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I would, therefore, reverse the decision of the learned Judge and dismiss the suit with costs in both Courts.

WILSON, J., then read the judment of the Chief Justice, which was as follows:—

GARTH, C.J.—I entirely agree in the conclusions at which my brother Wilson has arrived.

I think it very probable that the recent decision of the Privy Council in *Rai Bishen Chand's case* (1) may be the means of introducing a very material and salutary change of the law in cases of this kind; but whether that is so or not, I think there can be no doubt that the principle upon which that case was decided is directly applicable to the present.

Appeal allowed.

Attorney for appellants: Baboo *D. N. Dutt.*

Attorneys for respondent: Mr. *Carruthers* and Baboo *M. D. Sen.*

T. A. P.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

1886 *March* 19.

DOORGA SUNDARI DOSSEE (DEFENDANT) *v.* SURENDRA KESHAV RAI AND ANOTHER. (PLAINTIFFS.) *

Hindu law, Adoption—Adoption by two widows simultaneously—Invalidity of gift made to a person as being the adopted son of donor, where the adoption fails—Persona designata.

A testator gave by will to each of his two wives a power to adopt, and gave his property to his *sons so to be adopted*, but did not provide, nor did he know who the adopted sons were to be. The adoption which subsequently took place was found to have been a simultaneous adoption by the two widows: *held* that such an adoption was invalid, and that the persons purporting to be the adopted sons did not answer the description in the will of adopted sons, and that therefore there was not a sufficient designation of their persons as to enable them to take under the will.

Monemothonath Dey v. *Onathnath Dey* (2), distinguished, and *Fanindra Deb Raikat* v. *Rajeswar Das* (3), followed on the question of *persona designata.*

* Original Civil Appeal No. 33 of 1885, against the decree of Mr. Justice Norris, dated the 15th of August 1885.

(1) L. R. 11 I. A., 164; I. L. R., 6 All., 560.

(2) 2 Ind. Jur. N. S., 24.

(3) I. L. R., 11 Calc., 463; L. R., 12 I. A., 72.

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ON the 20th April 1879 one Bejai Keshav Rai died childless, leaving him surviving two widows, Nobo Durga Dossee (the elder), and the defendant Durga Sundari Dossee (the younger); having on the 19th April 1879 made a will whereby he dedicated all his property, ancestral and acquired, moveable and immoveable, to the goddess Sree Sree Unnopoornah Thakoranee; giving power to his two wives to adopt two sons, one by each wife, in the following words: "I have two wives; they shall adopt two sons one by each Rani. God forbid if the adopted son of any of the Ranis die or be incompetent for business on account of idiotcy, &c., then it shall accordingly be competent for them to take a second son in adoption, and successively three sons in adoption one after another." He then made the two adopted sons the *shebaits* of all his dedicated properties under the advice of his amlahs, giving power to his two wives to manage the dedicated properties under the advice of his amlahs, until the said two adopted sons should attain majority, when the dedicated properties were to be made over to the adopted sons in their character as *shebaits*.

On the 20th May 1879 the Ranis performed the first *shrad* ceremony of Bejai Keshav Rai, and on the same day, in exercise of the power given to them to adopt, the elder Rani took in adoption Keshav Lall Dutt (the plaintiff) giving him the name of Kumar Ganendra Keshav Rai, and on the same day but shortly afterwards as was alleged in the plaint) the younger Rani took in adoption (defendant No. 2) the third son of Hari Dass Ghose giving him the name of Unnoda Persad Rai.

On the 5th July 1879 the two Ranis leased out the bulk of the testator's properties to Kaliprosono Ghose (the brother of the elder Rani), and Bhobodyanee Churn Mitter (the father of the younger Rani). And on the same day, the Ranis entered into an *ekranamah* with one another, which after reciting the death of the Raja, and the power given them to adopt, and the adoption "at one and the same time" of the two boys, before mentioned, and recognising their position as adopted sons, it was agreed that the two Ranis should jointly and in equal shares both hold possession of and take charge of all the dedicated properties as

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shebaits, and should manage the business appertaining thereto, until the adopted sons should attain majority.

On the 7th July 1879 the two Ranis applied to the District Judge of Hooghly for probate, which was refused, but was subsequently granted on the 31st March 1880 on appeal to the High Court.

On the 28th July the elder Rani died leaving the plaintiff her heir her surviving.

On the 4th August 1884, Surendra Keshav Rai, through his next friend, brought a suit against Doorga Sundari Dossee and Unnoda Persad Rai, who was then still a minor, alleging the above facts, and alleging that shortly before the death of the elder Rani quarrels had arisen between the Ranis, and that the estate through mismanagement on the part of the Ranis had fallen into the hands of Kaliprosono Ghose and Bhobodyanee Churn Mitter, who managed it solely with regard to their own interests; and that the leases granted to them were disadvantageous to the estate; that since the elder Rani's death Bhobodyanee Churn Mitter had obtained uncontrolled management of the estate and was endeavouring to obtain possession of the elder Rani's jewels, and praying (*a*) that the will of the testator might be construed, and the rights of all parties declared thereunder; (*b*) that it might be declared that both under the will and under the *ekranamah* the plaintiff as adopted son was interested in the estate; (*c*) that, if necessary, it might be declared that the dedication to the Thakoranee was not *bonâ fide*, and was invalid; (*d*) that the plaintiff's interest in the estate might be ascertained and declared; (*e*) for an account and a Receiver.

The defendants put in written statements admitting the Rajah's death, his will, and the performance of the *shrad* ceremony, but denying that the plaintiff was adopted before the defendant No. 2, and alleging the adoption to have been simultaneous, admitting the leases to Kaliprosono Ghose and Bhobodyanee Churn Mitter, but alleging that they were fair and proper leases; admitting the *ekranamah* and the applications for probate and its result; and denying all the allegations upon which the plaintiff based his claim to the interference of the Court in the

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administration of the estate, and denying his right to an account and to the appointment of a Receiver.

At the hearing it was contended that the plaintiff could not maintain the suit as he was not a validly adopted son, a simultaneous adoption being bad. For the plaintiff it was contended that the authority to adopt given by the will was distributive; that it did not contemplate an adoption unless both adopted; that the evidence to be given would prove that the plaintiff was adopted first; that the cases of *Monemothonath Dey* v. *Onathnath Dey* (1) was not in reality an authority for the proposition that a simultaneous adoption was bad; and that the case of *Gyanendra Chunder Lahiri* v. *Kallapahar Hajee* (2), was founded on a misapprehension of the judgment of Phear, J, in the former case; that even if the adoption was bad the plaintiff would take as a *persona designata*; that under the *ekranamah* the Ranis had constituted themselves trustees for the two adopted sons; and that defendant No. 1 was therefore estopped from denying the plaintiff's rights as an adopted son or as a *persona designata*.

It was agreed by consent that the evidence taken should be confined to the subject of adoption, (though on appeal some difference arose as to the scope of the evidence, the subject of this agreement) and that the decision of the Court should be limited to the question of the validity of the plaintiff's adoption and upon his rights under the will and *ekranamah*.

The learned Judge (Mr. Justice Norris), on the evidence given before him, decided that the authority to adopt given by the will was an authority to adopt simultaneously, and that it could not be construed as distributive, and that on the authority of *Gyanendro Chunder Lahiri* v. *Kallapahar Hajee* (2), such an adoption was invalid; and further was of opinion that a simple adoption by either of the Ranis would not have been good under the power contained in the will. As regards the position of the plaintiff under the will, he held that the plaintiff took a moiety of the testator's property as *persona designata*, *Monemothonath Dey* v. *Onathnath Dey* (1); and as regards the

(1) 2 Ind. Jur. N. S., 24. (2) I. L. R., 9 Calc., 50.

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question of estoppel, he considered it to be unnecessary to express an opinion.

From this decision Doorga Sundari Dossee appealed.

Mr. *Woodroffe*, Mr. *Pugh*, and Mr. *J. G. Apcar*, for the appellant.

Mr. *Woodroffe*.—A simultaneous adoption is bad—see *Monemothonath Dey* v. *Onathnath Dey* (1); *Siddessory Dossee* v. *Doorga Churn Dutt* (2); *Dassmony Dossee* v. *Prosonomoyee Dassee* (3); *Gyanendro Chundra Lahiri* v. *Kallapahar Hajee* (4), this point has been decided in my favor in the Court below. In order that these persons can take as *personæ designatæ* it must be shown that there was an intention to give property to a person named or indicated in the will; and in the case of a person who is described as an "adopted son" this is a condition precedent to taking the property however clearly he may be designated. But here two things are wanting: (1) No one is indicated by name. (2) These are persons who could not satisfy the condition of being adopted sons. *Monemothonath Dey* v. *Onathnath Dey* (1) is not an authority on this question. [WILSON, J.—Was anything decided in that case, except that the plaintiff was not entitled to Surathnath's share?] As to estoppel, there is none; the Ranis assume that they are adopted sons. There is no estoppel in such a case as this. See *Gopee Loll* v. *Sree Chundraolee Buhojee* (5); *Oodey Koowur* v. *Mussamut Ladoo* (6).

Mr. *Pugh* on the same side.—With regard to the bearing of the *Tagore case* (7) on a case of this sort, no gift can be given to a person who is not in being, unless (1) he is a child in *ventre sa mere*, or (2) unless afterwards adopted by the mother in accordance with a power; it would be dangerous to admit any further exception. There being no provision in the will limiting the persons to be adopted thereunder to persons in existence at the date of the death of the testator, the plaintiff and infant defendant, if not validly adopted, could not become entitled as *personæ designatæ*. There is no designation of any particular individual as the testator could not tell who was to be adopted;

(1) 2 Ind. Jur., 24.
(2) 2 Ind. Jur., N. S., 22.
(3) 2 Ind. Jur. N. S., 18.
(4) I. L. R., 9 Calc., 50.
(5) 11 B. L. R., 391.
(6) 13 Moore's I. A., 585 (599).
(7) 9 B. L. R., 377; L. R., I. A., Sup. Vol., 47.

see on this subject the judgment of Fry, J., in *Boddington* v. *Clariat* (1) and on appeal (2).

Mr. *Kennedy* for Unnoda Persad Rai.—The ground of estoppel is stronger in my case than in the plaintiff's. I am a person who by act of the appellant have had my position formed. If I am not adopted, I have lost my position in my own family and I am only entitled to maintenance—*Ayyavu Muppanar* v. *Niladatchi Ammal* (3) and *Monemothonath Dey* v. *Onathnath Dey* (4).

[WILSON, J.—That case only decides that the question of adoption was *res-judicata*, and shows what is the right of an adopted son as between himself and sons born after adoption.] The reported cases do not preclude the Court from deciding that a simultaneous adoption is valid; *viz.*, *Monemothonath Dey* v. *Onathnath Dey* (4); *Siddessory Dassee* v. *Doorga Churn Sett* (5); *Dossmoney Dossee* v. *Prosonomoyee Dossee* (6); *Gyanendro Chunder Lahiri* v. *Kallapahar Hajee* (7). The case of *Gopee Loll* v. *Sree Chundraolee Buhojee* (8) is one of a successive adoption. The case of *Monemothonath Dey* v. *Onathnath Dey* (4) holds that a simultaneous adoption is invalid, but it is no authority with respect to the validity of the adoption in this case; no decision was come to as to this point in the Court of Appeal in that case. The *case of Siddessory Dossee* did not decide the question; the judgment turned on another point. If the adoption is good I take as adopted son, or I take as *persona designata*.

Mr. *Evans*, Mr. *Bonnerjee* and Mr. *O'Kinealy* for Surendra Keshav Rai.

Mr. *Evans*.—A testator can give charge of an idol in perpetuity; the objection in the *Tagore case* (9) rests on other grounds. It is open to a testator to appoint any person *shebait* to an idol, although the idol may have been dedicated by his father, and I submit he can make such an appointment in perpetuity; the rule in the *Tagore case* would not interfere with this, as that was a rule of property. A *shebait* has the right of the custody

(1) L. R. 22 Ch. D., 597.
(2) L. R. 25 Ch D., 685.
(3) 1 Mad. H. C., 45.
(4) 2 Ind. Jur. N. S., 24.
(5) 2 Ind. Jur. N. S., 22.
(6) 2 Ind. Jur. N. S., 18.
(7) I. L. R., 9 Calc., 50.
(8) 11 B. L. R., 391.
(9) 9 B. L. R., 377; L. R. I. A., Sup. Vol., 47.

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of property as decided in *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1). I also submit that the widows would have been entitled to treat the will in the first instance as invalid, supposing the power to adopt simultaneously is bad. It has been decided that such an adoption is bad; if that is so, then inasmuch as the two widows are the heirs, if they chose to adopt out of their family, it is impossible for them later on to attack the adoption. There has been no evidence taken on the question of estoppel; the *ekranamah* was put in, but it was agreed by both sides that the evidence should be confined to the adoption. I submit the Ranis are estopped from denying the adoption, and that they have constituted themselves trustees for the children under the *ekranamah*, and this they cannot gainsay. In cases in which persons have constituted themselves trustees, they have been clothed with the powers of trustees accordingly as they have acted. Acts and conduct will be enough to fix them with a fiduciary position, but in this case we have something stronger; the Ranis took up the position and duties of executrices after signing the *ekranamah*. The *ekranamah* divides the estate into halves. Before coming into Court the adoption was not denied, and the covenant in the *ekranamah* is a good equitable estoppel; it says in effect, "I will not deny your title in return for a reciprocal covenant from the other widow."

The judgment of the Court (GARTH, C.J., and WILSON, J.) was as follows:—

In this case it appears that Rajah Bejai Koshav Rai died on the 20th April 1879, childless, but leaving two widows, Nobo Durga and the defendant Durgamoni. By his will he gave each of his widows power to adopt a son. He further purported to give all his property to the goddess Unnopoornah, and declared that the two adopted sons should be the *shebaits*, adding various other provisions. The two Ranis accordingly on the 20th May 1879 adopted each a son, Nobo Durga taking the plaintiff, and Durgamoni the infant defendant. Nobo Durga died on the 29th July 1884. Quarrels ensued; and on the 4th

(1) L. R., 6 I. A., 182.

August 1884 the plaintiff filed his plaint in this suit, in which he claims half of the property of the deceased Rajah under the will.

It was held by the learned Judge who tried the case that the simultaneous adoptions could not be valid, and that therefore the plaintiff could take no title as the adopted son of the testator. And there can be no doubt that he was right in so holding.

But the learned Judge held that the gift took effect in favor of the plaintiff, as a gift to a *persona designata*. In this we cannot agree. There is no indication of an intention to give to the plaintiff or to any other particular person, but only to the persons, whoever they might be, who should be adopted by the Ranis.

The learned Judge in the Court below based his decision upon the authority of a case of *Monemothonath Dey* v. *Onathnath Dey* (1), but that case appears to us to be very distinguishable from the present. In that case one Promothonath Dey, having no male issue, adopted two sons, Monmothonath and Surathnath, at one and the same time, and he gave one of his sons so adopted to each of his two wives.

He afterwards made a will in favor of these two sons, whom he described in his will *as his adopted sons*, and he provided that if either of them should die the adoptive mother of that son should be at liberty to adopt another son.

A suit being brought after the testator's death to determine the rights of the parties under this will, it was held that the simultaneous adoption of the two sons was invalid; and then the question arose, whether there was such a *designatio* of the two persons known and described as the testator's adopted sons in the will, as to enable them to take under the will, though the adoption was in fact invalid; and it was held that there was.

They had been always considered and known as the testator's adopted sons, and therefore their description in the will was a sufficient *designatio personarum* to make it clear that they were the persons whom the testator intended to benefit.

Then one of these sons, Surathnath, having died, his adoptive mother, by virtue of the power contained in the will, adopted another son, Onathnath; and that adoption being valid, it was

(1) 2 Ind. Jur. N. S., 24.

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held that his description also in the will as the adopted son of the testator was sufficient to make the devise in his case valid.

There were therefore in this case three instances in which the rule of *designatio personæ* properly applied; in the case of the first two devisees, because they were both described, and generally known as the adopted sons of the testator, although their adoption was in fact invalid; and in the case of the last, Onathnath, because he was *actually* adopted in the way provided by the will.

But in the present case the facts were quite different. The testator had no doubt provided in his will that each of his wives should adopt a son; and he gave his property to the sons *so to be adopted*; but he did not provide, nor did he know, who the adopted sons were to be; and, therefore, as the adoption which took place was invalid, the persons purporting to be adopted did not answer the description in the will of adopted sons, or in other words, there was not a sufficient *designatio* of their persons to enable them to take under the will.

The decision, therefore, in the *Indian Jurist* appears to us to be no authority in the present case.

Another contention was raised before us. It was said that the whole property was by the will made debutter, and that nothing was given to the sons but a bare trust, the *shebaitship*. We assume this to be so for the sake of argument. It was then said that the rules laid down in the *Tagore case* do not apply to the devolution of the bare trusteeship in the case of a religious endowment. And in this we are disposed to agree. It was said next that the two persons adopted became the sons of their adoptive mothers, though not of the testator; and that as such they came within the terms of the gifts of the *shebaitship*. But there is nothing in the will showing an intention to give any thing to the persons to be adopted, except in the capacity of sons of the testator. The case falls within the authority of *Fanindra Deb Raikat* v. *Rajeswar Das* (1).

But at the trial a further question was raised whether the defendant Durga Sundari had so acted, as to be estopped from denying the plaintiff's title, or to have made herself a trustee for

(1) I. L. R., 11 Calc., 463.

nun to the extent of the interest which he claims. Allegations were made in the plaint as originally framed, tending to support such a case; and the plaint was amended at the hearing so as to raise it specifically. The issue, however, has not been decided, nor we think has it been tried. And there is not sufficient evidence on the record to enable us to decide it. The course taken on behalf of the plaintiff at the hearing was neither very clear nor very consistent. But we think it sufficiently appears that the absence of the necessary evidence is probably the consequence of an understanding, or misunderstanding, between the parties. Under these circumstances, as there is clearly no sufficient evidence upon the record to enable us to try the above issue, we think our proper course is to send the case back to the first Court under s. 566 of the Civil Procedure Code, directing it to determine such issue; to take any additional evidence that may be adduced by either party for that purpose; and to return its finding upon such issue to this Court, together with the evidence taken.

The former hearing was occupied in trying an issue of fact upon which the plaintiff failed. We think he should pay the costs of that hearing. We also think he should pay costs of this appeal. He might have insisted on going into the whole of the evidence at once, and we can see no sufficient reason why he did not do so. All other costs should be dealt with by this Court when the case comes back.

Case remanded.

Attorney for the appellant: Baboo *M. D. Sen.*

Attorneys for the respondents: Mr. *H. H. Remfry* and Messrs. *Beeby & Rutter.*

T. A. P.