APPELLATE CIVIL.

Before Guha and Lodge JJ.

SHASHANKABHOOSHAN CHAUDHURI

v.

BRAJENDRANARAYAN MANDAL.*

1935

June 20, 21, 24; *July* 3.

Hindu Law—Adoption—Will—Construction—Authority to two widows to adopt successively—Death of first adopted son after majority—Property, if vested in adoptive mother—Second adoption, if valid.

A Hindu, governed by the *Dâyabhâga*, by his will, authorised his two widows to adopt six sons successively in case of death of the one adopted. The widows, who were entitled to widow's estate only, were directed to exercise their power of adoption by turn and, in the event of their death without adoption, the income of the estate was to be spent on *debashebâ*.

One of the widows B adopted a son I, who attained majority and the estate was made over to him as directed in the will. But I died unmarried and, thereupon, the other widow R adopted the defendant.

Held: (i) upon a construction of the will, that the testator intended to perpetuate his line of succession by lineal descendants and the estate did not vest in the adoptive mother on the son's death:

(ii) that the second adoption was valid.

Jatindra Nath Chaudhuri v. *Amrita Lal Bagchi* (1) and *Amarendra Mansingh* v. *Sanatan Singh* (2) followed.

FIRST APPEAL by the defendant.

The material facts of the case and the arguments in the appeal appear from the judgment.

Brajalal Chakrabarti, Susheelkumar Basu, Dwijendrakrishna Datta, Sharatchandra Jana and *Byomkesh Basu* for the appellant.

Gunadacharan Sen, Bijankumar Mukherji and *Pramathanath Mitra* for the respondents.

Cur. adv. vult.

*Appeal from Original Decree, No. 122 of 1932, against the decree of Kshirodeshwar Banerji, Subordinate Judge of Murshidabad, dated Dec. 23, 1931.

(1) (1900) 5 C. W. N. 20.

(2) (1933) I. L. R. 12 Pat. 642; L. R. 60 I. A. 242.

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The judgment of the Court was as follows:—

This is an appeal from the decision of the learned Subordinate Judge of Murshidabad, in a suit for possession, on declaration of the plaintiffs' title to the properties in suit. The plaintiffs Nos. 1 to 3 claimed to be the reversionary heirs of one Indubhooshan Chaudhuri, the adopted son of Shashibhooshan Chaudhuri. The fourth plaintiff claimed title to the properties in litigation as the purchaser of one-fourth share of the same from the first three plaintiffs. The history of the title, on which the claim in suit was based, may be briefly stated: One Shashibhooshan Chaudhuri died on the 7th January, 1908, without issue, but leaving two widows, him surviving, Basantakumaree Chaudhurani and Rasheshwaree Chaudhurani. By a will, dated the 3rd August, 1907, Shashibhooshan Chaudhuri appointed the widows as executrices. There was a provision made in the will for adoption of sons by the widows. The elder widow Basantakumaree Chaudhurani adopted a son—Indubhooshan Chaudhuri—on the 22nd July, 1909, after probate of the will of Shashibhooshan Chaudhuri was obtained by the executrices under the will on the 22nd July, 1908. The adopted son attained majority on the 8th April, 1923; and, according to the terms of the will, the properties left by Shashibhooshan Chaudhuri were made over to the adopted son. Thereafter the adopted son died unmarried on the 20th February, 1925. The junior widow Rasheshwaree Chaudhurani then adopted Shashankabhooshan Chaudhuri, the defendant in the suit, on the 26th April, 1925. Basantakumaree Chaudhurani, the elder widow who had adopted Indubhooshan Chaudhuri, under the terms of the will of Shashibhooshan Chaudhuri, died on the 27th December, 1925. According to the plaintiffs, the adopted son Indubhooshan Chaudhuri, having died while in possession of the estate of his father Shashibhooshan Chaudhuri in absolute right as his father's heir, and having died unmarried, the adoptive mother Basantakumaree Chaudhurani inherited the

estate of Shashibhooshan Chaudhuri, mentioned as the Dengaparha Estate in the proceedings, as the only heir of Indubhooshan Chaudhuri. The aforesaid Basantakumaree Chaudhurani having died, the plaintiffs Nos. 1 to 3 were the reversionary heirs of Indubhooshan Chaudhuri as his nearest *sapinda* agnates, and were entitled to have their title to the properties in litigation declared, as such heirs, on the footing that the adoption of the defendant Shashankabhooshan Chaudhuri by Rasheshwaree Chaudhurani was invalid. It was asserted by the plaintiffs that Rasheshwaree Chaudhurani could not validly adopt a son under the terms of the will of her husband Shashibhooshan Chaudhuri, as the authority to adopt, so far as Rasheshwaree Chaudhurani was concerned, came to an end as soon as Basantakumaree Chaudhurani, the senior widow of Shashibhooshan Chaudhuri, inherited his estate, as heir of the deceased adopted son Indubhooshan Chaudhuri.

The claim in suit was resisted by the defendant Shashankabhooshan Chaudhuri, the son adopted by Rasheshwaree Chaudhurani; and the issue, as stated by the judge in the trial court, on which the parties fought the litigation, was the issue No. 3, raised for determination in the suit, on the pleadings of the parties concerned :—

> Is the adoption of the defendant by Rasheshwaree Chaudhurani invalid in law and void ? Had Rasheshwaree Chaudhurani power to take the defendant in adoption ? Did the authority to adopt, if given by Rasheshwaree Chaudhurani's husband, become incapable of execution, and did such authority come to an end as soon as the Dengaparha estate became vested in or possessed by Indubhooshan Chaudhuri's mother Basantakumaree Chaudhurani ?

The issue thus raised for decision in the case was decided by the trial court in favour of the plaintiffs in the suit. Hence this appeal. It must be noted that the other questions raised in the suit, to which several other issues related, were not argued before us in this appeal. The only question for consideration in the appeal is whether the judge in the trial court is right in his decision that the adoption of the defendant by Rasheshwaree Chaudhurani is invalid.

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The power of adoption was conferred by Shashi-bhooshan Chaudhuri on his two widows, by his will; and the extent of that power has to be determined with reference to the contents of the will. In construing the will, the object should in all cases be to ascertain from its wording the expressed intention and the effect has to be given to the same. The intention has to be gathered from the words of the entire will, taking them in the ordinary meaning, not overlooking the predilection of the class to which the testator belonged. As was observed by their Lordships of the Judicial Committee of the Privy Council in *Narasimha Appa Row* v. *Parthasarathy Appa Row* (1), surrounding circumstances have to be considered, and, among such surrounding circumstances, which the court is bound to consider, none would be more important than race and religious opinions and the court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom.

The relevant portions of the will of Shashi-bhooshan Chaudhuri, bearing upon the question in controversy in the case before us, are those contained in paragraphs 1 and 2, and those in the last part of paragraph 7 :—

1. I have no issue. I have two married wives living. The name of the first wife is Basantakumaree Chaudhurani and that of the second wife is Rasheshwaree Chaudhurani. After my death, my aforesaid two wives shall be in possession in equal shares, widow's estate, till the attainment of majority by the adopted son, of the movable and immovable properties left by me and shall perform the *shebá* and *pujá* of the goddesses Saraswatee and Kâlee and also the *Dewâli* and other festivals and ceremonies which are being performed from before. In no way shall they be competent to sell or alienate any property. On the adopted son attaining majority, the executrices shall hand over the charge of the entire estate to the adopted son. From that time, *i.e.*, from the time the adopted son, after attaining majority, takes the estate in his own hand, my aforesaid two wives shall get monthly allowances of Rs. 200, each receiving Rs. 100, so long as they will live and the adopted son shall be bound to pay that and that shall be a charge upon the estate. My aunt (father's sister) Khantamanee Dâsya shall receive a monthly allowance of Rs. 10 till her death, from my estate. Finis.

2. I give my aforesaid two wives permission to adopt sons. According to my permission, they both of them shall be entitled to adopt six sons in

(1) (1913) I. L. R. 37 Mad. 199; L. R. 41 I. A. 51.

succession, each adopting three, *i.e.*, to say, my first wife, Basantakumaree Chaudhurani, will adopt a son first; and after the death of that adopted son, my second wife, Rasheshwaree Chaudhurani will next adopt a son. In case of death of the said adopted son, my first wife will again adopt a son. In this way, both of them together shall be entitled to adopt six sons successively. In case of death of one out of my two wives, the surviving wife shall be entitled to adopt the remaining number of sons successively. My two wives shall not be entitled to partition the properties, *etc.*, of the estate, but if they do not pull on well they shall be entitled to make a division of the profits so long as the estate shall be under their charge. If the two wives do not pull on well with the adopted son from after the adoption and during the minority of the adopted son, then the adopted son shall receive a monthly allowance of Rs. 50 from the estate for his own personal expenses. The executrices shall pay the expenses of the education of the adopted son from the estate.

7. * * * * *If my aforesaid two wives do not adopt any son within reasonable time or if they die before adopting any son then the income of all the properties of my estate shall be spent in the *shebá* and *pujá, etc.*, of the aforesaid images, *Radhakrishna Thákur* and the executrices or the co-adjutors or any of them who shall be living shall appoint a religious and proper person as *shebâit* and that *shebâit* shall appoint his successor and so on. This is my last will. By this will I cancel the will which I executed on the 26th *Poush*, 1312 B. S., dated 18th *Srâban* 1314 B. S.

Applying the rule of interpretation referred to above, to the aforesaid provisions contained in the will before us, there can be no doubt that the primary intention of the testator, Shashibhooshan Chaudhuri, was to prepetuate his line of succession by lineal descendants. That was the intention underlying the provision of the adoption of six sons, one after another by the two widows. There was no idea in the testator that the properties left by him was to pass over to the agnatic relations as the first three plaintiffs are: that is what is clearly expressed in the last part of paragraph 7 of the will, and that is what is in consonance with the ideas of a Hindu governed by the *Dâyabhâga* law prevalent in Bengal, with all his predilection in the matter of inheritance, religion and otherwise. If the two wives did not adopt for any reason whatsoever, the income of all the properties of the estate were to be spent in the *shebâ* and *pujâ* of the family deities. There was no idea prevalent in the mind of the testator that the properties were to pass to any but the direct descendants. It is significant that the widows were merely to have the

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power of enjoyment over the properties left by their husband, and the direction contained in their husband's will was to hand over the same to the adopted son, as soon as he attained majority. The provision for six successive adoptions by the two widows indicated the keen desire on the part of the testator to perpetuate his line by sons adopted by his wives. In the matter of adoption, the two wives were to be considered as one person, acting under the authority bestowed upon them by the husband, so far as adoption of sons was concerned. The importance of the aspect of the provisions of the will is that, although a son duly adopted might attain majority, entitling him to get possession of the properties left by Shashibhooshan Chaudhuri, the power of adoption remained in the widows, in the event that happened, the adopted son dying unmarried. Regard being had to the intention of the testator, there was no vesting of the estate in the senior widow as the heir of the son adopted by her; the power of adoption conferred on the two widows, taken together, remained in abeyance; and there was no bar to the exercise of that power by the junior widow, on the son adopted by the elder widow dying unmarried. The testator did not intend that his estate should pass to any of the widows absolutely, or vest in any of them, nor was there the intention that the authority to adopt was not to be exercised in the event that happened, namely, the son adopted dying without leaving a male lineal descendant. The vesting of the estate in one of the two widows, and the passing of the same to the distant agnates on the death of one of the widows was not a thing intended or contemplated by Shashibhooshan Chaudhuri; what was contemplated was in the event that happened, that one of the two widows would exercise the power of adoption that was still in existence. That was what was done by the junior widow Rasheshwaree Chaudhurani on the 26th April, 1925, after the son adopted by the elder widow Basantakumaree Chaudhurani had died unmarried on the 22nd February, 1925 and it was in accordance

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with the intention of the testator, Shashibooshan Chaudhuri, as expressed in his will. It may be noticed in this connection that the widow's death and, for the purpose of the case before us, the death of both the widows, who have to be taken to be one so far as the authority to adopt was concerned,—is the limit of time within which, and the existence of male issue in the male line, the condition, subject to which the power of adoption conferred by the will of Shashibhooshan Chaudhuri, could be exercised. As a general rule there is no limit of time for the exercise of the power of adoption by the widow in whom her husband's estate has vested; she may adopt at any time she pleases, when the estate is vested in her. See *Mutsaddi Lal* v. *Kundan Lal* (1). In the case before us, no vesting of the estate in any of the two widows was intended, and the estate could not under the clear terms of the will, vest in one of the widows on the death of the son adopted by her. The position created by the adoption of Shashankabhooshan Chaudhuri by the junior widow Rasheshwaree Chaudhurani in the case before us, was something similar to the position which came up for consideration of this Court in the year 1900, and which was dealt with by the eminent Judge Sir Gooroo Das Banerjee in his judgment in the case of *Jatindra Nath Chaudhuri* v. *Amrit Lal Bagchi* (2), where, on a review of the authorities bearing on the question under consideration, it was stated that the weight of authority was in favour of the view that a Hindu widow adopting a son under the authority of her deceased husband upon the death of a son adopted or begotten, whose estate he inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted, and it was held that the correct view would be to hold that when a Hindu widow adopts a second son, upon the first son dying unmarried, the second adopted son takes the estate immediately, on his adoption. The differentiating element in the case before us is that

(1) (1906) I. L. R. 28 All. 377; L. R. 33 I. A. 55

(2) (1900) 5 C. W. N. 20.

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there were two widows with power of adoption given to them to be exercised alternatively up to the number six; and the vesting of the estate even if such could be contemplated under the terms of the will, which as already indicated could not be. There could not be any vesting of the estate in one of the two co-widows, to the exclusion of the other, who had the authority to adopt in her, which remained in abeyance, during the life-time of the son adopted by the elder widow.

The judge in the trial court, it would appear, paid little attention to the terms and the provisions of the will bearing directly upon the question in controversy between the parties to the suit. He has proceeded on a discussion of the law on the subject of vesting of the estate in the widow, on the death of the son adopted by her, and has, on the authority of decisions referred to in his judgment, come to the conclusion that the power to adopt became incapable of execution on the vesting of the husband's estate on some one other than herself. The proposition as laid down by the trial court cannot be accepted on the provisions of the will of Shashibhooshan Chaudhuri, to which detailed reference has been made above, and for reasons stated hereinbefore.

In so far as the authority of decisions in this country and of their Lordships of the Judicial Committee of the Privy Council are concerned, referred to in the judgment of the court below,—no useful purpose can be served by entering into a discussion on them. Most of the decisions mentioned by the judge in the court below were considered by their Lordships of the Judicial Committee in the case of *Amarendra Mansingh* v. *Sanatan Singh* (1), in which the point was raised that a widow's power of adoption was extinguished on the death of the son first adopted, inasmuch as he had then attained full age and full legal capacity to continue his line, and that the subsequent adoption of a son could not divest the estate which had vested in the nearest collateral heir of the last male holder. On that decision, what

(1) (1933) I. L. R. 12 Pat. 642; L. R. 60 I. A. 242.

must now be taken to be the settled law, appear to be this: A widow's authority to adopt is not extinguished by the mere fact that her first adopted son attained ceremonial competence before death; the power of adoption under the husband's authority is not exhausted at the death of the son first adopted by the widow. It is useful to refer to the main reasons assigned for the decision arrived at by their Lordships which were summarised in the following manner, after an exhaustive review of the case law on the subject:—

> The vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or* * * by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption. * * *The true principle must be found upon the religious side of the Hindu doctrine.

And to the efficacy of a son-ship: As to this doctrine taken to be well established, what was stated was this:—

> Their Lordships feel that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man.* * * *The Hindu law itself sets no limit to the exercise of the power during the life-time of the donee, and the validity of successive adoptions in continuation of the line is now well recognised. * * *
>
> * But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of the other rights to allow it to take effect, has long been recognised both by the Courts in India and by this Board.

This pronouncement recently made by the Judicial Committee, on a review of the previous case-law on the subject under consideration, is in consonance with what was stated to be the law prevalent in Bengal by Gooroo Das Banerjee J. in *Jatindra Nath Chaudhuri* v. *Amrita Lal Bagchi* (1) referred to in a previous part of the judgment. The law as now authoritatively laid down in *Amarendra Mansingh's* case (2) has, it may be noticed, been followed by their Lordships of the Judicial Committee in the case of *Vijaysinghji Chhatrasangji* v. *Shivsangji Bhimsangji* (3).

(1) (1900) 5 C. W. N. 20.
(2) (1933) I. L. R. 12 Pat. 642; L. R. 60 I. A. 242.
(3) (1935) I. L. R. 59 Bom. 360; L. R. 62 I. A. 161.

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On the provision of the will of Shashibhooshan Chaudhuri bearing on the question arising for consideration in this appeal, and on the authority of decisions of their Lordships of the Judicial Committee, the judgment of the trial court, in favour of the plaintiffs in the suit, cannot be upheld.

It remains to be mentioned that a question, relating to the application of the rule of *res judicata* against the defendant in the suit, was raised before us on behalf of the plaintiffs respondents in this Court, in support of the decree passed by the trial court in their favour. It was urged that the defendant appellant could not be allowed to agitate the question of validity of his adoption, in view of an order passed by this Court, on the 10th August, 1925, rejecting an application made by him for the substitution of his name in the place of Indubhooshan Chaudhuri, after the said Indubhooshan Chaudhuri died on the 20th February, 1925. It need only be stated in this connection that the validity of the adoption of the defendant was not considered and decided by this Court, in the order for substitution to which reference has been made above. The plea of *res judicata* as raised in this appeal for the first time during the course of argument, on which no issue in the suit was directed, appears to be wholly unsupportable.

In the result, the appeal is allowed, the decision of the trial court, and the decree passed by it, in favour of the plaintiffs respondents, are set aside. The suit instituted by the plaintiffs respondents, out of which this appeal has arisen, is dismissed with costs throughout.

Appeal allowed.

G. K. D.