that the plaintiff whose land and whose residence was in Ratnágiri was not an agriculturist within the meaning of Act XXIII of 1881.

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For these reasons we affirm the decree of the lower Court and dismiss this appeal with costs. Only one set of costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

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

PILU BIN APPA NALVADE (ORIGINAL PLAINTIFF), APPELLANT, *v.* BABAJI BIN NARU MANG AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1909. *October* 1.

Hindu Law—Alienation by widow—Consent by the body of reversioners—Transfer for legal necessity—Transaction for consideration—Gift—Partial relinquishment by widow.

The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity.

Bajrangi Singh v. *Manokarnika Bakhsh Singh*(1) and *Vinayak* v. *Govind*(2) followed.

The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate.

SECOND appeal from the decision of C. Roper, District Judge of Sátára, confirming the decree of V. V. Tilak, First Class Subordinate Judge of Sátára.

* Second Appeal No. 183 of 1909.

(1) (1907) 30 All. 1. (2) (1900) 25 Bom. 129.

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One Appa Nalvade died in the year 1899 leaving him surviving two widows Kondai and Chima, and Tanu, daughter by Chima. Tanu had a son Narayan and a daughter Mukta. In the year 1903 the two widows made a gift of four-fifths of their husband's property to Tanu and retained one-fifth for their maintenance. Tanu's son Narayan consented to the gift. After the gift Chima died during the same year. In the year 1904 Tanu mortgaged the property given in gift to her to Babaji bin Naru Mang to defray the expenses of legal proceedings instituted by the present plaintiff, the son of a separated nephew of Appa, for obtaining a succession certificate on the ground that he was adopted by Appa. The widows denied the adoption and the plaintiff's attempt to obtain the succession certificate failed. In October 1904, Kondai, the surviving widow, adopted the plaintiff who in June 1907 instituted the present suit to recover possession of the property, the subject of the gift to Tanu. The suit was brought against the mortgagee Babaji bin Naru as defendant 1 and against Tanu as defendant 2. The plaintiff alleged that he had been in possession of the property as owner but that defendant 1 as mortgagee of defendant 2 had brought a possessory suit against him and dispossessed him in October 1906.

Defendant 1 set up his title as mortgagee in possession under defendant 2.

Defendant 2 denied the plaintiff's title and possession and contended that the plaintiff's adoption was illegal inasmuch as Kondai had no authority to adopt. She further asserted her ownership under the gift by Kondai and Chima.

The Subordinate Judge found that the plaintiff was the legally adopted son of Appa but he was not entitled to the property. The suit was therefore dismissed on the following grounds :—

It will be observed that plaintiff's adoption took place after the gift to defendant 2 and after the mortgage to defendant 1. The defendant 2 is in possession through defendant 1 of the land in dispute if not of any other property comprised in the gift and the question is whether plaintiff is entitled to set aside the gift.

Although a son when adopted by a widow enters at once into the full right of a natural born son, his rights cannot relate back to any earlier period, that is

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to say, they do not relate back to the death of the adoptive father: Mayne, 7th edition, p. 259, and I. L. R. 5 Bombay 630.

An adopted son is bound by an alienation made by his adoptive mother before his adoption with the consent of persons who, at the time of such alienation, were the next heirs and competent to give validity to the transaction: Mayne, 7th edition, pages 260, 857 and 858, I. L. R. 25 Bombay 129, and 9 Bombay Law Reporter, p. 1348.

The alienation in the present case is a gift made not to a stranger but to a daughter, who was the next reversionary heir, and the consent of the daughter's son was, I think enough, there being no other member of the family likely to be interested in disputing the transaction.

On appeal by the plaintiff the District Judge confirmed the decree observing:—

The authorities are, I think, quite clear and consistent, Mr. Patwardhan (plaintiff-appellant's pleader) mainly relies on a very recent case reported at 10 Bom. L. R. 1029, but it does not in my opinion avail his client.

It is not disputed that the gift by plaintiff's adoptive mother received the express or implied consent of all persons who were likely to dispute the transaction. The donee was defendant No. 2, the daughter of Appa, to whom plaintiff was adopted.

On the demise of plaintiff's adoptive mother, Appa's estate would in the ordinary course have devolved absolutely on his daughter. Both the latter and her son have consented to the gift.

Hence no question of necessity arises. See 9 Bombay L. R. 1348. This view is consistent with everything laid down in 10 Bombay L. R. 1029. The widow's estate no doubt terminated on her adopting plaintiff but he is bound by any prior alienation consented to by the reversionary heirs of Appa.

The plaintiff preferred a second appeal.

P. D. Bhide, for the appellant (plaintiff):—The lower Court was wrong in relying on *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1]. It does not apply, as in that case there was no adopted son's rights to be considered. The daughter's consent to the alienation was useless: *Varjivan Rangji* v. *Ghelji Gokaldas*[2]. The consent of the daughter's son was also useless. He was a reversioner but not the only reversioner as in *Vinayak* v. *Govind*[3].

(1) (1907) 30 All. 1.

(2) (1881) 5 Bom. 563.

(3) (1900) 25 Bom. 129.

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P. B. Shingne, for the respondents (defendants):—The intervention of the adopted son makes no difference. He has to accept alienations made by the adopting widow when they are either necessary or proper: *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[1], *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[2]. When the next reversioner consents, the alienation is proper: *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[3]. In the present case the daughter's son assented to the gift, hence the ruling in *Varjivan Rangji* v. *Ghelji Gokaldas*[4] does not apply. The decision in *Vinayak* v. *Govind*[5] does not affect the present case, as here the next reversioner after the daughter had consented to the alienation within the meaning of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[3]. Moreover, there is an acceleration in this case in favour of the next reversioner. The case was therefore properly decided by the lower Court.

BATCHELOR, J.:—In this second appeal the facts are these. One Appa died in or about the year 1899 leaving two widows, Kondai and Chima, and a daughter by Chima, namely, the second defendant. The second defendant has a son, Narayan. In February 1903 the two widows made a deed of gift of four-fifths of their husband's property in favour of the second defendant, reserving the other fifth for their own maintenance. In October 1904 Kondai adopted the plaintiff, who is the son of Appa's separated nephew.

The question is whether the plaintiff is bound by the alienation made prior to his adoption. The gift was consented to by the defendant 2, the actual donee, and by her son, Narayan. The Courts below have accepted this consent as a sufficient consent on behalf of the reversioners likely to be interested in disputing the gift, and upon this ground have dismissed plaintiff's suit. But we are of opinion that this ground cannot serve to sustain the decree.

The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is, no doubt, relaxed in cases where the consent of the whole body

(1) (1861) 8 Moo. I. A. 529.
(2) (1869) 13 Moo. I. A. 209.
(3) (1907) 30 All. 1.
(4) (1881) 5 Bom. 563.
(5) (1900) 25 Bom. 129.

of persons constituting the next reversion has been obtained: see the judgment of the Judicial Committee in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1], which refers with approval to the decision of this Court in *Vinayak* v. *Govind*[2]. Now in *Vinayak's* case the reason of the relaxation, as the law has always been understood in this Presidency, is referred to this principle, that the consent of the persons who would be interested in disputing the transfer, affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity. If that is the reason of the rule, it is clear that its operation must ordinarily be limited to transfers for consideration, and cannot appropriately be extended to voluntary transfers by way of gift, where there is no room for the theory of legal necessity. We may add that we have been referred to no case where the Courts have applied the rule to a gift.

That is one reason why in our opinion the rule upon which the Courts below have relied is inapplicable to the present facts. And upon another ground also it seems to us that this case falls outside the rule. For, whether the consent required be more accurately defined as the consent of the whole body of persons constituting the next reversion, as it was expressed in *Bajrangi's* case, or as the consent of all those persons who would be likely to be interested in disputing the alienation, as it is put in other decisions, it is clear that the requirements of the rule have not been satisfied here. For the only consent which the present defendants can call in aid is that of the second defendant and of her son, Narayan. But the second defendant, in addition to being the actual recipient of the gift, is a Hindu woman, and the presence or absence of her consent is, in the words of Jenkins, C. J., in *Vinayak* v. *Govind*[2] "absolutely immaterial"; nor can the acquiescence of her son carry the defendants' case any further. That being so, it is not possible to hold that we have here the consent of "such kindred, the absence of whose opposition raises a presumption that the alienation was a fair and proper one": that is how the rule was put by Ranade, J., in *Vinayak* v. *Govind*[2] and the passage was cited without disapproval by

(1) (1907) 30 All. 1. (2) (1900) 25 Bom. 129.

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Sir Andrew Scoble in delivering their Lordships' judgment in *Bajrangi's* case[1]. Applying this principle we find that there is nothing in the consent of the second defendant and her son which can properly deprive the plaintiff, another reversioner, of the right to question the alienation.

Then it was sought to save the decree by reference to the rule which allows the Hindu widow to accelerate the succession by relinquishing her own interest to the next reversioner. But here again it appears that an essential condition of the rule is absent in this case, where the widows relinquished only a four-fifths part of the estate. Such a relinquishment does not satisfy the requirements of the rule, which was expressed in the following words by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*[2]: "It may be accepted", said Lord Morris, "that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances". Here the retention of the one-fifth part of the estate in the widow's hands takes the case out of the rule, and not the less so because the retention of 1/5th part of the life estate is described as a provision for maintenance. It was suggested by the defendants' pleader that Mr. Justice Chandavarkar's decision in *Hunsraj* v. *Bai Moghibai*[3] proceeded on a different principle, but if that case be examined, we think that it will be found to lend no support to the defendants. For, so far from diverging from the rule in *Behari Lal's* case[2], the learned Judge expressly cites that case as his authority, and in conformity with it holds no more than that the widow "can, during her life-time, convey the estate absolutely to him who is the next reversioner". The question, indeed, there was, not whether a partial relinquishment of the estate would be binding on the reversioner, but whether the widow had authority "to convey more than the estate she

(1) (1907) 30 All. 1.
(2) (1891) 19 Cal. 236 at p. 241.
(3) (1905) 7 Bom. L. R. 622.

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has"; and that question was decided on the ground that the widow there was bound by the special agreement of which specific performance was sought against her. The decision is, therefore, no authority for extending the carefully guarded rule laid down by the Privy Council to cases where the widow has made only a partial relinquishment of the estate.

For these reasons we reverse the decree of the lower appellate Court and decree the plaintiff's suit with costs throughout.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

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

1909.
October 5.

MAHARANA SHRI DAVLATSINHJI, THAKORE SAHEB OF LIMDI (ORIGINAL DEFENDANT 1), APPELLANT, *v.* KHACHAR HAMIR MON (ORIGINAL PLAINTIFF), RESPONDENT.*

Provincial Small Causes Courts Act (IX of 1887), sections 16, 27, 32, Schedule II, Clauses (2) and (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—Jurisdiction by consent of parties.

A suit for the recovery of Rs. 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes and the decree in such a suit is final under section 27 of the Provincial Small Causes Courts Act (IX of 1887).

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining the appeal. The respondent (plaintiff) urged that a second appeal lay: and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point.

* Second Appeal No. 598 of 1907.