APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908. *September 9.*

RAMAKRISHNA *alias* RAMASWAMI BIN KUPPUSWAMI (ORIGINAL PLAINTIFF), APPELLANT, *v.* TRIPURABAI KOM KUPPUSWAMI MODLIAR (ORIGINAL DEFENDANT), RESPONDENT*.

Hindu law—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage.

Thus, if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

Lakshman v. *Radhabai*(1) and *Moro* v. *Balaji*(2), followed. *Sreeramulu* v. *Kristamma*(3), not followed.

SECOND appeal from the decision of T. D. Fry, District Judge of Dhárwár, confirming the decree passed by V. V. Phadke, First Class Subordinate Judge at Dhárwár.

Suit for a declaration that the plaintiff was the owner of certain property.

The property in dispute belonged to one Kuppuswami, who died leaving him surviving his widow Tripurabai (defendant No. 1). She went into possession of the property; and mortgaged the same with the defendant No. 2 for Rs. 400. The mortgagee (defendant No. 2) obtained a decree on his mortgage: the property was sold in execution of the decree and purchased by defendant No. 3.

* Second appeal No. 870 of 1907.

(1) (1887) 11 Bom. 609. (2) (1894) 19 Bom. 809.

(3) (1902) 26 Mad. 143.

After this, Tripurabai adopted the plaintiff on the 28th January 1905.

On the 10th March 1905, the plaintiff as the adopted son of Kuppuswami brought a suit, to obtain a declaration that he was the owner of the property.

The Subordinate Judge held that the transaction entered into by Tripurabai was for good consideration and valid, and was binding on the plaintiff. His reasons were as follows :—

"Almost at the close of the trial the defendants produced a certified copy of a decision of the Bombay High Court (*Bhaudixit* v. *Ishwardixit*[1]), wherein it has been held that an adopted son of a Hindu widow has no right during her life-time to question the validity of alienations effected by the widow before his adoption. It is clear that this decision will bar the present suit. This Court is bound to follow a decision of the High Court but I have got my own misgivings owing to the fact that the decision has not been reported even in the Bombay Law Reporter. These cases are likely to go before the High Court where the decision now relied on by the defendants may be reconsidered."

On appeal, this decree was confirmed by the District Judge on the following grounds :—

"I have before me the decision of the Bombay High Court in the unreported case referred to by the Subordinate Judge. It does not, however, seem necessary for me to discuss the propriety of following an unreported judgment as I propose to follow the Madras judgment in *Sreeramulu* v. *Kristamma* (26 Mad. 143), which appears to conclude the question at issue.

It is urged on the other side that this ruling is opposed to the Bombay rulings in *Laxman* v. *Radhabai* (11 Bom. 609) and *Moro* v. *Balaji* (19 Bom. 809).

If this were so, I should, of course, follow the Bombay rulings, but it seems clear that the Madras case raises and decides the point for the first time.

On page 148 of the Madras judgment occurs the following passage :—

"In the few reported cases in which a son adopted by a widow brought a suit during her life-time to set aside alienations made by her prior to the adoption, the decision proceeded on the assumption that he would be entitled to recover possession of the property alienated, unless the alienation were made for a purpose which would be binding upon a reversionary heir. In all the cases in which the alienation was set aside at the instance of the adopted son, the decision proceeded only on the ground that the widow exceeded her lawful power in making the alienation. In none of them was the question distinctly

(1) S.A. No. 146 of 1905 (Unrep.).

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raised and considered, whether the vendee would not in any event be entitled to retain possession during her life-time as the widow of her deceased husband."

The point is then considered at length and the suit brought by the adopted son is dismissed as premature.

I thus have excellent authority for holding that this decision is not opposed to any former decision.

That being the case it is clearly my duty to follow this judgment unless and until it is dissented from by the Bombay High Court. More especially is that course incumbent on me when I find it remarked on page 155 that the rule "is not only sound in principle but is in consonance with justice and equity."

The plaintiff appealed to the High Court.

A. G. Desai for the appellant:—The decision in *Sreeramulu* v. *Kristamma*[1] is no doubt against me; but it is opposed to the rulings of this Court in *Lakshman* v. *Radhabai*[2]; *Moro* v. *Balaji*[3], which should be followed here.

G. S. Mulgaonkar for the respondent:—The question raised in this appeal was argued in *Bhaudixit* v. *Ishwardixit*[4], where the Madras case is followed. It has, however, not been followed in *Raoji Nana* v. *Kesu Nana*[5].

CHANDAVARKAR, J.:—The District Judge has rejected the appellant's claim, holding, on the authority of *Sreeramulu* v. *Kristamma*[1], that where a Hindu widow, who has inherited her husband's immoveable property, alienates part of it and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood, even though the alienation was not for a proper or necessary purpose, justified by Hindu law. This Madras ruling is directly opposed to the decisions of this Court in *Lakshman* v. *Radhabai*[2] and *Moro* v. *Balaji*[3], which the District Judge has misread in thinking that they are not conclusive on the point. There is an earlier decision of this Court (*Nathaji Krishnaji* v. *Hari Jagoji*)[6], which is equally conclusive. (See page 73 of that report.) Besides, these decisions have been followed in this Court except in one case (*Bhaudixit bin Bhaskardixit* v. *Ishwardixit bin Bhaskardixit*[4]) in which Russell and Batty, JJ., followed the

(1) (1902) 26 Mad. 143.
(2) (1887) 11 Bom. 609.
(3) (1894) 19 Bom. 809.
(4) S. A. No. 146 of 1905 (Unrep.).
(5) S. A. No. 682 of 1907 (Unrep.).
(6) (1871) 8 Bom. H. C. R. A. C. J. 67.

Madras decision. It does not appear to have been brought to the notice of those learned Judges that the law enunciated in *Nathaji Krishnaji* v. *Hari Jagoji*[1] and the other two decisions, (*Lakshman* v. *Radhabai*[2] and *Moro* v. *Balaji*[3]), has been followed in this Court in a number of unreported decisions and has been understood to be well established in this Presidency since the year 1871.

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death, with this difference that, after the adoption, she has a right of maintenance against the adopted son during the rest of her life, but that right, so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. These are indisputable propositions of law, and indeed they are admitted in the Madras judgment on the authority of the Privy Council ruling in *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* [4].

If the widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, [without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

But in support of their view the learned Judges who delivered the judgment in *Sreeramulu* v. *Kristamma*[5], rely on those decisions of the Privy Council and of our High Courts, in which it has been held that a Hindu widow has "an absolute right to the fullest beneficial interest in her husband's property for her life," that is, "during the term of her widowhood." Now, as a general proposition of Hindu law, that is true. But the cases in which it has been so held and which are cited in the

(1) (1871) 8 Bom. H. C. R. A. C. J. 67.
(2) (1887) 11 Bom. 609.
(3) (1894) 19 Bom. 809.
(4) (1843) 3 Moo. I. A. 229 at p. 242.
(5) (1902) 26 Mad. 143.

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Madras judgment, were cases in none of which was any question of an adoption by the widow and the effect it has on her estate as heir of her husband, involved. It is straining the language of those decisions, particularly the words "during her widowhood," to apply them to a state of facts not contemplated or covered by those decisions. That general proposition is qualified by the proposition laid down in other cases that such an adoption puts an end to that estate and divests her of it, though her widowhood continues.

The Madras judgment proceeds upon the analogy of an adoption made by a Hindu father after he has alienated any portion of his ancestral property. Now, it is true that the adopted son in such a case cannot question the alienation and that he becomes joint owner with the father only as to such ancestral property as the father was possessed of at the date of the adoption. But there can be no analogy between such a case and a widow making an adoption to her husband. In the case of the father, at the date of the alienation he was full proprietor of the property—he could do what he liked with it so long as there was then no son to restrict his right of alienation to purposes defined by Hindu law. The alienee takes the property absolutely and the subsequent adoption cannot affect it: *Rambhat* v. *Lakshman Chintaman*[1]. It is otherwise with a widow. Though she represents the estate as heir at the date of an alienation by her, her right is of a limited character and she has no absolute right over it except in certain cases defined by law. She can confer an absolute right on her alienee only in those cases; otherwise the alienation has effect only during the time that her widow's estate lasts. That estate, according to Hindu law, comes to an end either when she dies or when she makes an adoption. The alienee takes the property from her subject to that law, provided the alienation was not for a proper or necessary purpose according to Hindu law. It is difficult to see how the case of a father can supply any analogy to the case of a widow, which rests on different principles.

(1) (1881) 5 Bom. 630.

But the learned Judges in the Madras judgment rely on certain observations of the Privy Council in the well-known case of *Moniram Kolita* v. *Kerry Kolitany*[1] as having "an important bearing on the question now under consideration" and as lending support to their view. The observations are :—

"But, further, the widow has a right to sell or mortgage her own interest in the estate .... If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of the estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage."

Laying emphasis on the word "prior," the learned Judges in their judgment remark:—

"It will be noted that in this passage the Privy Council distinctly assume that even if the widow's estate should cease by her committing an act of unchastity and the succession of her husband's heirs should thereby be accelerated, the purchaser or mortgagee, from her, of her own life-interest in the estate, would not be divested of it, if the sale or mortgage had taken place prior to her act of unchastity, but only if it had been *subsequent* thereto."[2]

The observations of the Privy Council must be read by the light of the context in which they occur. The question in *Moniram Kolita's* case[1] was whether unchastity in a widow causes forfeiture of the property which she has inherited from her husband, where such unchastity is subsequent to the inheritance. After dealing with the texts in the Hindu law books on the subject, and concluding on the strength of those texts that such unchastity does not cause forfeiture, their Lordships proceed to refer to Mr. Justice Jackson's judgment as pointing out "the mischief, uncertainty and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly, in the present constitution of Hindu society and the relaxation of so many of the precepts relating

(1) (1880) L. R. 7 I. A. 115 at p. 155. (2) (1902) 26 Mad. 143 at p. 153.

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to Hindu widows." It is in this latter connection that the observations in question occur in the judgment of the Privy Council. First, their Lordships point out that if unchastity in a widow were held to involve the consequence of forfeiture of her estate, the reversionary heir of her husband, if he happened to be her husband's brother, might lead her into temptation and thus accelerate the succession in his own favour. That is one mischief. Next it is pointed out that a person who had taken a purchase or mortgage from her after her unchastity might suffer. The hardship, uncertainty and confusion, in such a case is obvious. The purchaser or mortgagee might not know of the unchastity at the time of the alienation in his favour, and to be deprived of the estate because the unchastity is subsequently *proved*, is hard upon the alienee, because, in that event, he must be treated as a trespasser *ab initio*, having taken the transfer without any title. These considerations do not exist in the case of a purchase or mortgage before the act of unchastity. There the purchaser or mortgagee takes a good title, subject to the condition that it will last until the widow's estate as heir is terminated in any of the modes recognised by Hindu law. Upon the hypothesis that unchastity is one of those modes, the purchaser or mortgagee, who takes the property subject to that condition, cannot complain of hardship, if subsequently the widow turns out to be unchaste, because till then he has the right to the estate. It is in this light that the Privy Council would seem to have made the observations above cited.

There is nothing in the judgment of the Privy Council to warrant the inference that their Lordships intended the observations in question as more than mere "*argumentum ab inconvenienti*," or to convey more than they have said expressly by way of illustration. The inference drawn from them by the Madras High Court is directly opposed to the decision of the Privy Council in *Bamundoss Mookerjea* v. *Mussamut Tarinee*[1] in which they entirely adopted the following *dictum* of the Bengal Sadar Divani Adalat: "In that case, the son, when adopted, became the undoubted heir; and it was of course the

(1) (1858) 7 Moo. I. A. 169 at p. 180.

correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

Article 125 of the second schedule to the Limitation Act, 1877, is also invoked by the learned Judges in the Madras judgment in support of their view. That Act, being a law of procedure, should not be presumed to have effected any change in the rights of parties given by the substantive Hindu law. Article 125 applies only to a reversionary heir which indeed a son adopted by a widow is not. But Articles 118 and 119 specially provide for the case of such a son; and where those Articles do not apply, the case must fall within Article 144: see *Moro* v. *Balaji*[1].

It is to be remarked that the judgment of the Madras High Court in *Sreeramulu* v. *Kristamma*[2] throughout confines the principle of its decision to a case where the alienation by a Hindu widow made before the adoption of a son by her, is of only a portion of the property inherited by her from her husband. If the principle is sound, there is no intelligible reason why it should not equally apply to a case where the widow has alienated the whole and not merely a portion of the property. The distinction made throughout the judgment in that respect is purely arbitrary. No authority is cited for it and it rests on no principle derived from texts or decided cases. After this, it is not necessary to follow the judgment in the consideration of the question whether its ruling is "in consonance with justice and equity." Notions of justice and equity vary and the considerations on that head noticed at the conclusion of the judgment may well be counterbalanced by others equally, if not more weighty. Most of those considerations are inapplicable to the law of adoption in this Presidency, where a widow is entitled to adopt a son, unless her husband has prohibited it, whereas in the Presidency of Madras she has to obtain the consent of her husband's *sapindas* to such adoption. In any case, such considerations as are pointed out in the judgment cannot outweigh the established principles of Hindu law.

(1) (1894) 19 Bom. 809. (2) (1902) 26 Mad. 143.

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For these reasons we adhere to the decisions of this Court in *Lakshman* v. *Radhabai*[1] and *Moro* v. *Balaji*[2] not only on the ground of *stare decisis*, but also as being sound Hindu law. Reversing the decree of the lower appellate Court we remand the appeal for disposal according to law on the merits. Costs shall abide the result.

Decree reversed.

R. R.

(1) (1887) 11 Bom. 609. (2) (1894) 19 Bom. 809.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Chandavarkar.

1908.
October 6.

KAVERIAMMA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LINGAPPA BIN RAMA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.

On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

Held, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

* Second Appeal No. 576 of 1906.