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in this case we have to consider the conduct of the judgment-creditor, and his transferee, the present applicant. We are satisfied in this case that the attachment either went under the order of the Court or ceased to exist under the provisions of Order XXI, Rule 57. It does not seem to make very much difference. It certainly seems extraordinary that in 1922 we should have to decide whether a Mulgeni lease granted in 1910 is void or not. Certainly the present applicant has only himself to thank for his own delay in not prosecuting the execution of his decree with due diligence. The appeal must be allowed and the Darkhast dismissed with all costs on the applicant.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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

1922. *February* 7.

CHIMABAI KOM MALGOUDA PATIL (ORIGINAL PLAINTIFF), APPELLANT v. MALLAPPA PAYAPPA, STYLES HIMSELF AS KALGAUDA MALGAUDA, MINOR, BY HIS GUARDIAN GODAVA KOM KALGAUDA PATIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Hindu law—Adoption—Adoption made by husband—Widow cannot dispute the adoption.

Under Hindu law as administered in this Presidency it is not competent to a widow to dispute the validity of the adoption made by her husband.

FIRST appeal against the decision of E. F. Rego, First Class Subordinate Judge of Belgaum.

Suit to recover possession.

The property in suit belonged to one Malgauda Kalgauda Patil of Dhamane in Belgaum District. Malgauda was a Jain by religion.

On Monday the 29th November 1915, Malgauda adopted Malappa (defendant No. 1) who was a son of

*First Appeal No. 249 of 1920.

his sister. The adoption deed was executed and registered on the same day. Next day Malgauda died.

In 1918, Chimabai (widow of Malgauda) sued to recover possession of Malgauda's property alleging that the adoption was invalid and had never in fact taken place.

The Subordinate Judge dismissed the suit on the ground that the adoption of defendant No. 1 took place in fact and was valid in law.

Chimabai appealed to the High Court.

A. G. Desai, for the appellant:—I need not argue the point as to the factum of the adoption, if I succeed in showing that the adoption, even if it took place, was not valid in law. A sister's son cannot be validly adopted among the regenerate classes of Hindus, and the law applicable to the Jains is the law applicable to the regenerate classes. It has not been proved by sufficient evidence that there is a custom among the Jains of adoption of sister's sons. If, therefore, the husband of the plaintiff has in fact adopted defendant No. 1, the plaintiff was not bound by the illegal adoption.

K. N. Koyajee, for respondents Nos. 1 to 3:—The appellant has first to meet the difficulty of a widow's inability to challenge the adoption made by her husband: see *Bhau* v. *Narsagouda*[1]. In that case the son adopted by the widow was not allowed to set up his right against the son illegally adopted by the husband. The present case is stronger, as the widow herself seeks to set aside her husband's adoption. In the Bombay Presidency, adoptions of sisters' sons are common: see *Manjunath* v. *Kaveribai*[2], and *Bai Nani* v. *Chunilal*[3]. If custom had to be proved, it was sufficiently proved by the witnesses.

[1] (1921) 46 Bom. 400.

[2] (1902) 4 Bom. L. R. 140.

[3] (1897) 22 Bom. 973.

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MACLEOD, C. J.:—The plaintiff in this case is the widow of one Malgauda, who died of plague on the 29th November 1915, and sues to recover possession of her husband's property against the 1st defendant who claims to be the adopted son of Malgauda. Various objections have been raised to the adoption, first, that Malgauda having lost his brother Appu a few days previous to the date of the adoption was in mourning, and was, therefore, incapable of performing any religious ceremony; secondly, that the adopted son was the son of Malgauda's sister, and therefore could not be adopted; thirdly, that the adoption did not take place at all, although it had to be admitted that an adoption deed was executed and registered.

On the 14th December 1915, the plaintiff made a petition to the Mamlatdar to have her name inserted in C and D Registers since her husband had died a fortnight back. In that petition she said that there were factions in the village, and therefore, the village officers might enter any other name. But, on the 6th January 1916, she made a petition to the Collector admitting the adoption and requesting the 1st defendant's name to be entered in the Revenue Registers in place of the deceased Malgauda.

On the 7th January 1916 she was examined in connection with her petition and Varsa proceeding. She admitted the whole story which she now denies in the suit. The passing of orders on this petition was unfortunately delayed, so that the plaintiff for some reason or other made up her mind to dispute the 1st defendant's adoption.

On the 6th June 1916 she made a petition to the Collector saying that her husband did not adopt according to caste rites and customs, and that he could not adopt that boy according to Shastras. But she did not deny

the fact that her husband had adopted the 1st defendant.

She was examined on 14th June 1916 when she pleaded that her previous statements had been made under coercions and threats; and for the first time she alleged that the 1st defendant was not present when he was alleged to have been adopted.

At the outset we are met with the question whether a widow could be allowed to dispute an adoption made by her husband. In *Bhau* v. *Narsagouda*[1] the plaintiff claimed as the adopted son of one Adgauda. He had been adopted by Adgauda's widow. The defendant was the son adopted by Adgauda in his life-time. Mr. Justice Shah at p. 405 says:—

"Assuming, without deciding, that the adoption of defendant No. 1 by Adgouda was invalid, the question is whether Sitabai, the widow of Adgouda, could make another adoption to her husband during the life-time of the boy adopted by her husband. The point is one of first impression. No reported precedent on the point has been cited to us: and it must be considered in the light of the power which the widow has in this Presidency to adopt, in the absence of any prohibition expressed or implied by her husband. It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him valid or invalid. In spite of the liberal interpretation of her powers to adopt in this Presidency, I do not think that the Hindu law contemplated, and certainly it has not provided, that the widow could practically ignore and supersede her husband's act of adoption. There is no authority for it: and I think that the general effect of the Hindu law of adoption is against such a power. Even an invalid adoption may become effective under certain conditions and the wife—or rather the widow—cannot go against her husband's wishes so unequivocally expressed or treat the adoption by her husband as non-existent."

And at p. 408 the learned Judge concludes:—

"It may appear somewhat anomalous that the widow should not be allowed to treat as non-existent an adoption by her husband which is *invalid*. But I do not think that there is anything anomalous in the widow being required to accept the act of adoption by her husband with all its implications at least so far as she herself is concerned."

[1] (1921) 46 Bom. 400.

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It seems to me that an adoption by the husband whether valid or invalid would stand on much the same footing as a will, so that it would be considered as an implied prohibition against the widow adopting after the death of her husband. It was contended for the appellant that those remarks of the learned Judge were obiter, but it seems to me that they were directly in point, as they dealt expressly with the widow's power to adopt the plaintiff against the adoption by her husband, and if it could be said that the husband had impliedly prohibited an adoption by his widow by his having adopted in his life-time, it would necessarily follow that the validity of the plaintiff's adoption by the widow was directly in issue.

It does not seem necessary, therefore, to consider the other points which were raised in this case. But with regard to the factum of the adoption, all the evidence seems to point to the fact that it actually did take place, and that the suggestion by the widow seven months later that the adopted boy was not in Belgaum, when it was alleged he was adopted, must be considered as a desperate attempt to get rid of the 1st defendant's claim to succeed to Malgauda. There are several witnesses who deposed that they were present at the adoption and that the 1st defendant was adopted. If the plaintiff really thought that the 1st defendant was not present she would have made that allegation at once instead of waiting for seven months when she felt the necessity, if she wished to succeed to her husband's estate, of proving some fact which would put an end to the claim of the 1st defendant.

On the question whether amongst Jains the adoption of a sister's son is invalid, no doubt there is no judicial decision to the effect that Jains do not observe the

same law as the regenerate classes. Therefore, if the question had to be decided in this case evidence would have to be led to prove the custom that the adoption of a sister's son amongst Jains is acknowledged.

Then on the question whether Malgauda could not have adopted owing to his being in mourning, we have been referred to no direct authority on the question. But it is argued that as Malgauda was in mourning, he was not competent to perform any religious ceremony, and therefore, could not adopt. But the evidence certainly points to the fact that amongst Jains adoption is not looked upon in the same way as amongst the regenerate classes, and that adoption is really more a secular than a religious ceremony. The appeal, therefore, must be dismissed with costs.

COYAJEE, J. :—I agree in holding that this appeal must fail. In *Bhau* v. *Narsagouda*[1] which was a case decided by a Division Bench of this Court, Mr. Justice Shah observes at p. 405 : "It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him valid or invalid". I am bound to respect this opinion as coming from a learned Hindu Judge. I do so the more readily because we are in this case dealing with an adoption by a Hindu of his sister's son ; and it is matter of common knowledge that in the Bombay Presidency adoptions of daughter's sons and sister's sons are not uncommon. For this proposition we have the high authority of Mr. Mandlik who in his Vyavahara Mayukha, Part II, at p. 493 observes :

"I must note that the existence of a time-honoured custom, allowing the adoption of a *dauhitra* (daughter's son) or *bhagineya* (sister's son) is testified to in distinct terms by the Dvaita-Nirnaya and the Vyavahara Mayukha, and also impliedly by Krishna Bhatta. I have made special inquiries on the

(1) (1921) 46 Bom. 400.

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subject, and I have no hesitation in stating that in this Presidency such adoptions are common, and not the slightest taint attaches to them on account of such relationship".

Special usages in favour of adoptions of daughter's sons and sister's sons have, moreover, been judicially recognised in some of the Districts of this Presidency. I need only refer to the judgments of Candy J. and Fulton J. in *Manjunath* v. *Kaveribai*[1].

For these reasons I agree in holding that it is not competent to the plaintiff, who is the widow of Malgauda, to seek to set aside the adoption made by her husband.

Decree confirmed.

J. G. R.

[1] (1902) 4 Bom. L. R. 140.

APPELLATE CIVIL.

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

1922. *February 7.*

SHAMA DURGAJI BHOI (ORIGINAL DEFENDANT NO. 1), APPELLANT *v.* GANGADHAR NARAYAN MUZUMDAR (ORIGINAL PLAINTIFF NO. 2), RESPONDENT*.

Ferry—Ferry rights, infringement of—Immemorial user—Grant not produced—Presumption of grant.

The plaintiffs were the Inamdars of the village of Bopkhel. Between the village of Bopkhel and Kirkee Bazar, there ran the Mula river which people could cross until a dam was built in 1872. The plaintiffs then began to run a ferry to take people across and they received the income from the ferry until 1915 when defendant No. 1 began to run a rival ferry. The plaintiffs sued for a declaration that they alone had a right to ply a ferry between the two villages. There was no direct grant from Government produced by the plaintiffs but the evidence showed that in 1879 the Collector had made an order that they should ply a private boat in the river within the limits of Mouje Bopkhel.

* Second Appeal No. 112 of 1921.