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supervene which might render it impossible to treat the suit as if it was never instituted at all or unfair to the respondent to permit the appellant to ignore the basis on which the parties proceeded to trial in the Court of first instance.

PRIVY COUNCIL.

P. C. & J. C. 1888. Mar. 1, 2, 3, 8. April 21.

SRI AMMI DEVI (PLAINTIFF)

and

SRI VIKRAMA DEVU, A MINOR, BY THE AGENT TO THE COURT OF WARDS (DEFENDANT).

[On appeal from the High Court at Madras.]

Failure to prove alleged authority to widow who had purported to adopt to her deceased husband. Query; as to effect upon an adoption of an adopted elder being the only son of his father.

Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained.

The Courts below also differed as to whether the adoption if authorized was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision.

APPEAL from a decree (20th December 1884) of the High Court reversing a decree (17th March 1882) of the Subordinate Judge of Vizagapatam.

As to the fact of an authority to adopt having been given orally or by will, and as to the legal competency of the subject of an alleged adoption, the Courts below had differed in opinion.

The suit was brought by the appellant's mother, Sri Nilamani Patta Maha Devi, the junior widow of Krishna Bhupati Devu, zamindar of Madgole, in the Vizagapatam District, deceased, on the 25th December 1875.

The defendants were Sita Patta Maha Devi, the senior widow of the deceased raja, and Vikrama Devu, whom she had purported to adopt. The plaint alleged that the late zamindar who left no

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Present: Lord MACNAGHTEN, Sir B. PEACOCK and Sir R. COUCH.

male issue had given no authority either oral or written to the widow to adopt a son to him; and that it was without any authority that she had purported to adopt the second defendant, who besides was the only son of his father, and, therefore, could not according to the sastras be adopted. On both these grounds it was claimed that the adoption should be set aside. The defence was that the authority to adopt had been given by the deceased raja to the senior widow both orally on the 20th December 1875, and again by his will executed on the following day, 21st, in the presence of witnesses. It was also asserted that although the boy adopted was now the only surviving son of his natural father, he was his second-born son; and that the adoption was valid.

The Board of Revenue in its capacity as Court of Wards was directed by the Madras Government on 19th October 1877 to apply to intervene for the protection of the widows; but on the application of the plaintiff, the High Court having received a report from the District Judge (s. 7, cl. 3, Regulation V of 1804) that she was competent to manage her affairs without a guardian, submitted a certificate to that effect to the Government. After the filing of the plaint the suit was before the Subordinate Judge for settlement of issues, when the Collector having obtained sanction to defend on behalf of the minor, filed his written statement to the effect that on the 20th December 1875 the late zamindar of Madgole orally authorized his senior wife, the first defendant, to adopt a son to him, and on the following day executed a will providing for the adoption of a boy. In accordance with the above, she duly adopted on the 8th November 1876 the second defendant, who, though now the only surviving son of his natural father, was his second-born son; and that the adoption of even an only son when complete was valid according to Hindu Law.

Sri Krishna Chandra Devu, the natural father of the second defendant, then was, on his own application, added as a defendant. He filed a written statement to the same effect. The issues raised the questions of the giving of the authority by the late zamindar either orally or by will, and also as to the validity of the adoption authorized.

The alleged will was as follows:—

"Will executed on the 21st day of December 1875 by (us) Sri

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Sri Sri Krishna Bhupati Devu Maharajulungaru, zamindar of Madgole, in favor of our senior wife Sri Sita Patta Mahadevigaru.

"1. Thinking that our end is approaching—as you have become sonless owing to our having no male issue—you will at least after our death make one or two adoptions for the continuance of the family and continue the line.

"2. Till the person you may adopt comes of age, you will yourself, in co-operation with the *varisu* (heir) Vaddadi Gopala Bhupatigaru, manage carefully the affairs of the whole of our Madgole zamindari, and after that will deliver over possession of the same to the person whom you may adopt.

"3. From the said zamindari estate itself the debts which we justly owe to the zamindar of Jeypore and others shall be paid.

"4. You may, as you choose, continue the mokhasas, inams, lands, and other grants made by us from the zamindari to the respective parties in enjoyment of such grants.

"5. After the discharge of debts you will give to Ammi Devi, daughter by our junior wife Sri Nilamani Devigaru, a village yielding a cist of Rs. 1,200 per annum on account of her 'pasupu kunkumu.'

"6. You will cause to be paid to our junior wife, the said Sri Nilamani Mahadevi, Rs. 2,400 per annum for her maintenance.

"7. You will yourself cause to be paid to our mistresses, Sitamma and Nilamani, Rs. 600 each per annum as long as they live.

"8. Having resolved that you should act as stated above, authority is by this will itself granted to you to take possession of the said zamindari with all our properties, movable and immovable. You shall therefore act according to this will.

"Tuesday, the 9th of Margasira Bahula, Yuva year."

This was said to have been executed by the deceased in the presence of many witnesses by stamping it with the "matsya santakam" or family device of a fish for his signature a few days before his death.

The Subordinate Judge, A. L. V. Ramana, found it not proved that the authority was given orally or by will; no such will, as had been alleged, having been executed. He was of opinion that the adoption of an only son, whether the first-born or an after-born son, was invalid among the regenerate classes, to one of which the parties, being kshatryas, belonged.

On appeal, this judgment was reversed by the High Court (Sir C. Turner, C.J., and Muttusami Ayyar, J.). Their judgment concluded as follows:—

"On the whole we consider the appellant sufficiently established that authority to adopt had been given, and that the will had been executed by the zamindar, and that the respondent failed to prove that at the time the authority was given and the will executed the zamindar was not competent to give the one or execute the other. We shall, therefore, hold that on these issues the respondent's case failed.

"There is the further point, viz., the question whether the adoption is valid in respect of the competency of the person adopted? At the hearing we were inclined to refer to a Full Bench for consideration the question, whether it has been rightly held that an eldest or only son can legally be adopted? The point has been decided in this Presidency in favor of the validity of the adoption, and in a case under the Mitakshara Law, a decision of the High Court of Bengal to the same effect has been approved by the Privy Council. We, therefore, fear that it would be useless to ask the Court to reconsider a question of law on which the highest tribunal has pronounced an opinion, seeing that the reasons on which we still entertain doubt as to the validity of such an adoption have been stated with great ability by Mr. Justice Mitter of the Calcutta High Court. The essence of adoption being gift, the competency of the giver is essential to the effectual creation of sonship, and the Hindu Law, as we understand it, declared the Hindu house-holder incompetent to give his only son. Moreover, in the various treatises which illustrate the later law obtaining in this Presidency, we find that the commentators, when discussing restrictions which some writers imposed on adoptions, and declaring that they could not apply in cases of necessity, are generally careful to add that the adoption is valid if the boy be a younger son. We should be glad if opportunity arose for the re-consideration of this question by the Privy Council; but until the present precedents are overruled, we feel ourselves constrained to follow them. We do not, therefore, direct an inquiry as to whether the appellant was the eldest or the only son of his father."

After obtaining leave to appeal from this judgment the plaintiff died, leaving an only daughter, the present appellant.

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Krishna Chandra Devu, the natural father of the adopted minor, having also died, the Court of Wards represented the minor on this appeal.

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *C. C. Macrae* for the respondent.

Only the question of fact, as to the authority having been given to the widow, was now argued; the argument of the question of law being postponed till it should be ascertained whether it was raised: the result being that it was not raised.(1)

On a subsequent day (21st April) their Lordships' judgment was delivered by

Lord MACNAGHTEN.—The zamindar of Madgole died on the 25th of December 1875. He left two widows but no male issue. On the 8th of November 1876 the senior widow adopted a son to her deceased husband.

In 1881 the junior widow brought the present suit to have the adoption set aside, on the ground that the senior widow had no authority from her husband to make an adoption; and also on the ground that the adoption was invalid by Hindu law, because the infant who was adopted was the only son of his natural father.

The question of Hindu law was not argued before their Lordships. In the view which they took of the evidence, it became unnecessary to have it discussed. But as this question seems to have been determined by the High Court in deference to a decision, or supposed decision of this Board, it may be as well to state that the learned Counsel on both sides informed their Lordships that they had been unable to find the decision by which the High Court conceived themselves bound.

The case presented on behalf of the senior widow and the adopted child was this:—On Monday the 20th December 1875 the zamindar verbally authorized the senior rani to make an adoption; on the following day he executed a will expressly conferring upon her authority to adopt, and at the same time he dictated a letter and sent it to the Collector at Vizagapatam

(1) In *Nilmadub Doss* v. *Bishumber Doss*, 13 M.I.A., 1885, the fact of adoption severing the relation of the boy with his natural father was negatived by the decision; and that the father would not be likely to give in adoption an eldest or only son otherwise than as "dwayamashyayana" was referred to among the reasons.