1881

OBHOY CHURN NUNDI v. KRITARTHA-NOYI DOSSEE.

the disposal of that special appeal,—it is evident to us that Mr. Grant decided this question, which is a question of fact, in favor of the plaintiff. We, therefore, think that the appellants cannot set up this objection.

We accordingly allow the appeal so far as regards the defendants who were made defendants after the 24th November 1864, and dismiss the suit as against them; and disallow the appeal, and affirm the judgment of the lower Court, as against Obhoy Churn Nundi and Issur Chunder Pal, who were made defendants on the 23rd November 1864. There will be no costs in this appeal, as the appellants partly fail and partly succeed.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

1881
May 11.

UMA SUNDURI DABEE (DEFENDANT) *v.* SOUROBINEE DABEE (PLAINTIFF).*

Hindu Will—Adoption—Failure by Widow to adopt—Inheritance, Widow's Right to.

A husband's express authorization, or even direction, to adopt, does not constitute a legal duty on the part of the widow to do so, and for all legal purposes it is absolutely non-existent till it is acted upon.

A widow's refusal to comply with such a direction, is no ground of forfeiture as regards her rights of inheritance.

When a Hindu, by his will, gave his widow authority to adopt, if necessary, from one to three *dattaka* sons, and she, having neglected to do so, brought a suit, to recover possession of her husband's property and for an account of the administration, against the administrator of the estate, after having ineffectually attempted to get the letters of administration recalled and fresh letters granted her as heiress of her husband,—

Held, that she was entitled to the decree she prayed for.

IN this case the plaintiff, Srimoti Sourobinee Dabee, was the widow, and the principal defendant, Srimoti Uma Sunduri Dabee, was the mother, of one Paramata Lall Gossami, who died on the 23rd Cheyet 1281 B.S., corresponding with the 5th April 1874, leaving no issue.

* Appeal from Original Decree, No. 206 of 1879, preferred against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 17th April 1879.

1881

UMA SUNDURI DABEE v. SOUROBINDE DABEE.

On the day that he died, Paramata Lall executed an instrument therein termed a will; and on the 28th June 1875, the defendant obtained letters of administration with a copy of the will annexed. Subsequently, the plaintiff made an unsuccessful attempt to have these letters of administration recalled and fresh letters granted to her, and the District Judge's order on this application was confirmed by the High Court on the 19th June 1877. Accordingly, the plaintiff instituted the present suit on the 27th June 1877, alleging her right as heiress of her husband under the Hindu law, and asking that the defendant, as administratrix, might be compelled to make over to her the estate of her deceased husband, and also to render an account of the administration, and pay what sums might be found due upon the taking of such account.

It appeared that, at the time of the death of Paramata Lall Gossami, the plaintiff was *enceinte;* but that, subsequently, a daughter was born. The will, which was in the Bengalee language, after alluding to that fact, and declaring that, if a son were born, the plaintiff was to be the guardian, continued:—

"God willing, may not this take place, if my wife gives birth to a daughter and not to a son, or if a son be born and dies at any time, I, for the perpetuation of the aforesaid libations of water and oblations of food, authorise my wife to adopt a *dattaka* son; if necessary, she shall be able to adopt from one to three *dattaka* sons, and for that purpose she shall consult with my mother, kinsmen, and the managing head of the family, and submit his name to the Maharajah of Burdwan. He who shall be selected by the Maharajah of Burdwan, my supporter, shall be adopted by her as *dattaka*. The *dattaka* adopted according to law shall be my son; so that, during his minority, affairs shall also be managed in the manner aforesaid,—*i.e.*, the directions which have been laid down with respect to the guardianship of the son born of my loins, shall also stand good in the case of a *dattaka* son, and not otherwise; but then if my mother dies, or if for any reason whatever she be unwilling before my son attains his majority, then my wife, when competent, shall be guardian, and shall manage all affairs according to family usage; she should always remain under the control of my mother and

1881

UMA SUNDURI DABEE v. SOUROBINEE DABEE.

the Maharajah of Burdwan. If she, of her own free will, sets herself to any action, she shall never be appointed guardian. Therefore, if my mother dies, and my wife does not remain under the control of the Maharajah of Burdwan, the Maharajah shall, for the protection of the property, appoint a manager."

It was contended in the lower Court that this instrument was actually an authority to adopt, and nothing more; that it was in reality not a will, inasmuch as the person who executed it did not by its contents devise his property to any particular person; that the plaintiff was bound to act upon the authority given her to adopt, and that she could not take advantage of her own laches in omitting to do so, and thus get possession of her husband's property; and lastly, that, upon the true construction of the document, its effect was to exclude the plaintiff from the management of the estate and from her rights as heiress.

The District Judge, however, held, that the document was in fact a will, and that all it did was to give the plaintiff permission to adopt; that being so, following the decisions in *Deenomoyee Dossee* v. *Doorga Pershad Mitter* (1) and *Pearee Dayee* v. *Hurbunsee Kooer* (2), the plaintiff could not be compelled to adopt, and the fact of her possessing an authority to adopt a son did not supersede or destroy her personal rights as widow, which remained in force until an adoption was actually made; consequently there was no bar to the plaintiff's bringing a suit for the recovery of her late husband's property: *Bamun Doss Mookerjea* v. *Mussamut Tarinee* (3) and *Prasannamayi Dasi* v. *Kadambini Dasi* (4).

Further, there being no express words of disinherison used in the will, the plaintiff could not be disinherited or deprived of a Hindu widow's estate in the property by implication: *Davis* v. *Lowndes* (5), *Denn* v. *Gaskin* (6), *Shuldham* v. *Smith* (7), *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (8).

(1) 3 W. R., Misc. Rul., 6.
(2) 19 W. R., 127.
(3) 7 Moore's I. A., 169.
(4) 3 B. L. R., O. J., 85.
(5) 2 Scott., 71; see p. 82.
(6) 2 Cowp., 657.
(7) 6 Dow. H. L., 22.
(8) 4 B. L. R., O. J., 103; see p. 187.

He accordingly gave the plaintiff a decree for her husband's property and for an account of the administration.

From that decree the defendant appealed to the High Court.

Baboo *Nil Madhub Sen* and Baboo *Mohiny Mohun Roy* for the appellant.

Mr. *W. C. Bonnerjee* and Baboo *Rashbehary Ghose* for the respondent.

The judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

CUNNINGHAM, J.—In this case the widow and heiress of the late Paramata Lall Gossami sues his mother, who is also administratrix with the will annexed, praying that the administratrix be directed to make over to her the estate of her deceased husband, to render an account of the administration, and, to pay what sums may, on taking such accounts, be found due to the deceased's estate. On the part of the defendant it is contended, that, by the testator's will, the defendant was placed in charge of his property; that the intention of the will was to oblige the plaintiff to adopt, and to exclude her from management of the estate and from her rights as heiress; and that she is, accordingly, not entitled to the possession of the property.

The will in dispute directs, that the widow being *enceinte*, if a son be born, the mother should be guardian.

(His Lordship then set out the will as above, and continued):—

Letters of administration with a copy of the will annexed were obtained by the mother, the present defendant, on the 28th June 1875; and the present plaintiff subsequently endeavoured to procure the revocation of these letters. This attempt has been unsuccessful, no legal ground for revocation being, in the opinion of the Court before which the matter came, made out.

Having failed in setting aside the administration, the widow now sues to enforce her right as heiress to her husband's estate.

The Court below has held, *first*, that the effect of the husband's will was not to constitute a legal obligation on the widow to adopt; *secondly*, that the will does not exclude her rights of inheritance; and *thirdly*, that she is consequently entitled to a

1881

UMA SUNDURI DABEE v. SOUROBINEE DABEE.

decree for her husband's property and for an account of the administration.

We concur in these findings. The law is clearly established that a husband's express authorization, or even direction, to his widow to adopt, does not constitute a legal duty on the part of the widow. It is, as has been observed (1), for all legal purposes absolutely non-existent till it is acted upon. The widow cannot be compelled to act upon it, unless and until she chooses to do so.

In the judgment of the Sadr Court in *Bamun Dass Mookerjea* v. *Mussamut Tarinee* (2), in which their Lordships of the Privy Council expressed their entire concurrence, the Court observed,—that "there appears to be no power under Hindu law to compel a widow to adopt, though a case (in Macnaughten's Principles of Hindu Law, Vol. II, p. 247) has been referred to, where there is mention of an incompetency in a widow to succeed if she neglect to make an adoption" (3). It is true that "the question of any possible check on a widow who wilfully protracts or evades an adoption specially enjoined upon her by her husband," was not, on that occasion, before the Sadr Court or the Privy Council; and all that was necessary to decide was, that "the power of a widow, duly authorized to adopt, to claim her personal rights until she does adopt, is not affected by any consideration of what might be the proper course if she could be proved to have violated any clear and positive legal obligation." We think, however, that the observations of the Sadr Court must be accepted as favoring the proposition that such a legal obligation cannot be created; and the remarks of Peacock, C. J., in *Prasannamayi Dasi* v. *Kadambini Dasi* (4) are an authority for the view, that the widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.

We cannot, therefore, regard the language of the testator as having created a trust which the widow is legally bound to carry out. She is at liberty to comply with her husband's directions or not as she pleases; and her omission or refusal to do

(1) Mayne, 98.
(2) 7 Moore's I. A., 169; Cf. 206.
(3) Cf., 190.
(4) 3 B. L. R., O. J., 90.

1881

UMA SUNDURI DABEE v. SOUROBINEE DABEE.

so is no bar to her rights of inheritance. Accordingly, the contingency for which the will provides not having occurred, and there being no gift over, the testator must be regarded as intestate, and his widow as heiress-at-law entitled to succeed.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

WOMES CHUNDER CHATTERJEE AND ANOTHER (DEFENDANTS) v. CHUNDEE CHURN ROY CHOWDHRY AND ANOTHER (PLAINTIFFS).*

1881 *April* 29.

Second Appeal—Improper Reception of Evidence by Lower Court—Remand.

On second appeal, the High Court has, generally speaking, no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below.

The only cases which can be with propriety disposed of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds.

Watson v. *Gopee Soonduree Dossee* (1) dissented from.

THIS was a suit brought to recover possession of certain lands which the plaintiff, one Chundee Churn Roy Chowdhry, contended belonged to his zemindari, he having held possession of the same through his tenants. The defendant No. 1, previously to this suit, claimed the land in question as forming part of his nimhowla, and had brought a case under s. 530 of the Criminal Procedure Code; and the Criminal Court had held that he was entitled to remain in possession until such time as a Civil Court should decide the question of title. The plaintiff, therefore, brought this suit to have the question decided.

* Appeal from Appellate Decree, No. 2479 of 1879, against the decree of Baboo Kedaressur Roy, Subordinate Judge of Jessore, dated the 9th June 1879, affirming the decree of Baboo Manmotho Nath Chatterjee, Munsif of Bagirhat, dated the 2nd May 1878.

(1) 24 W. R., 392.