Privy Council Appeal No. 4 of 1920.

Yadao - - - - - - - - - *Appellant*

v.

Namdeo - - - - - - - - - *Respondent.*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JUNE, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
SIR JOHN EDGE.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal by the plaintiff, a minor, through his guardian, from a decree, dated the 27th April, 1918, of the Court of the Judicial Commissioner of the Central Provinces, which reversed a preliminary decree of partition of the 15th December, 1916, of the Additional District Judge of Akola, in Berar, and dismissed the suit. By the preliminary decree it was declared that the parties to the suit were entitled to separate possession of the property mentioned in the schedule to that decree, and that :—

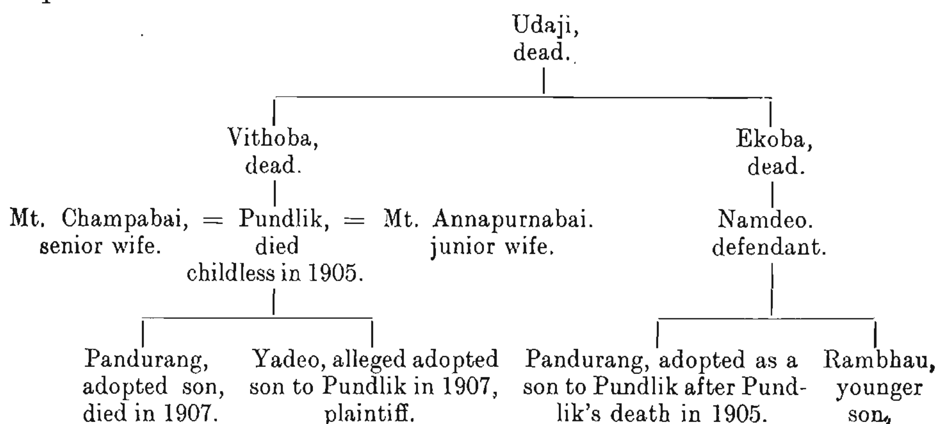
> "The plaintiff, as a legally adopted son of the deceased Pundlik Patil, is entitled to a half share in the property immoveable and moveable, including the shop assets, and that he is entitled to the possession of that half share after a partition of it all by metes and bounds as against the defendant. If any other property besides that in the hands of the receiver available for partition is brought to the notice of the Court, till the passing of a final decree of partition it shall be put into the schedule,"

and a Commissioner was appointed to make partition of the said property.

The plaint in the suit was not in the form of a plaint for partition, but in the Courts below the suit was treated as a suit

for partition, and as a suit for partition their Lordships will consequently regard it.

The following short pedigree shows the position of the parties :—



At the time of his death Pundlik was a member of a joint Hindu family, which consisted of himself, his cousin Namdeo, and Namdeo's two sons Pandurang and Rambhau. The property mentioned in the schedule to the decree of the trial Judge was the property of that joint family. The parties to the suit are Hindus to whom the Hindu law applicable to Hindus of the Mahratta country of the Presidency of Bombay applies, and the question upon which the result of this appeal depends is whether Mussamat Champabai had, under circumstances which later will be mentioned in some detail, power validly to adopt the plaintiff as a son to her deceased husband Pundlik.

Pundlik died childless in January, 1905, leaving his two wives, Mussamat Champabai and Mussamat Annapurnabai, surviving him. Mussamat Champabai was the senior wife, and she, with the concurrence of Mussamat Annapurnabai, adopted in 1905 as a son to her deceased husband, Pandurang, who was one of the two sons of Namdeo, the defendant. The validity of that adoption is not disputed. Pandurang, whose adopted name was Vithal Rao, died in childhood and unmarried in 1907 ; and Mussamat Champabai in December, 1908, in fact adopted to her deceased husband the plaintiff without having obtained the consent of anyone, except the consent of the plaintiff's natural father, who had given him to her to be adopted by her to her deceased husband. Namdeo had refused to give his consent to the adoption, and his contention was and is that Mussamat Champabai had, under the Hindu law which was applicable to their family, no power as a widow to make the adoption, and also that any such adoption by her had been prohibited by Pundlik. The trial Judge came to the conclusion that after the adoption of Pandurang the joint family had separated, and that afterwards, when the contingency for a second adoption arose by reason of Pandurang's death, Mussamat Champabai could validly adopt the plaintiff without the consent of Namdeo who was then separate, and made the preliminary decree for partition. The learned Judges of the Court of the Judicial Commissioner came to the conclusion that there had been no

separation of the joint Hindu family; that Pundlik intended that Pandurang only should be adopted, and had given no general permission as regards the adoption of a son; that on Pandurang's death Namdeo and his son Rambhau became by survivorship sole owners of the joint family estate; and that Mussamat Champabai could not under such circumstances make a valid adoption of the plaintiff without having obtained the sanction of Namdeo; and, holding that the adoption was invalid, they, by their decree, dismissed the suit. From that decree of the Court of the Judicial Commissioner this appeal has been brought.

Except that their Lordships agree with the Court of the Judicial Commissioner that Pundlik had not given an authority for the adoption of the plaintiff, they do not agree with the Court of the Judicial Commissioner as to what the facts were. Pundlik, until he died in January, 1905, had managed the joint property. On the 31st March, 1905, Mussamat Champabai, with the concurrence of Mussamat Annapurnabai, adopted as a son to their deceased husband Pandurang, and on the 23rd April, 1905, Namdeo executed the following deed:—

"Deed of adoption.

"In favour of both Mt. Champabai and Mt. Annapurnabai, widow (widows) of Pundlik Vithoba Patil, resident of Warwat Bakal, Taluq Jalgaon, District Akola. I, Namdeo Yekoba Patil, Warwatkar, execute this writing to the effect that in accordance with the wishes of the deceased Pundlik Vithoba Patil, who was my real cousin (uncle's son) at the time of his death, I have placed upon your lap my own son Pandurang.

"The adoption ceremony in accordance with the popular usage in regard to it was settled with the consent of us three to be performed at an auspicious time on Friday Falgun Vadya 11, corresponding to 31st March, 1905, and the ceremony has been done. In his capacity as an adopted son, Pandurang would hereafter be called by the name of Vithal Rao, son of Pundlik Patil. He has become the sole owner of the entire moveable and immoveable property of the deceased Pundlik Vithoba Patil, and even in all sorts of papers the management should hereafter be conducted as 'Pundlik Vithoba Patil shop at Warwat' Firm through managing proprietor Vithal Rao, son of Pundlik Patil, minor, through guardian mothers Mt. Champabai and Mt. Annapurnabai. Deceased Pundlik Patil and I formed a joint family. Immoveable and moveable property belongs to the joint family. Vithal Rao is the sole heir to half of the entire property on the authority of the deed of adoption and half of the property belongs to me. The following are the conditions on which the adoption business was settled amongst us.

"1. My half share in the moveable and immoveable property may be kept as joint if both Champabai and Annapurnabai would approve, but if you do not approve of it you may separate it and give it at any time you like.

"2. A list of the entire property should be made and signed by us three. After preparing such list it should be kept with Jairam Govind Patil of Sowghad and Govind Hari Sawarkar as Punchas. It is true that Vithal Rao, son of Pundlik Patil by virtue of his adoption, is the owner of all the property of the deceased Pundlik, son of Vithoba. But for the protection of the property and for the future welfare of the real owner Vithal Rao, you both should do the management of the entire property till the adopted son completes his 25 (twenty-fifth) year. After Vithal Rao attains majority he should do the management according to the orders

of both of you. This is the original desire in making the adoption. But the above condition is specially mentioned to-day for the good conduct, for excellent dwelling in the world and for the growth of the family tree of Vithal Rao. If there arise any difference between Vithal Rao and both of you then on the authority of this writing Vithal Rao will have no right at all during the lifetime of both of you and the entire property should be managed by Champabai.

"4. After Vithal Rao completes his 25 (twenty-fifth) year, Champabai has got power to make over the entire property to his charge. If after the transfer of the power you and Vithal Rao do not pull on amicably a separate yearly allowance of Rs. 200 to Champabai and a separate yearly allowance of Rs. 200 to Annapurnabai may be apportioned. This allowance would be a charge on the entire moveable and immoveable property.

"5. If Annapurnabai desires to live separate on account of household affairs before Vithal Rao completes his 25th year, Champabai has power to give an allowance of Rs. 5 per mensem to her, and Vithal Rao would never acquire the right to interfere in this decision. On the conditions as mentioned above I have placed my son on the lap of you both. He should secure for the deceased Pundlik Patil and his ancestors spiritual, final and eternal happiness, and by the grace of God he may propagate the family and give you all the pleasure, and with this object I have completed this writing of the deed of adoption with my free will, and I have made my signature to-day in order to make it over to the charge of you both. Dated 23rd April, 1905. Written by Bhaoo Sheoram Patil, Keli.

"Namdeo Yekoba Patil."

As their Lordships construe that deed of the 23rd April, 1905, Namdeo by it declared that he had separated from Pandurang, whom he had given in adoption. It was not merely an expression of an intention to separate, although an unequivocal intimation of an intention to separate by a member of a joint Hindu family governed by the Mitakshara would operate as a severance of the joint status (see *Girja Bai* v. *Sadashiv Dhundiraj and others*, 43 I.A. 151, and *Kawal Nain and others* v. *Prabhu Lal and others*, 44 I.A. 159). Their Lordships find as a fact and hold in law that on the date of that deed Namdeo and his son Rambhau had separated from Pandurang, and had ceased to be members with Pandurang of the joint family, although no partition of the family property had been effected.

It is common ground that the adoption of Pandurang was a valid adoption. Pandurang died unmarried in 1907. After the death of Pandurang, Mussamat Champabai tried to obtain the consent of Namdeo to her adopting to her deceased husband Rambhau, but Namdeo refused to give him in adoption, and on the 11th December, 1908, she adopted to her deceased husband the plaintiff, who was by birth a son of Raoji Patil.

It has not been and cannot be disputed that Mussamat Champabai had the authority of her husband Pundlik, if she chose to exercise it, to adopt to him Pandurang. That authority she acted upon in adopting Pandurang in 1905, but on behalf of Namdeo it is contended that Pundlik's authority to his wife to adopt a son to him was limited to an adoption of his son Pandurang, and that Pundlik's expressed wish in his last illness was that no boy except Pandurang should be adopted to him.

If it had been proved that Pundlik had in fact expressed as a direction to be followed by his wife his wish that no boy except Pandurang should at any time be adopted to him, their Lordships would hold that the direction prohibited Champabai from adopting the plaintiff, and consequently, that the plaintiff's adoption was invalid. But such a direction to operate as a prohibition against his widow adopting any boy to him as a son except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time, and on every occasion on which otherwise after his death his widow might validly make an adoption to him. Such a direction may be given by the husband orally or in writing, as for instance by a will. The duty of a Hindu widow is to obey such directions as her husband may have given as to the way in which she should exercise a power of adoption to him. That is a general principle of Hindu law as to adoptions, and is not applicable only in cases in which the husband and wife were subject to the Bombay school of Hindu law. In *Sitabai* v. *Bapu Anna Patil*, 47 I.A. 202, in which a husband had given in his will a direction as to how his wife should exercise a power of adoption to him, the Board held :—

> "That according to the Bombay School of Law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by will as to the way in which her power of adoption may be exercised."

In the present case the strongest evidence suggestive of a prohibition by Pundlik, of any kind as to the making of an adoption to him by Mussamat Champabai was that given by Balkrishna, who had been Pundlik's gumashta, Balkrishna said :—

> "He (Pundlik) told us that he was very ill and that we should manage the property well. We opened the talk about the arrangement of inheritance. He told us that his cousin's (Namdeo's) sons were his heirs, and if at all an adoption was wanted Namdeo's son Pandurang should be the only boy for adoption, otherwise he had no wish to adopt anybody else or to make any other arrangement. Namdeo's younger son (Rambhau) was then four or five month's old."

To a similar effect as to Pundlik's intention as to the boy who might be taken in adoption to him was the evidence of Raibhan, a Tahsildar and Magistrate, the evidence of Ramchandra, a pensioner, and the evidence of Jayram, who had married a sister of Pundlik. According to Jayram, some persons who were present during Pundlik's last illness were pressing him to adopt a son as he was sonless, and Pundlik "said then that he did not want to adopt . . . Pundlik Patil told them that he was not obstinate, and that if a son was to be adopted he would adopt Namdeo's son, Pandurang, and none else."

The conclusion which their Lordships draw from the evidence is that Pundlik intended if he adopted any boy as his son, to adopt Pandurang, and if his statements can be construed as a direction to his wife, that direction was that she should adopt Pandurang, and that he gave no direction as to what should be

done if Pandurang should be unavailable or should die after he was adopted.

Under these circumstances and Pandurang having died in childhood and unmarried, it is necessary to consider what power, if any, Mussamat Champabai had under the Hindu law applicable in the Mahratta country of the Presidency of Bombay to adopt the plaintiff as a son to her deceased husband.

It has been decided by the High Court at Bombay that in the Mahratta country of the Presidency of Bombay and in Gujarat a Hindu widow, who is sole or joint heir to her husband's estate, may adopt a son to her deceased husband, without authority from her husband, and without the consent of his kindred, or of the caste or of the ruling authority, but that she cannot adopt where her husband has expressly forbidden an adoption. That is not now disputed ; it is undoubtedly the law. But it has been held by that High Court in *Ramji* v. *Ghamau*, 6 Bomb. 498, and by the same bench in *Dinkar Sitaram* v. *Ganesh Shivram*, 6 Bomb. 505, that a Hindu widow in the Mahratta country of that Presidency or in Gujarat, who has not her husband's estate vested in her, and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority, or the consent of her father-in-law, or of her husband's undivided coparceners. *See* paragraph 130 of Mayne's Hindu Law, where the two authorities above mentioned are cited, as the authorities for the last-mentioned proposition. They were decisions of the 8th July, 1879, of a Full Bench consisting of Sir Michael Westropp, C.J., Melvill and Kemball, JJ. The decision in *Dinkar Sitaram* v. *Ganesh Shivram* merely followed the decision in *Ramji* v. *Ghamau*. It is contended in this appeal that these decisions were wrong in law. It may be mentioned that in *Dinkar Sitaram* v. *Ganesh Shivram*, the District Judge had held that the consent of relations was unnecessary in the Presidency of Bombay.

In the present case Pundlik had not separated ; he had died a member of a joint Hindu family, and the estate which was vested in Mussamat Champabai at the time when she adopted the plaintiff as a son to her husband was not the interest which Pundlik had in the joint family property, but was the estate which had vested in Pandurang on the separation of the joint family.

In *Ramji* v. *Ghamau* (6 Bomb. 498) the parties were members of a Hindu joint family, and it may be assumed from the report of the case that the parties were subject to the Hindu law applicable to Hindus of the Mahratta country of the Presidency of Bombay. In that case it was held that a Hindu widow, who has not the family estate vested in her and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided coparceners. That was the question which had to be decided in that case. So far as their Lordships are aware that decision in *Ramji* v. *Ghamau* was the first decision of the High Court at Bombay on that question in any case in which

the Hindu law applicable to Hindus in the Mahratta country of the Presidency of Bombay or in Gujarat had to be considered, and the attention of their Lordships has not been drawn to any earlier decision of the Supreme Court of Bombay on that question. In *Ramji* v. *Ghamau* the learned Judges stated :—

> " There has not been any text quoted to us from the books to the effect that the widow of a parcener in a Hindu undivided family may adopt without the authority of her husband or the assent of her coparceners. The authorities in relation to the taking in adoption by a Hindu widow in this Presidency are so fully collected and discussed in *Bayabai* v. *Bala Venkatish* (7 Bomb. H.C.R., Appendix I), *Rakhmabai* v. *Radhabai* (5 Bomb. H.C.R., A.C.J. 181), and *Narayan Babaji* v. *Nana Manohar* (7 Bomb. H.C.R., A.C.J. 153), that it is unnecessary to set them forth here."

After referring to some ancient texts and to some statements of Sir Thomas Strange and Mr. Colebrooke, the learned Judges said :—

> " Accepting, however, the view which the cases seem to establish, viz., that the widow, where the husband dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, may adopt without the sanction of the husband (if he have not expressly or by implication indicated his desire that she shall not do so) and without the sanction of his kindred, we are not (as has been previously said in this Court) disposed to carry the deviation from ordinary Hindu law further than it has been already established by precedents."

The allusion to what had " been previously said " in the High Court was an allusion to a judgment of Sir Michael Westropp, then Mr. Justice Westropp, reported in *Bayabai* v. *Bala Venkatish*, 7 Bomb. H.C.R., Appendix I, which it will be necessary to refer to later.

The Hindu law in the Mahratta country of the Presidency of Bombay and in Gujarat as to the power of widows to adopt to their deceased husbands differs widely from the Hindu law as it has been variously interpreted in other parts of India, but whether it is the original Hindu law on that subject, or, as the learned Judges in *Ramji* v. *Ghamau* assumed, a deviation from it is not now an easy question to decide with certainty ; probably it is a deviation.

In *Lakshmibai* v. *Sarasvatibai*, 23 Bomb., at page 794, Sir Lawrence Jenkins, C.J., said :—

> " It has been argued before us on the part of the appellant that a widow's power to adopt does not rest on any delegation from her husband, but is her own inherent right, and it is obvious that the distinction may have more than an academic value. The commentaries, which prevail in this Presidency, seem to me strongly to favour the view thus contended for, but some at any rate of the more recent decisions in this Court contain expressions that point in the other direction. In the view I take of the present case, it is not necessary to decide the point, but the inclination of my opinion (though I reserve to myself the right to reconsider the matter hereafter, if necessary) is that in this Presidency the widow's right is inherent and not merely delegated."

There does not appear to their Lordships to be any sound reason why in the Mahratta country of the Presidency of Bombay the Hindu law as to the power of a Hindu widow who has not

the authority of her deceased husband to adopt a son to him, should depend on the question as to whether her husband had died as a separated Hindu or as an unseparated Hindu, or on the question as to whether the property which was vested in her when she made the adoption was or was not vested in her as his heir. If it was her religious duty to adopt a son to her husband, that duty would be the same in either case, although possibly the right of the adopted son to the property vested in the widow might be different. It has, however, been held by the Board in *Pratapsing Shivsing* v. *Agarsingji Raisingji*, 46 I.A. 97, which was a case from the Ahmedabad District of the Presidency of Bombay, that :—

> " The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her."

The Board was not then dealing with a case in which the deceased husband had expressly or implicitly prohibited his wife from making any adoption.

In *Shri Ragunada* v. *Shri Brozo Kishoro*, 3 I.A., at page 193, the Board said :—

> " It may be the duty of a Court of Justice administrating the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

That case came from Travancore, where the Hindu law as interpreted in the Province of Madras as to the power of Hindu widows to adopt, who have not had the authority of their husbands to adopt a son to him, is much more restricted than it is in the Mahratta country of the Presidency of Bombay and in Gujarat, where it is the law that the widow of a separated husband, who has not prohibited her from making an adoption to him, can validly adopt a son to him without the consent of anyone except that of the parent of the boy. In the present case, owing to the family having separated, the rights of Namdeo and his son Rambhau were merely the rights of collaterals in unpartitioned property

In *Narayan Babaji* v. *Nana Manovhar*, 7 Bomb. H.C.R., A.C.J., 153, where the question for decision was whether a Hindu wife could in the lifetime of her husband make a valid adoption to him, a widely different point from that to be decided in this appeal, and a widely different point from that which had to be decided in *Ramji* v. *Ghamau*, Westropp, C.J., delivered a long judgment

of value when the respective authority of various ancient texts and commentaries on Hindu law has to be considered on questions of a woman giving or taking a boy in adoption or on the difference between the power of a widow and that of a wife to take a boy in adoption, and on other questions which their Lordships have not to consider in this appeal. In the course of the judgment, the learned Judge stated that he adhered to an opinion expressed by him in 1866 in *Bayabai* v. *Bala Venkatish* as to the construction of some passages in the Dattaka Chandrika. As will later appear, it is not at all clear what was the judgment which Mr. Justice Westropp actually did deliver in *Bayabai* v. *Bala Venkatish.*

In *Rakhmabai* v. *Radhabai*, 5 Bomb. H.C.R., A.C., 181, which was decided in the High Court on the 26th August, 1868, the suit was between the two widows of Murarav Desai, of Nipani, in the Mahratta country of the Presidency of Bombay, who had died childless and apparently separate. The suit was brought by Radhmabai who was the junior widow; she claimed to be jointly entitled with the defendant Rakhmabai to the estate of their deceased husband.

The defence was that Rakhmabai had authority to adopt a son to her late husband, and had adopted Rav Saheb, who therefore became the lawful heir to the entire estate. The District Judge who tried the suit found that the adoption was not authorised by the husband, but he had no doubt that the adoption was in fact made, and for some reason which was not apparent to the Court of Appeal, he decreed that the plaintiff was entitled to the half share which she claimed. The defendant appealed to the High Court at Bombay and the appeal came before Sir Richard Couch, C.J., and Newton and Warden, JJ., who having found that the adoption had in fact been made, proceeded "to consider whether it was valid, either by reason of its having been made by the authority of the deceased Murarav (the husband), or by virtue of the power which Rakhmabai had by the Hindu law, by which the parties were governed." The High Court found that the husband had given no direction to adopt, and then considered whether the adoption without authority having been given by the husband was valid. The learned Judges of the High Court then referred to the Mitakshara, the Vyavahara Mayukha, an opinion expressed by Sir W. H. Macnaghten in a note at page 68 of the second edition of his Principles of Hindu Law, several cases reported, some reported in Borradaile's Reports and some in Morris' Sudder Dewany Reports, and to the opinions which had been given in some of those cases by Shastris and by Pundits, and expressed their decision thus:—

> "Upon the review which we have made of the authorities applicable in this part of India, we are of opinion that in the Maratha country, wherein the property in question in this suit is situate, a Hindu widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

That decision was not based upon the fact that the deceased husband was a separated Hindu, nor was it based upon the fact that at the time of the adoption, the widow who made the adoption had vested in her the whole or any part of the property which had belonged to her husband. Their Lordships regard it as equally applicable to an adoption by a Hindu widow of the Mahratta country of the Province of Bombay, whether her husband at the time of his death was joint or separate, and whether his property was or was not vested in her as his heir at the time when she made the adoption, and consider that it is a decision to be applied in this appeal.

The learned Judges in *Rakhmabai* v. *Radhabai*, having expressed their decision which has been quoted on the authorities which they had reviewed, proceeded to consider whether the elder of the two widows had power to adopt without the consent of the other, and having referred on that subject to Strange's Hindu Law, Appendix 83, to a decision of the Supreme Court, to a decision of the High Court, to West and Bühler's Digest of Hindu Law of Inheritance and to Steele's Summary of the Law and Custom of Hindu Inheritance, said :—

> "Considering the act of adoption as the performance of a religious duty, we think these authorities are sufficient to justify us in holding that Rakhmabai, the elder of the two widows, had the right to adopt. In the judgment of the Privy Council their Lordships say that 'in the case of an undivided family, if there be no father of the husband living, the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing another coparcener against their will.' The interest of the younger of two widows cannot, we think, be regarded in the same light as that of a member of an undivided family, and probably their Lordships would not consider the remark applicable in cases where, by the law which governs them, no consent of kinsmen is required. We must not omit to notice the judgment of Mr. Justice Westropp in Regular Appeal No. 17 of 1863 (*Bayabai* v. *Bala Venkatish*, subsequently reported in 7 Bomb. H.C.R., Appendix I), which was cited by the respondent's counsel. The judgment was not a written one, and we have no report of it, but we understand that the opinion given by the learned Judge was that a widow had no power to adopt a son to her husband where he had expressly, or by his conduct impliedly, forbidden her to do so. In this we quite concur, and the Judicial Committee have so held in the judgment we have referred to. There is no question of prohibition in this case."

Their Lordships will now consider the case of *Bayabai* v. *Bala Venkatish*, 7 Bomb. H.C.R., Appendix I, which was decided in the High Court at Bombay on the 7th March, 1866, by Westropp, Tucker and Warden, JJ., and is one of the three decisions referred to by Sir Michael Westropp, C.J., in *Ramji* v. *Gamau*, 6 Bomb., at page 501, as the cases in which the authorities in relation to the taking in adoption by a Hindu widow in the Presidency of Bombay were so fully collected and discussed that it was unnecessary to set them forth in the judgment of the full Bench in *Ramji* v. *Gamau*, by which it will be remembered that Full Bench decided that in the Presidency of Bombay a Hindu widow, who has not the family estate vested in her and

whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his coparceners.

It is necessary to make a few prefatory observations about the judgment of Mr. Justice Westropp which is reported in 7 Bomb. H.C.R., Appendix I, as having been delivered in *Bayabai* v. *Bala Venkatish* on the 7th March, 1866, in Regular Appeal No. 17 of 1863. In the first place it appears that Mr. Justice Warden was one of the Judges in that case, and was also one of the Judges in *Rakhmabai* v. *Radhabi*, which was decided on the 26th August, 1868, and is reported in 5 Bomb. H.C.R. A.C. 181. In the judgment of the Court in the latter case, at page 193 of the Report, it is stated that the judgment of Mr. Justice Westropp in Regular Appeal No. 17 of 1863 was not a written judgment and " we have no report of it." It may be assumed that a decree of the High Court in *Bayabai* v. *Bala Venkatish* was drawn up, and that it was drawn up as of the 7th March, 1866. A decree must be justified by the judgment upon which it is based. Their Lordships are of opinion that the judgment of Mr. Justice Westropp in *Bayabai* v. *Bala Venkatish*, as reported in 7 Bomb. H.C.R., Appendix I, could not possibly have been an orally delivered judgment, and they are further of opinion, strange though that opinion may seem, that no judgment was written in that case until after the judgment of Sir Richard Couch, C.J., Newton and Warden, JJ., in *Rakhmabai* v. *Radhabai*, had been reported in 1869 in 5 Bomb. H.C.R. A.C. 181.

The points which were considered by Mr. Justice Westropp in *Bayabai* v. *Bala Venkatish*, as appears from an examination of his judgment as it is reported, were : point (1), the power of a Hindu widow to adopt a son to her deceased husband without an authority from him to do so ; point (2) whether the husband in the case before him had given authority to his wife to adopt or had not impliedly forbidden her to do so, and point (3) whether the widow had not been cajoled into making the alleged adoption by being kept in ignorance of her rights, and of the effect of an adoption. To the consideration of point (1), Mr. Justice Westropp devoted seventeen pages of his judgment as it is reported ; to the consideration of point (2) he devoted about one page ; to the consideration of point (3) he devoted two pages. In considering point (1), Mr. Justice Westropp is reported at pages xvi and xvii of the Appendix to 7 Bomb. H.C.R. to have said :—

" Baji Rav, the last of the Peshwas, as a general rule, treated adoptions by widows without the order of their husbands as illegal. But it is certain that he was swayed by interested motives. . . . The disapprobation which the deviation of the Maratha school met with in such high quarters may to some extent account for the fact that, for a long time afterwards, and down even to the hearing of this case, we find that adoptions by widows without express authority from their husbands have been constantly and vigorously contested, but, it must be admitted, generally speaking, without success, unless there were some other defect in the adoption than the absence of express authority from the husband. . . . Assuming, but not deciding, that the deviation of the Maratha school is established to the furthest

extent to which any of the foregoing authorities reach (namely, that the widow may, without express authority or order from her husband, and without the consent either of his or her relations, adopt a son), and without in the least degree wishing or intending to infringe on the law of adoption by a widow so far as it can be considered as established in the Maharashtra, cherished as I believe that law to be by the Hindu community, or a very considerable proportion of it, yet I am not disposed to extend it, or to depart from the general Hindu law one single step further than provincial or local usage has firmly settled as admissible. And I have not any doubt that we should extend it much beyond its present boundaries were we to hold that the widow may adopt where the husband has, when perfectly in the possession of his senses, as well on the day preceding his death as on the day of his death, in reply to suggestions that he should adopt a son, positively refused to do so."

There is nothing in the judgment of Westropp, J., so far as their Lordships can see, which confined his observations as to the power of a Hindu widow to adopt in the Mahratta Country of the Bombay Presidency, and in Gujarat without the consent of relations to cases in which the widow was the widow of a separated husband, or to cases in which the widow was the widow of an unseparated husband; his observations appear to their Lordship to have been general and to apply to either class of cases.

Mr. Justice Westropp in *Bayabai* v. *Bala Venkatish*, if the report is to be trusted, found that the husband had forbidden his wife to adopt. If the other Judges in that case, Tucker and Warden, JJ., had agreed with him that the widow had been forbidden by her husband to adopt, there was nothing further to consider in the case. According to the report of his judgment, Mr. Justice Westropp finally found that the widow had been cajoled into making the alleged adoption by being kept in ignorance of her rights, and of the effect of an adoption. With that finding, the other two Judges agreed. Their judgments will be found reported at page xxiii of the Appendix thus :—

"Tucker, J., concurred in thinking that the defendant Bayabai had been circumvented by unfair means, and that an adoption procured, as the alleged adoption in this case, by suppression and misrepresentation of facts, could not be permitted to stand. It was clear to him that this youthful widow had been led by those around her to believe that the act of adoption would not divest her of her interest in the property of her late husband, and that she had not been fully informed as to her position and rights. . . . As to the right of a widow in this Presidency to adopt without any authority from her husband, he did not consider it necessary now to give any final decision, but his opinion inclined in favour of that right, and of its having been sufficiently recognised by the Courts of Justice at this side of India. Further, he was inclined to think that she had that right unless her husband expressly prohibited her from adopting, and that a mere refusal by him to adopt would not be sufficient. But on this point he would refrain from giving any positive opinion.

"Warden, J.: I concur in the observations of my brother Tucker."

Whether the judgment reported as that of Mr. Justice Tucker had been written by him or was prepared for the Report by the reporter from his note of the case, their Lordships do not know, but it reads as if it had been written by a reporter from his note, not by the Judge.

Mr. Justice Warden must apparently have forgotten when the case of *Rakhmabai* v. *Radhabai* was being argued in 1868, what was the actual point on which the case of *Bayabai* v. *Bala Venkatish* had been decided in 1866.

Their Lordships have come to the conclusion that the adoption of the plaintiff who is the appellant, was valid, and they will humbly advise His Majesty, that the decree of the Court of the Judicial Commissioner should be set aside with costs and the preliminary decree of the Additional Judge should be affirmed and restored. The respondent must pay the costs of this appeal.

In the Privy Council.

YADAO

v.

NAMDEO.

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