for partition. All these claims were opposed.

Tyabji, J., who tried the case, held that the adoption was valid, and rejected the claim of exclusive right set up on behalf of the plaintiff. He further refused to order a partition, on the ground that it would not be beneficial to the infants concerned, or to either of them. On all these points the Court of Appeal agreed with him.

On the last point, that of partition, it is enough to say that their Lordships entirely concur with the Courts in India.

As to the adoption and its effect the first point raised by the appellant was this: It was contended that, on the face of the will, the power to adopt was a part of a plan for the disposition of the family property which was in contravention of the law, and that the power was dependent upon that plan having effect. But this is to misread the will.

The dispositions made by the testator were within his competence, at the date of the will, and at the date of his death; they were only liable to be defeated in one event (which in fact happened), namely, his brother's widow giving birth to a son. And the will expressly said that, supposing that event to occur, the adoption should still be made.

The next point raised was as to the effect of the adoption upon the title to the joint property. It was contended that, at the time when the adoption took place, the family estate had

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become vested absolutely and exclusively in the infant Bachoo, plaintiff-appellant, and that the adoption could not detract from the right so vested. Their Lordships are, however, of opinion as were the Courts in India, that the case of *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(1), decided by this Board, governs this case and excludes the appellant's contention.

The point that remains for consideration is quite unconnected with the other questions in the case. Navalbai, the daughter of Bhagwandas, was made a defendant in the suit. In her written statement she alleged that she was absolutely entitled to Government promissory notes, of the nominal value of Rs. 20,000 as given to her and transferred to her name by her father in his life-time. As to the fact of the gift and the transfer there is now no controversy. At the time of the gift Bhagwandas was the head of the family, and indeed the only male member of it, and the estate was large. Tyabji, J., considered that the gift was not justified by the circumstances of the case. The Court of Appeal, having in the meantime ascertained that the gift was made out of income, not out of capital, took a different view, and decided in favour of Navalbai.

The question belongs to a class in respect of which this Board is always very unwilling to interfere with the decisions of the Courts in India; and no sufficient reason has been shown why they should do so in the present instance.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant and 4th respondent:—*Messrs. Payne and Lattey.*

Solicitors for respondents 1, 2 and 3:—*Messrs. Hughes & Sons.*

J. V. W.

(1) (1876) L. R. 3 I. A. 154; 1 Mad. 69.