APPELLATE CIVIL.

Before Mr. Justice Pandrang Row and
Mr. Justice Venkataramana Rao.

PARIMI SUNDARASIVUDU AND SEVEN OTHERS (PLAINTIFFS), APPELLANTS,

1939, July 17.

v.

BALAJIPALLI ADINARAYANA SASTRY (NINTH DEFENDANT), RESPONDENT.*

Hindu law—Adoption—Authority to widow to adopt—Construction of—"Suitable boy from our family or boy belonging to same gotra *as myself" (husband)—Adoption by widow of her own brother—Valid if.*

Purporting to act in pursuance of an authority to adopt given to her by her deceased husband which ran thus: "My wife shall adopt a suitable boy from our family or a boy belonging to the same *gotra* as myself", a Hindu widow adopted her own brother who did not belong to the family of, and was not of the same *gotra* as, the deceased.

Held that as the condition imposed by the deceased was not complied with, the adoption was invalid.

The qualification laid down by the deceased was part of the power given to his wife. It was a condition annexed to the power. The terms of the power did not warrant an inference of a general intention to adopt.

APPEAL against the decree of the District Court of East Godavari at Rajahmundry in Original Suit No. 13 of 1933.

P. Somasundaram for appellants.

G. Chandrasekara Sastri for respondent.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the

VENKATARAMANA RAO J.

* Appeal No. 118 of 1936.

SUNDARA-SIVUDU v. ADINABAYANA. — VENKATA-RAMANA RAO J.

Judgment of the learned District Judge of Rajahmundry dismissing the plaintiffs' suit for possession of a house which is item 2 of schedule A to the plaint. The plaintiffs claimed title to the property through one Surayya who was alleged to be the adopted son of one Subbarayadu. The adoption was said to have been made by the widow of Subbarayadu in pursuance of an authority given to her by her husband by his last will and testament dated 7th July 1882. Both the factum and the validity of the adoption were denied in the lower Court, but during the trial the factum was not seriously disputed but only the validity of the adoption was put in issue. The learned Judge came to the conclusion that the adoption was invalid on the ground that it did not conform to the authority given by the husband. The substantial question for decision in this appeal is whether the view taken by the learned Judge is sound and this turns on the construction of the said authority. It is contained in one sentence which runs thus :

"My wife shall adopt a suitable boy from our family or a boy belonging to the same *gotra* as myself."

The said Surayya was no other than the brother of the widow of Subbarayadu and it is conceded that he did not belong to the family of Subbarayadu nor had he the same *gotra* as Subbarayadu. As observed by the Privy Council in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*(1), it is well established law that the power to adopt given to a wife must be strictly pursued. There is no doubt that the power in this case has not been strictly pursued, but it is contended by Mr. Somasundaram that, from the fact of Subbarayadu having given a power to adopt, it must be inferred that

(1) (1930) I.L.R. 10 Pat. 187 (P.C.).

there was a general intention on the part of Subbarayadu to be represented by an adopted son, that the direction given to his wife to adopt a boy from the family or a boy belonging to the same *gotra* as the testator was only indicative of a preference, and that if it was not possible for the widow to comply with the said direction, it would be open to her to adopt any other suitable boy of her own choice. It seems to us that this contention is untenable. It may be open to a Court to infer a general intention to adopt and construe that general intention rather liberally where there are no special instructions given by the husband or, possibly in cases where such instructions were carried out and an adoption made in accordance therewith but the adopted boy died and another adoption was made. In *Suryanarayana* v. *Venkataramana*(1) the Judicial Committee observe thus :

> "Their Lordships agree with the learned Judges of the High Court in the opinion that the main factor for consideration in these cases is the intention of the husband. Any special instructions which he may give for the guidance of his widow must be strictly followed; where no such instructions have been given, but a general intention has been expressed to be represented by a son, their Lordships are of opinion that effect should, if possible, be given to that intention. This more liberal rule has been followed by the High Court of Bombay, as well as in Madras, and is not without support in Bengal."

It is clear from this judgment that where there are special instructions given by the husband, they must be the paramount consideration in testing the validity of the adoption. In this case the terms of the power do not warrant an inference of a general intention to adopt nor were the instructions carried out.

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(1) (1906) I.L.R. 29 Mad. 382, 388 (P.C.).

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A number of cases were relied on by Mr. Somasundaram, but it will be found that in most of them the widow carried out the instructions and did adopt a boy in accordance therewith but the adopted boy died and the question arose whether her power was exhausted by the first adoption or whether it was open to her to make a second adoption. The Courts took a liberal view that the testator must be taken to have expressed a general intention that he should be represented by an adopted son. The cases of *Suryanarayana* v. *Venkataramana*(1), *Chenga Reddi* v. *Vasudeva Reddi*(2), *Sindigi Lingappa* alias *Sidda Lingappa* v. *Sindigi Sidda Basappa*(3) and *Yadao* v. *Nemdeo*(4) are all of that category. Some of the Privy Council cases on which Mr. Somasundaram relied are all distinguishable on the facts of those cases. In *Mutasaddi Lal* v. *Kundan Lal*(5) the testator directed that one of the sons of one Hardeodas should be adopted. The boy that was adopted was not a boy living at the date on which the authority was given to adopt. It was contended that the testator meant that the boy who was then living was the boy intended to be adopted and not a boy born thereafter. Their Lordships were of the opinion that the special instructions which the testator gave were that one of the family of Hardeodas should be adopted and they were complied with. Therefore it was a case in which the instruction given by the testator was strictly pursued. The observation in *Bhagwat Koer* v. *Dhanukdhari Prashad Singh*(6) to the effect that the Courts must not be astute to defeat an adoption but should uphold it as far possible where it is

(1) (1903) I.L.R. 26 Mad. 681. (2) (1915) 29 M.L.J. 144.
(3) (1916) 32 M.L.J. 47. (4) (1921) I.L.R. 49 Cal. 1 (P.C.).
(5) (1905) I.L.R. 28 All. 377 (P.C.).
(6) (1919) I.L.R. 47 Cal. 466, 479 (P.C.).

not in excess of the power was relied on, but, where it is in excess of the power, Courts have no option but to declare an adoption invalid. In this case it is our opinion that the adoption was in excess of the power. On a construction of the will it is clear that the instruction of the testator was not to adopt any boy of the widow's choice but that the widow should adopt a boy possessing certain qualifications, namely, that he should belong to his family or failing which he ought to belong to the same *gotra* as himself. The power, as already observed by us, was contained in one sentence and the qualification laid down by the testator is part of the power given to his wife. It is a condition annexed to the power. As observed by the Privy Council in more than one decision, a condition annexed to such a power should be strictly complied with, or else the adoption would be invalid. The case of *Rajendra Prasad Bose* v. *Gopal Prasad Sen*(1) is a case in point. In that case the testator directed a particular boy to be adopted and, if that boy was not available, another boy should be adopted with the permission of his father. He also expressed his general intention that his estate should be inherited by the adopted son. The father of the testator died and twelve years after the father's death the widow made an adoption and the question was whether the adoption was valid. Their Lordships of the Privy Council held that the adoption not having been made with the permission of the father, the adoption was invalid because that was a condition annexed by the testator to the authority given to his widow. It will be seen from the terms of the will that there was an intention that his estate should be represented by an adopted son, but still their Lordships held that the condition annexed to the power not having been

(1) (1930) I.L.R., 10 Pat. 187 (P.C.).

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complied with, the adoption cannot be upheld. Therefore the adoption in this case cannot be held to be valid as the condition imposed by the testator was not complied with.

In this view we do not think it necessary to examine the other contention of Mr. Somasundaram that the widow made every possible attempt to make the adoption but failed to secure a boy of the qualifications required by the testator and therefore the adoption must be upheld. The contention is that we must so read the will as to hold that, if the conditions imposed by the testator were not possible of fulfilment, the widow was permitted to adopt a boy of her own choice by adding the words "if possible" to the power conferred. A contention of this nature was negatived by their Lordships of the Privy Council in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*(1) on the ground that a Court ought not to add words where the intention of the testator is clearly expressed. We are therefore unable to uphold the contention of Mr. Somasundaram.

In the result the appeal fails and is dismissed with costs. The memorandum of cross-objections is also dismissed with costs.

A.S.V.

(1) (1930) I.L.R. 10 Pat. 187 (P.C.).