PRIVY COUNCIL.

P. C.*
1920

May 6, 7.

SITABAI

v.

BAPU ANNA PATIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.]

Hindu Law—Adoption—Construction of will—Position of widow under Bombay School of Hindu law as to adoption—Widow's power to adopt—Will naming boy on bad terms with widow.

According to the Bombay School of Hindu 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 should be exercised.

The will of a Mahratta Brahmin governed by the Bombay School of Hindu law directed that "my wife should as far as possible adopt Shankar, the second son of my elder brother. If he (the boy) cannot be obtained any other boy should be adopted with the advice of the trustees. The will provided that the son adopted should keep the widow, treat her with affection and give her maintenance. Shankar and the family of which he was a member were on bad terms with the widow who adopted with the advice of the trustees a son of her sister. At the time of that adoption Shankar could have been obtained for adoption :

Held, that the terms of the will left no discretion to the widow but imposed upon her a mandate which she was bound to obey and that the adoption she made was invalid.

APPEAL 5 of 1919 from a judgment and decree (12th March 1917) of the Court of the Judicial Commissioner, Central Provinces, which reversed a judgment and decree (16th October 1916) of the Court of the District Judge, Amraoti.

* *Present* : LORD BUCKMASTER, LORD DUNEDIN, SIR JOHN EDGE AND MR. AMEER ALI.

The defendants were the appellants to His Majesty in Council.

The suit which gave rise to this appeal was brought by the respondents on 30th September 1914 for a declaration that the adoption of the second appellant, Narayan, by Sitabai, the first appellant, was invalid in law. The respondents did not dispute the factum of the adoption.

The parties are Mahrattas living in Berar, and the law applicable to the case is the Bombay School of Hindu law under which a widow has inherent right to adopt a son to her husband unless there is a prohibition express or implied by him.

On 12th June 1901, one Prahlad Narayan Jog, a Mahratta Brahmin of Amraoti in Berar, and a pleader by profession made his last will and testament. At that time he was of middle age and had four daughters by a deceased wife but no son, and he had married the first appellant who was about 11 years of age.

The material provisions of his will are as follows:—

Clause 2—"If I adopted or my wife after my death adopted a son, then that adopted son shall keep her with him, and treat her with affection and shall give her maintenance. In case the adopted son and she did not agree Rs. 15 shall be given (to her) every month for her maintenance, and my wife shall remain separate."

Clause 20 establishes an Anna Chhatra (a place where food is given to mendicants and poor helpless persons) and leaves Rs. 16,000 for the outlay and upkeep of it to be managed by the Kohlapur State.

Clause 22—"If I did not adopt a son during my life time my wife should as far as possible adopt Shankar, the second son of my elder brother Tirthoswarup (*i.e.* respected) Govind Narayan Jog. If he

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(the boy) cannot be obtained, any other boy should be adopted with the advice of the trustees."

Clause 24.—" My adopted son shall keep my mother, my wife and my daughters Chiranjira, Yamunabai and Durgabai with him and treat them with affection, and after the daughters go to their husbands' houses they shall be brought (at different times) to the parental house for temporary residence and for delivery (on confinement.)"

Clause 25.—" If owing to any reason the boy is not taken into adoption then as to the estate which the adopted son would have got after he had been adopted, all that estate shall be devoted to the above-mentioned Anna Chhatra for its augmentation."

Clause 27 gives the names of five persons whom the testator appoints executors of his will.

The will was in the Mahratti language and in the Courts in India the meaning and construction of the words " *banel to pawe to*" in clause 22 were in dispute. The official translation of those words is "as far as possible", but the appellants contend that they mean " if agreeable to her " (the widow.)

The testator died soon after making his will, and probate was granted to the executors in September 1901 but only three of them were *de facto* executors.

On 25th January 1909, the widow wrote to one of the executors a letter in which she said " I am going to adopt a boy. But Shankarrao and his father and brother quarrel with me. They have started proceedings in Court with a view that I should not get even maintenance. There can therefore be no harmony between them and me, and so I have no mind to adopt Shankarrao Jog. I will adopt another boy. My real sister has two sons of whom the elder is Narayan, who is five years of age. I approve him and so wish to adopt him. Permission may therefore be given to

me as mentioned in the will. If you do not approve this boy you may propose to me any other boy whom you may choose, so that I may consider the matter and let you know about it. You may give me permission if you approve the aforesaid boy. I have written to other trustees just as I have written to you."

The three *de facto* executors expressed their approval, the fourth did not reply, and the fifth had died. Accordingly, on 12th February 1909, Sitabai adopted her sister's boy Narayan, the second appellant. In 1911 the three executors handed over Rs. 16,000 to the Kohlapur State to establish an Anna Chhatra which was founded on 12th September 1913, the first respondent, who is an officer of that State, is the *ex officio* manager of it, in which capacity he instituted the present suit against Sitabai and her adopted son. He asserted that as Shankarrao was available at the time, the widow made the alleged adoption; she was on the construction of the will bound to adopt him and that the adoption she had made was invalid. He alleged that in the absence of an adopted son the Anna Chhatra would be entitled to the residuary estate of the testator, and prayed for a declaration that the second appellant was not the legally adopted son of the testator.

Shankarrao applied to be made a plaintiff as being "interested" in getting the declaration prayed for, and on 23rd January 1915 the Court made an order to amend the plaint by adding him as a plaintiff.

The appellants filed a joint written statement contending that the words "*b inel to pa've to*" in clause 22 of the will only suggested that the widow should adopt Shankar if she found the adoption of him agreeable; that those words only indicated a preference for Shankar and did not amount to a mandate to the widow that so long as he was available she should

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adopt him and no one else, and that the will did not prohibit the adoption of Narayan.

The District Judge was of opinion that the appropriate meaning of the words "*banel to pawe to*" would be expressed by the words "as far as possible." He upheld the adoption of Narayan stating his conclusion as follows: "I conclude therefore that there is no prohibition either express or implied, and that the adoption (not otherwise challenged) actually made cannot be upset because Shankar was available and because he and his father sent notice at the time of the adoption to say that he was ready to be adopted, and his father ready to give him. I am of opinion that with the advice (not necessarily with the consent) of the executors the widow was within her rights in making the adoption and the protests of Shankar and his father are unavailing. The actual adoption is proved to have been with the active consent and advice of some at least of the executors. I find nothing to invalidate the actual adoption."

On appeal to the Court of the Judicial Commissioners, they allowed the appeal, and passed a decree reversing the decree appealed from declaring the adoption invalid. They accepted the meaning of the disputed Mahratti words in clause 22 of the will adopted by the Court below. Their view of the law was that where a widow was told by her deceased husband in his will to adopt a person named by him she was bound to adopt him, and it was only when the adoption of such a person was impossible that she had power to adopt anybody else unless there had been an express or implied prohibition of such adoption also. They held that the widow so long as Sankar was available for adoption at the time the disputed adoption took place, she had no power to adopt Narayan, and that the adoption in suit must be declared invalid

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On this appeal,

J. M. Parikh and *Sanyal*, for the appellants, contended that it was the dominant intention of the testator to have an adopted son, and by the use of the ambiguous words "*banel to pawe to*" he never meant to restrict the inherent right his widow had to make an adoption and to select a suitable boy, so as to defeat such intention. He did not, on the proper construction of his will as a whole, intend that so long as Shankar was available for adoption, his widow should be prohibited under all circumstances from adopting any one else. Shankar and his father and brother were on bad terms with the widow, and his adoption would have defeated the testator's intention as expressed in clauses 2 and 24 of the will and made his adoption impossible. There is no express prohibition to adopt any one else than Shankar and the terms of the will are too ambiguous for a prohibition to be implied. Reference was made to *Lakshmibai* v. *Sarasvatibai* (1). The language of the will in parts of it certainly implies that there should be some affectionate feeling between the widow and the boy adopted : and the facts are that they were on bad terms as far as Shankar was concerned. There is no actual mandate from the husband to his widow to adopt Shankar : and on the principle of *factum valet* the adoption of Narayan is a valid adoption.

The judgment of their Lordships was delivered by

LORD BUCKMASTER. Their Lordships do not desire to trouble counsel for the respondents. There is no controversy as to the facts which lie behind this dispute, and the relevant proposition of law has been accepted in both the Courts below. It is this : That

(1) (1899) I. L. R. 23 Bom. 789.

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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 should be exercised.

The whole question in this case, therefore, is whether the will of one Pralhad Narayan Jog, dated the 12th June 1901, imposed any such mandate upon his widow. The direction he gave is contained in clause 22. and it runs in these terms :—

"If I did not adopt a son during my lifetime my wife should, as far as possible, adopt Shankar, the second son of my elder brother Tirthoswarup Govind Narayan Jog. If he (the boy) cannot be obtained, any other boy should be adopted with the advice of the trustees."

The point for determination, therefore, is whether those words merely appeal to the wife to exercise her discretion in the manner indicated, or whether they impose upon her a mandate so to exercise it. The difficulty in the construction is due to the rather confused and inartistic use of words in the clause; but their Lordships, having given the most careful consideration to the arguments that have been advanced by both counsel for the appellants, have come to the conclusion that the view expressed by the Judicial Commissioner as to its effect was correct. "Should as far as possible" means, in their Lordships' opinion, that unless there are conditions outside the will preventing the possibility of the adoption, the widow, when she does adopt, is to exercise her power in favour of Shankar; and this view is strengthened and confirmed by the final words which provide that if the boy cannot be obtained another boy should be adopted with the advice of the trustees. The boy could be obtained. The only difficulty that arose was due to an unhappy and unfortunate difference of feeling between the widow and Shankar and Shankar's

family. Counsel for the appellants have suggested that this prevents the possibility of his adoption, and they point to two clauses in the will—clause 2 and clause 24—in both of which the testator in strong language directed that the adopted son should keep the widow, treat her with affection, and give her maintenance, which they say is in the circumstances impossible.

That condition is, however, subsequent to the appointment, and not a condition precedent to the exercise of the power. Their Lordships abstain from expressing any opinion as to what the effect of the will might be if the adopted son declined to exercise the duties which the will so imposes. That question does not now arise. The only question is that to which their Lordships have referred, and although the words of the will might have been expressed with greater clearness their Lordships entertain no doubt that the judgment of the Judicial Commissioner is correct, and that this appeal should be dismissed with costs, and their Lordships will therefore humbly advise His Majesty accordingly.

J. V. W.

Appeal dismissed.

Solicitor for the appellants : *Edward Dalgado.*
Solicitor for the respondents : *Henry S. L. Polak.*