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The result therefore is that we allow the appeal, reverse the decree of the lower appellate Court, and restore that of the trial Court with costs of this appeal and in the lower appellate Court on the plaintiffs.

The cross-objections are dismissed with costs.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah, and Mr. Justice Crump.

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DNYANU *bin* PANDU CHAVAN (ORIGINAL PLAINTIFF) APPELLANT, *v.* TANU KOM BALARAM CHAVAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—Junior daughter-in-law adopting a son with the consent of her father-in-law—Validity of the adoption.

P, a Hindu, had a son living in union with him. The son died during P's life time leaving him surviving two widows. Of the two widows, the junior had a son, who also died a minor without attaining ceremonial competence. P adopted the plaintiff as his son. Later, the junior widow adopted defendant No. 11 with the consent of P. The plaintiff sued contending that the adoption of defendant No. 11 was invalid :—

Held, that the adoption of defendant No. 11 was valid under Hindu law.

The preferential right of the senior widow to make an adoption exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family. Even then it is subject to any authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow.

The doctrine of the preferential right of the senior widow to adopt is not extended to a case where the husband dies in union with his father, and where the widow can adopt if at all with the consent of her father-in-law.

Vithoba v. *Bapu*[1], referred to.

* Second Appeal No. 502 of 1918.

(1) (1890) 15 Bom. 110.

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DNYANU v. TANU.

SECOND appeal from the decision of J. H. Betigiri, First Class Subordinate Judge, A. P., at Satara, modifying the decree passed by A. R. Gupte, Subordinate Judge at Islampur.

Suit to recover possession of property.

One Balaram, a Maratha, was the owner of the property in dispute. He had three sons, Pandu, Raoji and Krishna, who being illegitimate sons, were classed as Kadawe Marathas.

Krishna had a son Dnyanu (plaintiff). Pandu had a son Bala. Bala died in Pandu's life time in union with the latter. He had two widows, Banu and Tanu (defendants Nos. 1 and 2); and he had a son, by his junior widow Tanu.

Bala's son died a minor without attaining ceremonial competence.

Pandu adopted Dnyanu (plaintiff) as his son; but as they quarrelled Pandu turned the plaintiff out of his house.

Later, Tanu (defendant No. 2), with the consent of Pandu adopted Babu (defendant No. 11). Babu belonged to another sub-sect of Marathas known as Godawe Marathas.

In 1913 Pandu died.

Shortly afterwards, Dnyanu sued to recover possession of Pandu's property, alleging that the adoption of defendant No. 11 was not valid under Hindu law.

The trial Court held that the adoption of defendant No. 11 was proved to have taken place, but that it was invalid in law because Babu (defendant No. 11) belonged to a different sub-sect from Pandu's. The plaintiff's claim was therefore decreed.

On appeal the lower appellate Court was of opinion that the difference in sub-sects was no impediment to the

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validity of defendant No. 11's adoption: and that the plaintiff and defendant No. 11 were entitled to the property in equal shares. The decree appealed from was modified by placing the plaintiff and defendant No. 11 into joint possession of the property.

The plaintiff appealed to the High Court.

Patvardhan with *M. V. Bhat*, for the appellant:—The right to make an adoption to Bala was vested in his senior widow. It was an absolute right not preferential one. She cannot be deprived of it without being consulted. The father-in-law cannot give his consent to an adoption by the junior widow, in derogation of the preferential right of the senior widow to adopt. In support of this contention we rely on *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*[1] which lays down that the adoption by the junior widow without the consent of the senior widow was not valid even though it purported to be made with the consent of the Sapindas.

We further contend that the consent of the father alone was not enough in this case as he had already adopted the appellant as his son.

Lastly, we submit that the junior widow's power to adopt even with the consent of the father-in-law, had come to an end as she had an infant son.

Jayakar with *S. Y. Abhyankar*, for the respondent:—In Bombay the widowed daughter-in-law can adopt with the consent of the father-in-law. And the preferential right of the senior widow cannot deprive the junior widow of her right to adopt with the consent of the father-in-law who is the head of the joint family. The preferential right of the senior widow exists only when the widows inherit their separated husband's

(1) (1915) 39 Mad. 772.

property. *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*[1] is distinguishable on the ground that different views prevail here and in Madras as to the basis of widow's power to adopt.

As the father was the head of the family his consent alone was enough. Plaintiff's consent was not necessary. Junior widow's power to adopt was not exhausted as her son had not attained ceremonial competence.

SHAH, J.:—The question of law argued in this second appeal is whether the adoption of Babu (defendant No. 11) by Tanu (defendant No. 2) is valid, according to Hindu law.

The facts relating to this point are briefly these: One Balaram Gujar had three illegitimate sons, Pandu Raoji and Krishna. We are not concerned with Raoji at all. Krishna left a son named Dnyanu. He is found to have been adopted by Pandu in 1907. Pandu had a son Bala, who died in 1903 leaving two widows named Banu and Tanu. It appears from the recitals in the document of authority passed by Pandu that Tanu had an infant son who died sometime before 1910. Bala died in union with his father. The infant son does not appear to have attained the age of ceremonial competence. In 1910 Pandu authorised Tanu to make an adoption. She adopted Babu in 1911. Pandu died in 1913. Dnyanu, the adopted son of Pandu, filed the present suit claiming the property of Pandu to the exclusion of defendant No. 11.

The question as to the validity of the adoption of defendant No. 11 was decided by the trial Court in favour of the plaintiff on the ground that Babu, who was a legitimate son of his natural father, could not be validly adopted as Pandu was an illegitimate son of his father

(1) (1915) 39 Mad. 772.

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and as there would be "no inter-marriage and inter-dining between legitimately born Marathas and bastard Marathas". In appeal the First Class Subordinate Judge with Appellate Powers did not accept the ground taken up by the trial Court, and held the adoption to be valid.

In the appeal before us it is contended that the adoption is invalid as Banu, the senior widow of Bala, had the preferential right to adopt, and that the consent given by the father-in-law to Tanu, the junior widow, was neither sufficient nor valid under the circumstances. In support of the adoption it is urged that the exception in favour of the power of the widowed daughter-in-law to adopt with the consent of her father-in-law is recognized in this Presidency, and that the ordinary rule of the senior widow having a preferential right to adopt has no application to the present case.

It is clear that if Bala, the predeceased son, had been a separated member of the family, there could be no doubt as to the right of Tanu to adopt even without the consent of her father-in-law on the footing of her having an infant son. After the death of her infant son she would take the property as the mother and heir of her infant son, and she would be entitled to make an adoption (see *Gavdappa* v. *Girimallappa*[1] and *Verabhai Ajubhai* v. *Bai Hiraba*[2]).

In the present case, however, the predeceased son died in union with his father. Even in such a case it has been held that the widowed daughter-in-law could adopt with the consent of the father-in-law. (See *Vithoba* v. *Bapu*[3]). The observations of Ranade J. in *Gopal* v. *Vishnu*[4] support this view.

(1) (1894) 19 Bom. 331.
(2) (1903) L. R. 30 I. A. 234.
(3) (1890) 15 Bom. 110.
(4) (1898) 23 Bom. 250 at p. 255.

It is urged, however, that the father-in-law cannot give his consent in derogation of the preferential right of the senior widow to adopt. The preferential right of the senior widow exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family ; and even then it is subject to any authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow. This is clear from the observations in *Rakhmabai* v. *Radhabai*[1]. But no authority is cited in support of the contention that in the case of an undivided family where the father-in-law's consent is necessary to validate an adoption by a widowed daughter-in-law, the consent ought to be given to the senior daughter-in-law. The principle underlying the recognition of the preferential right of the senior widow to adopt, in my opinion, has no application to a case where the adoption can be justified only by the consent of the father-in-law. The preferential right of the senior widow does not exist, apart from the will of the father-in-law. The doctrine of the preferential right of the senior widow to adopt has not been extended to a case where the husband dies in union with his father, and where the widow can adopt, if at all, with the consent of her father-in-law ; and I see no justification in Hindu law for such an extension.

The case of *Rajah Venkatappa Nayanim Bahadur* v. *Renga Rao*[2], relied upon by Mr. Patvardhan has no application to the present case. It has been held in this case that an adoption by a junior widow without the consent of the senior widow is not valid even though it purports to be made with the consent of the Sapindas. In this Presidency the exception recognised in favour

(1) (1868) 5 Bom. H. C. (A. C. J.) 181 at p. 193. (2) (1915) 39 Mad. 772.

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of the validity of an adoption made by the daughter-in-law with the consent of the father-in-law does not stand on the same footing as an adoption made by a widow with the consent of the Sapindas in Madras. This point is examined in *Vithoba* v. *Bapu*[1]. The Madras case to my mind is clearly distinguishable, having regard to the different views that prevail in Madras and Bombay as to the basis of the widow's power to adopt after her husband's death. Though there may be apparently something common between the consent of the kinsmen which is required even when the husband is separated in interest from them, and the consent of the father-in-law required in this Presidency when the predeceased son dies in union with his father to validate an adoption by the widowed daughter-in-law, I do not think that the latter is subject to the same limitation as the former as regards the preferential right of the senior widow to adopt.

It is further urged that the consent of Pandu alone is not sufficient as he had already adopted the present plaintiff as his son, and as the plaintiff had a vested interest in the estate as a coparcener. I do not think that the consent of the plaintiff was necessary to validate the adoption. The consent of the father-in-law is recognized as sufficient on account of the position which he occupies as the head of the family. It makes no difference whether he has other sons or not, and whether they consent or not. His consent has a certain legal effect on the adoption and that is independent of the existence and consent of the other coparceners. That is the *ratio decidendi* in *Vithoba* v. *Bapu*[1].

Lastly, it remains to consider whether the fact that Tanu had an infant son put an end to her power to adopt with the consent of her father-in-law. The infant son does not appear to have attained the age of

[1] (1890) 15 Bom. 110.

ceremonial competence; and I do not think that the fact of her having an infant son, who died prior to the adoption, could put an end to her power to adopt with the consent of her father-in-law.

It is not necessary to consider in this case whether the adoption would be valid if the infant son had attained ceremonial competence; and I desire not to be understood as expressing any opinion on the question. I desire to add that the fact of Tanu having an infant son does not appear to have been relied upon by either side in the lower Courts: and there is no finding on this point. It is recited as a fact in the deed executed by Pandu. Even if Tanu had no infant son I think that the adoption of defendant No. 11 by her with the consent of her father-in-law would be valid.

No question is raised in this litigation as to the validity of the plaintiff's adoption by Pandu on the footing of Tanu having an infant son at the date of the adoption.

I would, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

CRUMP, J.:—I concur.

Decree confirmed

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

LAXMISHANKAR DEVSHANKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* HAMJABHAI USUFALLY VOHRA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order VI, rule 17, Order XXI, rule 103—Amendment of plaint—Suit for possession—Conversion of the suit to one for redemption of mortgage—Practice and procedure.

* First Appeal No. 265 of 1917.