1886

BALWANT SINGH v. DAULAT SINGH.

not dismissed under ss. 556 or 557 of the Civil Procedure Code. This petition therefore is not entertainable under s. 558 of that Code, and it is inapplicable to an order made, as ours was made, under s. 549 of the Code." It is extremely difficult to apply the terms of this order to the petition of the 27th November, and is a matter now of uncertainty and dispute what petition the order speaks of and what order it speaks of. The effect of it is apparently to maintain in full force the order of the 14th August, by which the appeal was struck off the file.

It appears to their Lordships that the case has never been fully considered by the High Court.

The question is first, whether the appellant should give security; and their Lordships assume that on the 13th September he was ordered to give security after hearing him; and next, whether, on giving security, the appeal should be restored to the file. That seems never to have been considered by the High Court, because they held that the petition of the 27th November, which was to restore after tendering security, was not entertainable and could not be listened to. Their Lordships will humbly advise Her Majesty to make an order that the appellant may give security for the costs mentioned in the order of the 3rd June, 1882, of such nature as shall be satisfactory to the High Court and within such reasonable time as shall be fixed by that Court; and that upon his giving such security his appeal shall be restored to the files of that Court. There will be no costs of this appeal.

Solicitors for the appellant: Messrs. *Oehme* and *Summerhays*.

Solicitors for the respondent: Mr. *T. L. Wilson*.

APPELLATE CIVIL.

1886
March 22.

Before Sir Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

LAKHMI CHAND (PLAINTIFF) *v.* GATTO BAI (DEFENDANT)*

Adoption—Hindu Law—Jains—Second adoption by widow.

In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and

* First Appeal No. 134 of 1884, from a decree of Maulvi Muhammad Samiu-lah-Khan, Subordinate Judge of Aligarh dated the 27th June, 1884.

1886

LAKHMI CHAND v. GATTO BAI.

that as such adopted son he was entitled to all the property left by her deceased husband, it was found that subsequent to the husband's death, the defendant had adopted another person, who had died prior to the adoption of the plaintiff, and without leaving widow or child.

Held that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu law of adoption, and the *Kritima* form of adoption not being recognised by the Jain community, or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband.

Held therefore that the adoption of the plaintiff was valid and effective.

Held that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother, the first adopted son, so that if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *Sheo Singh Rai* v. *Dakko* (1) referred to.

THE parties to this suit were Jains (Saraogis). The plaintiff sued the defendant for a declaration that he was adopted in January, 1856, by the defendant to her deceased husband Kishen Lal, (who died in September, 1843,) and that as such adopted son he was entitled to possession of all the property left by Kishen Lal. The defence to the suit was, that subsequent to the death of her husband Kishen Lal, the defendant, in 1844, had adopted one Nemi Chand, in whom the whole estate had thereupon vested, and that she had consequently no power to make a second adoption; and that, in fact, she had not adopted the plaintiff.

It appeared that not long after the death of Kishen Lal the defendant had adopted Nemi Chand. Nemi Chand died in August, 1855, at the age of 13 years, without leaving either widow or child. The lower Court dismissed the suit, holding that the defendant had not adopted the plaintiff, and that she could not do so, the adoption of a second son not being valid, according to the precepts of the Jain religion.

The plaintiff appealed to the High Court, contending that the lower Court was in error in holding that his adoption by defendant was not established, and that the defendant had no power to make it.

(1) I. L. R., 1 All. 688; L. R., 5 Ind. Ap. 87.

1886

LAKHMI CHAND v. GATTO BAI.

Mr. *W. M. Colvin*, Mr. *C. H. Hill*, and Pandit *Ajudhia Nath*, for the appellant.

Mr. *G. E. A. Ross* and Mr. *T. Conlan*, for the respondent.

PETHERAM, C. J., and STRAIGHT, J. (After coming to the conclusion that the adoption of the plaintiff was established, observed as follows):—

But it is said for the respondent, even if this be so, that is something short of proof of an adoption to Kishen Lal. We do not feel pressed by this contention; if there was an adoption, in fact, we think it must be taken that it was an ordinary adoption to her deceased husband. It is true that the powers of a Jain widow in the matter of adoption are of an exceptional character, namely, that she can make an adoption without the permission of her husband or the consent of his heirs, and that she may adopt a daughter's son; and further, that no ceremonies or forms are necessary. But, except that in these respects it is not controlled by the Hindu law of adoption, we think that in all others its principles and rules are applicable, and that the *Kritima* form of adoption not being recognised in the Jain community, or among the Hindus of these Provinces, it must be assumed that she had the power to make a second adoption, and that such adoption was to her husband.

The only remaining question of law is, whether the defendant having once adopted Nemi Chand after the death of her husband, and the whole estate having vested in him, she had the power to make a second valid adoption to her husband, so as to divest herself a second time of the property, and to vest it in the second adopted son.

It is contended on behalf of the defendant that upon the death of Nemi Chand, the estate of Kishen Lal vested in her as his heir, and not as the heiress of her deceased husband, and that it could not afterwards be divested so as to vest in another person as a second adopted son of her husband. This, however, does not seem to us to be the case, as the effect of the second adoption being to make the second adopted son the son of her husband, he must be treated as if he had been born, or at all events conceived, in the lifetime of the husband, and his title relates back

1886

LAKHMI CHAND v. GATTO BAI.

to the date of the death of the elder brother, the first adopted son; so that if the elder brother has left no widow or child who would succeed him to the exclusion of his younger brother, a second adopted son succeeds as heir to the father.

This view seems to us to be the reasonable and necessary consequence of the fiction that the widow, by adoption, makes the adopted son the son of the deceased husband, and it appears to be in accordance with that taken by the Privy Council in the case of *Sheo Singh Rai* v. *Dukho* (1), and with the statement of the customs of the Jains as declared by Seth Raghunath Das and the other lay witnesses for the plaintiff. It is true there is a difference of opinion on the question of the custom among the expert witnesses, but in our opinion that of the lay witnesses is of infinitively more value on this point; and for these reasons we think that the defendant had power to make a valid adoption to her husband a second time, and that the adoption of the plaintiff was valid and effective.

1886
May 4.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

IDU (APPLICANT) v. AMIRAN (OPPOSITE PARTY.)*

Muhammadan law—Custody of children—Act IX of 1861, *s.* 5—*Appeal.*

The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years.

An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal.

Held that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed.

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* First Appeal No. 45 of 1886, from an order of W. H. Hudson, Esq., Judge of Jaunpur, dated the 20th February, 1886.

(1) I. L. R., 1 All. 688; L. R., 5 Ind. Ap. 87.