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Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

PARBATI (DEFENDANT) *v.* SUNDAR (PLAINTIFF).*

Hindu Law—Brahmans—Adoption of sister's son—Suit for partition of property by person in possession making a false claim thereto.

According to the Hindu Law, a Brahman cannot validly adopt his sister's son.

B, a childless Hindu and a Brahman, adopted *X*, his sister's son, and, subsequently apprehending that the adoption was invalid, executed a will by which he left his estate to *X*. After *B*'s death, *X* obtained possession and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by *P* and *S*, two widows of *B*, who set up a right of inheritance from *X*, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by *S* against *P* for partition of the estate.

Held that the adoption of *X*, by *B*, a Brahman, was invalid, and that *P* and *S* were not entitled to succeed him as his heirs.

Held also, that, inasmuch as the parties had set up a false claim to the estate, and had no estate in law which they could divide, the suit for partition was not maintainable merely by reason of the fact that they were in possession. *Armory* v. *Delamirie* (1) and *Asher* v. *Whitlock* (2) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Mr. *C. H. Hill* and Pandits *Bishambar Nath* and *Sundar Lal* for the respondent.

PETHERAM, C. J.—This is a suit instituted by one Musammat Sundar against Musammat Parbati, both of them being the widows

* First Appeal No. 37 of 1884, from a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Sahâranpur, dated the 27th February, 1884.

(1) Smith's L. C. 6th edn, 313. (2) L. R., 1 Q. B. 1.

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of one Baldeo Sahai, for partition of the property in suit said to be held jointly by them. As it is of great importance in the case to ascertain precisely the grounds upon which the claim is made, and the grounds upon which the defence is based, I will first proceed to explain them.

The plaintiff states in her petition of plaint as follows :—

"1. That the properties mentioned in the accompanying schedules form part of the estate of Lala Baldeo Sahai, deceased, who, being childless, declared Prem Sukh Das in his lifetime to be his adopted son and heir, solemnly executing a will in his favour in 1875. He died in December, 1878.

"2. That on the death of Lala Baldeo Sahai, the plaintiff and the defendant undertook to maintain Prem Sukh, minor, and to look after the affairs connected with the property.

"3. That Prem Sukh Das, who had not contracted a marriage, died during his minority, on the 3rd December, 1879.

"4. That the parties, who are the widows of Lala Baldeo Sahai, and mothers of Prem Sukh Das, obtained joint possession of all the moveable and immoveable properties, and lived together in commensality."

That is, in her petition of plaint she says in effect that, at the time of the death of Baldeo Sahai, he left an adopted son as his heir. Plaintiff and respondent took possession of the estate of Baldeo Sahai on behalf of Prem Sukh Das, the adopted son, who was a minor. The minor died a year after. Since then the plaintiff and defendant remained in joint possession of the estate. Now the defendant is dealing with the property in a way to which she (the plaintiff) objects, and she asks for a division of the estate between them.

The defendant pleads that "Prem Sukh Das was not an adopted son of Baldeo Sahai, nor could he be adopted ; the disputed property was acquired by him under a will executed by Baldeo Sahai. The plaintiff has no right in respect of the property in suit, and her claim in respect of it should be dismissed."

The parties went to trial upon the question of adoption, and in proving that Baldeo Sahai had adopted the minor Prem Sukh

as his son, it was proved that Prem Sukh was the son of Baldeo Sahai's sister. It is not necessary for us to consider the evidence as to the fact of adoption. The question is, had the adoption of his sister's son by Baldeo Sahai any legal validity? Baldeo Sahai himself had doubts about its validity. The will would not have been necessary had the adoption been a good one.

We have then to consider what was the position of the two ladies on the death of Baldeo Sahai. A form of adoption had been gone through and a will made. Prem Sukh was entitled to the same interest either under the will or by reason of the adoption. Whoever got possession of the estate, got it on behalf of Prem Sukh.

Both the ladies state that they maintained and brought up Prem Sukh, and they got their names registered as mothers of Prem Sukh.

During the lifetime of Prem Sukh, then, the two ladies were in possession of the minor's property, whom they recognised as their son. The result of this is, that they constituted themselves trustees for the minor. As such, they continued to be in possession of the property till the death of the minor in December, 1879. After his death they continued in possession. They placed themselves in the position of his mothers, and as heiresses to him, and not in the position of the widows of Baldeo Sahai. That is the right which both claimed in the property, and upon the basis of which they remained in possession of the estate since the death of Prem Sukh.

Two contentions have been raised before us. The first is that the two widows are actually heirs; that the adoption was legal and valid; and that Prem Sukh was therefore the son of Baldeo Sahai and his two widows.

The question then is, can a Brahman (for the parties in this suit are Brahmans) in this country validly adopt his sister's son?

It is urged that the earlier authorities on Hindu Law do not prohibit such an adoption; that the view taken by the two *Mimansas* is opposed to these earlier authorities; and that the ancient texts upon which the *Mimansas* profess to base their view do not support that view. It is admitted that all the Courts have hitherto

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adopted the view which the *Mimansas* take; but it is urged that as that view is wrong, the decisions based upon it are wrong also. I do not propose to re-open the question. All the Courts have acted upon the view taken by the two *Mimansas*, and we are bound to follow the authority of a long and uniform course of decisions. Sitting as a Division Bench of this Court, it is not competent for us to disturb the long and uniform course of decisions by all our Courts, from the earliest times, upon this point. If the respondent wishes to re-open the whole question, she must go to the Privy Council. It must therefore be held that the adoption of Prem Sukh Das was invalid, and that upon the death of Baldeo Sahai he took the estate under the will.

The question then arises:—What is the position occupied by the two ladies since Prem Sukh's death? They had no rights as mothers. They took possession of the estate on behalf of Prem Sukh, and their possession was that of trustees on his behalf. They remained in possession as heiresses, and as such set up a claim to his estate. That claim has failed.

It is then contended that, even allowing that they have no right to the property as the heiresses of Prem Sukh, *still*, inasmuch as they are in possession of the estate, they are competent to maintain a suit for its partition between themselves. Various authorities have been cited in support of this contention.

The first case cited to us was the case of *Armory* v. *Delamirie* (1.) We were also referred to some of the cases mentioned in the note to this case.

Now in the first case, the plaintiff, who was a chimney sweeper's boy, had found a jewel. He carried it to the defendant's shop, and delivered it into the hands of the defendant's apprentice. The apprentice, under the pretence of weighing it, took out the stones, and returned the empty socket. In an action for trover by the plaintiff, it was held in this case that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all except the rightful owner.

Now in that case no false claim was set up: the claim was a claim to bare possession.

(1) Smith's L. C. 6th edn., 313.

The other case cited was *Asher* v. *Whitlock* (1), a case relating to land.

In that case a person had enclosed from the waste of a manor a piece of land by the side of the highway in 1842. In 1850 he enclosed more land adjoining, and built a cottage. He occupied the whole till his death in 1860. By his will this person devised all his property to his wife for and during so much of her natural life as she might remain unmarried, and from and after her decease or second marriage, whichever event might first happen, to his only daughter in fee. After the death of this person, his widow remained in possession with the daughter, and in 1861 married the defendant. Early in 1863 the daughter died, and the mother also died soon after. The defendant continued to occupy the property, and the heir-at-law of the daughter brought this suit for ejectment against him. It was held in that case that a person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land and cannot show title or possession in any one prior to the testator. Possession is a good title against all the world, except against one who can show better title. By reason of his possession such person has an interest which can be sold or devised. If this person had devised his interest to two others, they might divide it among themselves.

In this case there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. We cannot recognize such a claim; to do so would be to recognize an illegal transaction, and we should be dividing an estate which has no legal existence. The suit is not maintainable, and we must allow this appeal, and dismiss the connected appeal No. 55 of 1884. No costs on either side in any of the Courts.

BRODHURST, J.—The plaintiff, the younger widow of Baldeo Sahai, Brahman, instituted a suit in the Court of the Subordinate Judge of Sahāranpur against the defendant, the elder widow of the said deceased person, for partition, and for separate and complete possession of a half share of certain houses, and for other reliefs as contained in the plaint.

(1) L. R. 1 Q. B. 1.

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The Subordinate Judge partly decreed and partly dismissed the claim, and from his decree the defendant has now appealed.

It is proved that Baldeo Sahai went through the form of adopting Prem Sukh, his sister's son, and, subsequently having reason to believe that such an adoption was invalid, he, on the 21st July, 1875, executed a will in favour of Prem Sukh.

Baldeo Sahai died in 1878, and Prem Sukh succeeded to possession of his estate; but he died in 1879 during his minority.

The adoption of a sister's son by one of the twice-born has been held in numerous rulings, and by every one of the High Courts in India, to be invalid under the Hindu Law, and the proposition of the plaintiff-respondent's learned counsel to the contrary, in my opinion, has not been and cannot be sustained.

The plaintiff-respondent did not obtain possession of the property in suit as a widow of Baldeo Sahai, but Prem Sukh succeeded to possession under the will, and on his demise the plaintiff was not entitled to the property, and had no right to bring the suit.

I therefore concur with the learned Chief Justice in allowing the appeal and in dismissing the suit without costs.

Appeal allowed.

PRIVY COUNCIL.

P. C.
J. C.
1885
June 19.

ALEXANDER MITCHELL (DEFENDANT) *v.* MATHURA DAS AND OTHERS (PLAINTIFFS.)

[On appeal from the High Court for the North-Western Provinces.]

Act III of 1877, (*Registration Act*), *ss.* 17, 49.—*Effect of a registered instrument confirming a prior one of the same purport not registered.*

An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s. 17, sub-section *b* of Act III of 1877) being unregistered, was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested—*held* that the fact of the prior deed not having affected the property being unregistered,

Present: SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.