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for the proposition that an award is equivalent to a judgment, whether it has passed into a decree or not. It is binding upon the parties. And where it directs partition to be effected, it dissolves the joint family, and from the moment of its date severs their joint interests. On these grounds we confirm the decree with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *March* 18.

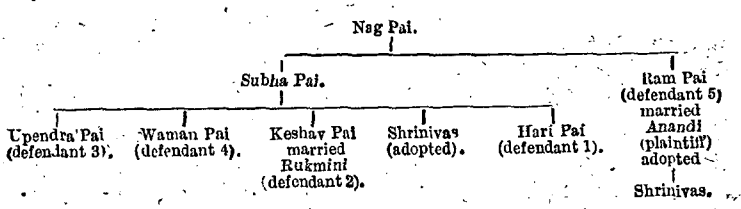
ANANDI *alias* SHITABAI *kom* RAM PAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI SUBA PAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Mitakshara—Adopted son—Succession to the adopted son—Adoptive mother entitled to succeed in preference to adoptive father.

Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed, in preference to the adoptive father, to a son taken in adoption.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kánara, confirming the decree passed by K. R. Natu, Subordinate Judge at Kumta.

The relationship between the parties to this suit appears from the following genealogical tree:—



The parties shown in the above genealogical tree were living together as a joint family. A partition took place between

* Second Appeal No. 800 of 1907.

them on the 10th August 1888. At this partition Ram Pai (defendant 5) obtained one-half share and the five sons of Subha Pai obtained the other half.

Both Ram Pai and his wife Anandi adopted Subha Pai's son Shriniwas as their son. But subsequently to the adoption, a son, Purshottam, was born to them. They therefore allotted to Shrinivas one-fourth of the moiety of the estate which had on partition come to the hands of Ram Pai. Thus Shrinivas obtained $\frac{1}{8}$ share of the entire estate.

Shrinivas died a bachelor on the 29th July 1892.

On the 25th July 1904, Anandi filed this suit to recover Shrinivas' $\frac{1}{8}$th share in the family property.

The defendants (sons of Subha Pai) and Ram Pai resisted her claim.

The Subordinate Judge dismissed the suit on the ground that Anandi as the adoptive mother of Shrinivas was not entitled to succeed in preference to the adoptive father. His reasons were as follows:—

"Although under Mitakshara which prevails here a mother by birth would be a preferable heir to father by birth, still whether an adoptive mother would have a preference to an adoptive father has not, so far as I know, been yet decided by any of the High Courts. No such decision has been pointed out to me. The reasons which give a preference to a mother by birth over a father by birth do not, I think, apply in the case of an adoptive mother. By many commentators, a mother by birth is preferred to the father by birth upon considerations derived from a comparison of the respective degrees in which mother and father share, in the composition of the sons, while the Mitakshara prefers her on the ground of greater propinquity (Mayne, section 521). Paragraph 167 of Mayne discusses the question of the preference amongst the several widows of deceased's adoptive father. But no authority is cited as to whether an adoptive mother would have a preference to an adoptive father. In the present case the adoption of Shrinivas was made by deceased, defendant 5. According to the Mitakshara, it has been decided in Bombay that a step-mother cannot be introduced as an heir under the word *mata* (mother) but that she is a more distant heir as the wife of *gotraja sapinda* and therefore herself a *gotraja sapinda* according to the doctrines of this Presidency (*vide* I. L. R. 19 Bom. 707). Just as therefore a step-mother cannot have a preference to a father by birth, so I think an adoptive mother cannot have a preference to an adoptive father."

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On appeal this decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

S. S. Patkar, for the appellant:—We submit that the adoptive mother is entitled to succeed to the estate of the son taken in adoption in preference to the adoptive father. She has the preferential right to succeed if the son is natural born. The grounds of her preference are (1) that माता comes first in the compound मातापितरौ; (2) that the mother is not necessarily common to all sons but the father is; and (3) that she is nearer by propinquity. On the texts, the adoptive mother is entitled to preference; and even according to decided cases an adopted son occupies the same position as a natural son except in a few instances which are defined both in the Dattaka Chandrika and Dattaka Mimansa. See *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*[1]. An adopted son is heir to the *stridhan* of his adoptive mother: *Teencowree Chatterjee* v. *Dinonath Banerjee*[2]. He has the rights of succession as a natural son: *Surjokant Nundi* v. *Mohesh Chunder Dutt*[3]; *Sham Kuar* v. *Gaya Din*[4]; Mayne's Hindu Law, page 214, section 164; page 217, sections 166, 167 (7th Edn.).

S. V. Palekar, for the respondent:—In the case of a natural son, the mother enjoys preference because she has conceived and nurtured him. This reason does not apply to an adopted son. It is competent to a bachelor to adopt: *Gopal Anant* v. *Narayan Ganesh*[5] and in that event the father would be the heir. Thus, the father has the preferential right: and he has been accorded it by other commentators.

CHANDAVARKAR, J.—The sole question argued in this second appeal is whether, under the Hindu Law, governed by the Mitakshara School, the adoptive father or the adoptive mother is the preferential heir to an adopted son. According to the Mitakshara, when a son dies, leaving his parents as his heirs, the mother succeeds to the son's estate before the father. Both the Courts below have, however, held in the present case that

(1) (1883) L. R. 10 I. A. 138.
(2) (1855) 3 W. R. (Civ. Rul.) 49.
(3) (1882) 9 Cal. 70.
(4) (1876) 1 All. 255.
(5) (1888) 12 Bom. 329.

the rule in question applies only to the estate of a natural-born but not to that of an adopted son dying.

The learned Subordinate Judge says:—

"The reasons which give a preference to a mother by birth over a father by birth do not, I think, apply in the case of an adoptive mother. By many commentators a mother by birth is preferred to the father by birth upon considerations derived from a comparison of the respective degrees in which mother and father share in the composition of the son, while the Mitakshara prefers her on the ground of propinquity."

Vijnaneshwara puts the preference of the mother to the father on two grounds, which, as West J. has rightly observed in his judgment in *Lallubhai* v. *Mankuvarbai*[1] are of an artificial character. They are (1) that the word *pitarau* (parents), which occurs in Yajnyavalkya's text specifying the heirs in the case of obstructed succession, is the abbreviation of two words forming a conjunctive compound, *matapitarau* (parents), in which the word *mata* (mother) comes before the word *pitru* (father); and (2) that the mother's propinquity is greater than the father's. (The Mitakshara, Section III, sections 2 and 3, Stokes's Hindu Law Books, pp. 441 and 442).

No doubt propinquity does enter into the reasoning of Vijnaneshwara but it does not on that account follow that he intended to deny the same propinquity to an adopted son which he allows to the natural-born son. The fallacy of the Subordinate Judge's reasoning lies in the fact that he gives the go-bye altogether to the legal fiction on which the whole doctrine of adoption in Hindu Law is founded. As observed in West and Bühler, "the effect of adoption is to sever the boy adopted entirely from his family of birth. His proper residence is with his adoptive parents. He exchanges 'the gotra' of his real father for that of the adoptive father as a woman enters her husband's gotra by marriage. He learns the sacred invocations in his family of adoption, and in the absence of a son by birth completely takes his place." (West and Bühler's Digest of Hindu Law, 3rd Edition, pp. 934 and 935). The

(1) (1876) 2 Bom. 388 at p. 439.

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fiction has the effect of bringing about the ties of blood-relationship between the boy and his adoptive parents. If that is so, the remark of the Mitakshára (Stokes's Hindu Law Books, pp. 442 and 443) that "the father is a common parent to other sons, but the mother is not so: and, since her propinquity is consequently greatest, it is fit, that she should take the estate in the first instance, conformably with the text, 'To the nearest Sapinda the inheritance next belongs'", must apply in virtue of the legal and Shastric fiction as much to an adopted as to a natural-born son.

The text of Yajnyavalkya in which the heirs in the case of an obstructed succession are specified applies to succession to an adopted son as much as to succession to a natural-born son. Besides, Vijnaneshwara points out in another connection that there is a blood-tie between an adopted son and the family and collateral kinsmen of his adoptive father. Dealing with the twelve kinds of sons recognised by the old but now obsolete Hindu Law, he refers to a text of Manu, according to which the first six, among whom are the natural-born and the adopted son, are heirs and kinsmen, and the other six are not heirs but only kinsmen. Vijnaneshwara then explains the text as follows:—"That must be expounded as signifying, that the first six may take the heritage of their father's collateral kinsmen (Sapindas and Samanodakas) if there be no nearer heir; but not so the last six. However, consanguinity and the performance of the duty of offering libations of water and so forth, on account of relationship near and remote, belong to both alike." (The Mitakshara, Chapter I, Section XI, placitum 31, Stokes's Hindu Law Books, page 422.) This explanation he supports by another text of Manu relating to an adopted son: "A given son must never claim the family and estate of his natural father. The funeral oblation follows the family and estate; but of him, who has given away his son, the obsequies fail." Stokes's Hindu Law Books. (Page 422, placitum 32). It is true that in these citations from the Mitakshara the reference is only to the father, not to the mother. But that does not mean that the mother is excluded. Vijnaneshwara is one of those who held strongly to the principle of the Shastras that the

husband and wife form one body. He refers to the principle and its limitations in the Chapter on Debts[1]. In the Chapter on Penance he says that the husband and wife form one body by reason of their joint rights in matters of religious merit[2], secular affairs, and pleasures.

As West, J., points out in *Lallubhai Bapubhai* v. *Mankuvarbai*[3] Vijnaneshwara "really accepted the proposition 'that of him whose wife subsists one-half the body survives' as a basis for actual practice."

The learned District Judge, accepting the view of the Subordinate Judge, has refused to follow what he calls "the letter of the law" of the Mitakshara on the ground that "the fiction of the physical reality of an adoption is not always maintained." But the cases in which it is not maintained are specified and not left to conjecture or inference. Those, again, are cases which form exceptions to the general rule which is the result of the legal fiction. And it is a rule of construction (Mimansa) according to Hindu Law, that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to unduly encroach upon the general rule. See this rule of construction explained in *Gangu* v. *Chandrabhagabai*[4]. The legal fiction, on which the theory of adoption is founded, invests an adopted son with the *status* of a natural-born son, except in cases excluded from the operation of the fiction either expressly or by necessary and clear implication. The District Judge further observes:—"The mother appears to be preferred on account of the merit which she possesses in reference to her son, from having conceived and nurtured him in her womb. Clearly this ground is absent in the case of an adoptive mother." This last sentence begs the whole question. The ground is absent only if we drop the whole theory of adoption, based on a legal fiction according to Hindu Law. The same remark applies to the reasoning that

(1) The Mitakshara: Moghe's 3rd Edition, pages 142 and 143.

(2) The Mitakshara: Moghe's 3rd Edition, page 373, of the Mitakshara.

(3) (1876) 2 Bom. 388 at p. 440.

(4) (1907) 32 Bom. 275 at p. 283; 10 Bom. L. R. 149.

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because the adoption was made by the adoptive father and the adoptive mother had nothing to do with it, therefore, the adoption was for the benefit of the former only and the latter was "no more than the wife of the man who made the adoption". It is now more or less an exploded theory that a Hindu who has no son born to him adopts merely for his spiritual benefit and that secular objects either do not enter into the act or that they enter incidentally. Whatever the spiritual theory which originally gave rise to adoption in Hindu society, its motives and effects are at least as secular as they are spiritual; and an adoption is made as much, if not more, for the purpose of having an heir and continuing the family as for spiritual ends. These latter can, according to the Hindu Shastras, be attained by other means than those of adoption[1]. But there is no secular way of continuing a family except by adoption where there is no son born. Assuming that a Hindu adopts a son for his spiritual benefit, what warrant is there in either Hindu Law or Shastras for the inference that the spiritual benefit secured to the Hindu by his act of adoption does not enure for the benefit of his wife also? As we have pointed out above, for religious purposes and merit, the wife is identified completely with the husband and they form "one body". And this is in accordance with the Dattaka Mimansa:—"In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband." (Dattaka Mimansa, Section I, Section 22: Stokes's Hindu Law Books, page 536). Accordingly, a Full Bench of the Allahabad High Court has held in *Sham Kuar* v. *Gaya Din*[2] that under the Dattaka Mimansa and the Mitakshara, an adopted son succeeds to property to which his adoptive mother succeeded as heiress to her father.

(1) 1. As Manu says, "many thousands of Brâhmins having avoided sensuality from their early youth, and having left no issue in their families, have ascended nevertheless to heaven" [Manu V, 159—161, Bhattacharya's Hindu Law, 2nd Edn., page 15. See also West and Bühler's Hindu Law, 3rd Edn., page 905, Note (*a*). Manu's text is cited with approval by Vijnaneshwara in the Mitakshara; Moghe's 3rd Edn., page 194].

(2) (1876) 1 All. 255.

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For these reasons the decree appealed from must be reversed and the point on which the District Court has decided the appeal being substantially of a preliminary character, the case must be remanded to that Court for disposal according to law. Costs of this second appeal must be paid by the respondents. Other costs to abide the result.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909.

March 23.

GULABCHAND PARAMCHAND (ORIGINAL DEFENDANT 1), APPELLANT, *v.* FULBAI KOM HARICHAND RAMCHAND AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 5), RESPONDENTS.*

Indian Contract Act (IX of 1872), sections 2 (g) (h), 20-35, 65—Indian Trusts Act (II of 1882), section 84—Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two.

By an agreement made between the parties the plaintiff promised to pay the sum of Rs. 1,800 to the defendant as consideration for the latter's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had before her son's death paid to the defendant the sum of Rs. 750. Subsequently the plaintiff having brought a suit to recover that sum, the defendant contended that the agreement being by way of marriage brokerage was void as opposed to public policy and, therefore, under section 65 of the Indian Contract Act (IX of 1872) no sum paid under it could be recovered.

Held, that having regard to the character of the agreement between the parties the plaintiff was entitled to recover the sum from the defendant.

Section 65 of the Indian Contract Act (IX of 1872) provides for the restitution of any advantage received under a contract or agreement. The section preserves the distinction between agreement and contract which is maintained throughout the Act. The section speaks generally of an agreement discovered to be void without any express reference to the cause or origin of the void character, so that an agreement which is void by reason of a principle of law would not on that account fall outside the scope of the section.

* Second Appeal No. 258 of 1908.