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up liability and machinery, and treats them as one and the same. We think it confounds liability, which is created by a provision of substantive law which happens to have been inserted in the Code, and procedure, which is adjective law. We may further observe that what the section provides for is the execution of an order of Her Majesty in Council. This is the legal case for which the Legislature proceeds to lay down rules; and in s. 610 this is a different case from the enforcement of a surety bond which cannot be brought within the purview of an order of Her Majesty in Council. We think, therefore, with all deference to the majority of the Judges of the Allahabad Court, that s. 610 cannot be construed so as to extend the provisions of s. 253 to a case not expressly provided for by the Legislature.

We think, therefore, that a surety bond of this kind cannot be summarily enforced by execution.

The appeal fails and is dismissed but without costs.

P. O'K. *Appeal dismissed.*

PRIVY COUNCIL.

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AKHOY CHUNDER BAGCHI AND OTHERS (PLAINTIFFS) *v* KALAPAHAR HAJI AND ANOTHER (DEFENDANTS.)

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Adoption—Construction of authority to adopt—Attempt by two widows to adopt each a son simultaneously.

Two widows of a Hindu each adopted a son to their deceased husband, under an authority from him, thus expressed. "You.....the elder widow, may adopt three sons successively, and you..... the younger widow may adopt three sons successively." *Held*, that, this might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than as authorizing simultaneous adoptions.

Held, also, that, supposing that the husband had intended to give such an authority, the law did not allow two simultaneous adoptions.

The opinion of W. H. Macnaghten (1) on the subject referred to and approved.

* *Present*: LORD MONKSWELL, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

(1) Principles and Precedents of Hindu Law, Vol. II, Chap. VI of Adoption; note to case XIX.

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APPEAL from a decree (18th May 1882) of the High Court affirming a decree of the Judge of Rungpore (18th December 1880), which reversed a decree (6th July 1880) of the Munsiff of Gaibanda, and dismissed the suit with costs.

The two widows of a deceased Hindu, purporting to act under an authority from him (*anumatipatro*), each adopted a son to him, simultaneously. The question now raised was whether one of these adoptions was valid; and this, although dependent upon the construction of the authority as to whether the adoptions which it authorized were intended to be simultaneous or not, involved the decision whether or not the Hindu law permitted simultaneous adoptions.

The suit, out of which this appeal arose, was one of twelve rent suits brought by the guardians of the minor Gyanendra Chunder Lahiri, who was adopted on 30th June 1875 by Brahmamoyi Debi, since deceased, widow of the late Kali Krishna Lahiri, whose other widow, Shama Sundari Debi adopted at the same time another boy, Norendro Chunder Lahiri. Both widows acted under the supposed authority of which the words are set forth in their Lordships' judgment.

The present suit was brought in the Munsiff's Court for Rs. 439, rent and arrears, in respect of land, part of the estate of the deceased Kali Krishna Lahiri, occupied by the defendant Kalapahar Haji; and it was alleged that the plaintiff was entitled to a half share of the rent payable under a lease, made by his adoptive mother Brahmamoyi Debi, together with Shama Sundari, who, after the death of the former, received the entire rent. The latter was made a defendant, but not Norendro Chunder, the son adopted by her. The relation of landlord and tenant not having been shown to subsist, by payment of rent, or in any other way, between the minor Gyanendra Chunder and Kalapahar Haji, the title of the former had to be established. This depended on the validity of his adoption, which both the defendants denied.

The Munsiff made a decree in favour of the plaintiff, whose title he considered established, for part of the amount claimed. He found that the authority to adopt had been proved, and duly followed; and he did not discuss the legality of the simultaneous adoptions.

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On appeal, the District Judge held that the adoption, having been simultaneous with that of Norendro Chunder, was invalid by law, and that it was open to either of the defendants to insist on this defence. He therefore reversed the decision of the Munsiff, and dismissed the suit.

A Divisional Bench of the High Court (WHITE and MACPHERSON, JJ.) affirmed the decree of the District Judge. Their judgment is given at length in the report of the appeal, *Gyanendra Chunder Lahiri* v. *Kalaphar Haji* (1), as disposed of by the High Court in May 1882.

They were of opinion that, as the adoption of one son alone was all that was actually necessary according to the requirements on the part of the father in connection with the observances of the Hindu religion, the adoption of two children to him could not be held to be within the scope of the authority given by him to the widows. They held also following the authorities on the subject, that where such a thing as a double adoption is attempted, neither of the children becomes the legally adopted son of the deceased, notwithstanding the performance of due ceremonies in regard to each.

Mr. *J. D. Mayne*, for the appellant, argued that the adoption was maintainable ; and also that its validity could not be contested in the present proceedings, and between these parties, one of whom had herself taken part in representing the adoption as an actual thing, and in causing action on the part of the plaintiff's parents, as she had been one of the adopting widows.

Amongst other arguments, he urged that the invalidity of second adoptions, held invalid in *Rangama* v. *Atchama* (2), or of adoptions where sons already existed, presented no analogy to affect the validity of simultaneous adoptions. The adoption of a second boy, after a first, would, if permitted, deprive the first of part of the rights already vested in him. But the simultaneousness of the adoptions in a case like this prevented any such deprivation. The rights of inheritance attached to both equally from the first moment of adoption. Thus a main argument against concurrent adoptions lost its force, and

(1) I. L. R., 9 Calc., 50.

(2) 4 Moore's I. A., 1.

practically the intentions of the husband in such a case might receive effect, consistently with the theory of law on the subject and the habits of the people. He submitted that this case was not governed by the law laid down in *Monemothonath Day* v. *Onathnath Day* (1), followed by *Sidessur Dasee* v. *Doorga Churn Sett* (2), nor by the deduction made by H. W. Macnaghten in his "Principles and Precedents of Hindu Law," Vol. II, chapter VI, of Adoption, note to case XIX. This had been inserted, but without remark, in a lately issued work by Shama Charan Sircar, the "Vayavastha Chandrika," Vol. II, p. 118.

Mr. *R. V. Doyne* and Mr. *J. T. Woodroffe*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The suit which is the subject of this appeal was brought for the rent of some property which was part of an estate formerly belonging to one Kali Krishna Lahiri. He died in 1851, having had two wives—the elder, Shama Sundari Debi, and the younger, Brahmamoyi Debi. By Shama Sundari Debi, he had one son, Koilash Chunder Lahiri, who died in 1856. After the death of Koilash Chunder Lahiri, the two widows simultaneously, as has been found by the lower Appellate Court, adopted sons. Shama Sundari adopted one Suresh Chunder, and Brahmamoyi adopted Jogesh Chunder. That adoption took place in 1859, on the 5th of June. Suresh Chunder died in 1866, and Jogesh Chunder in 1867. Some seven or eight years after the death of Jogesh Chunder, each of the two widows made another adoption, which are found by the lower Appellate Court to have been simultaneous, and no question will arise whether one was at any moment of time before the other. These adoptions were made on the 30th July 1875.

The suit was brought by Gyanendro, the son who was adopted by the younger widow on that occasion, against a tenant of some of the land, and against Shama Sundari Debi. Norendro, the son who was adopted by Shama Sundari Debi, is not a party to the suit. The claim for rent is founded upon a lease, which

(1) 2 Ind. Jur., N. S., 22; Bourke, 189.
(2) 2 Ind. Jur., N. S., 24; Bourke, 260.

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was executed on the 12th February 1870, by both the widows reserving a certain rent, and there is no question now as to whether the amount for which the decree was passed is correct or not.

The only question raised in the case is whether upon what has taken place Gyanendro is entitled to recover half of the rent reserved by the lease; and it may be material to see, before the facts are adverted to, how the case is stated in the plaint. It says: "The late Brahmamoyi Debi, mother of the said minor Gyanendro Chunder Lahiri, being, in right of her husband and deceased adopted son, entitled to, and being jointly and in equal shares with defendant No. 2,"—that is Shama Sundari "possessed of pergunnah Muktipore and others mehal No. 187 of the Collectorate towzi of zillah Rungpore, being the ancestral zemindari which the said minor is entitled to and possessed of, died on the 2nd Falgoon 1285, leaving her surviving the said minor taken in adoption by her as the sole heir of her and her late husband and son, and as the proprietor of the property." The case seems to be put upon the ground that after what had taken place, Brahmamoyi Debi was entitled to half of the estate, and that her adopted son succeeded to that half.

Now, according to the pedigree, upon the death of Koilash Chunder Lahiri, Shama Sundari would succeed to the property as his heir; but it is contended that the widows having the authority to adopt, the adoption of Norendro and Gyanendro, if it were valid, would divest the estate from Shama Sundari Debi and also from Brahmamoyi Debi if she took an interest in it, and would make the adopted sons entitled to the estate in equal shares. So that the case really depends upon the validity of the adoptions which were made by the two widows on the 30th July 1875.

Now as to those adoptions two questions arise. The first is whether the authority which was given to the widows by the husband authorised such an adoption as they made; and, secondly, whether, supposing he gave such an authority, it is one which the Hindu law allows. The document itself was not produced, but the contents were deposed to by two witnesses. One of them, Kashi Chunder, said it was as follows:—"You, Shama Sundari,

the elder widow, may adopt three sons successively, and you Brahmamoyi, the younger widow, may adopt three sons successively, and that (or those)"—the word being capable of being translated both in the singular and the plural—"adopted son (or sons) will be entitled to offer pind," &c. Another witness deposed to there being the words introduced "and on that being exhausted;" but the lower Appellate Court seems to have thought it doubtful whether reliance could be placed upon the memory and impartiality of that witness, and the construction of the document must be taken upon the words stated by Kashi Chunder.

It appears to their Lordships that these words might be reasonably construed as giving to the widows, not a power to adopt simultaneously, but first to the elder widow power to adopt three sons successively, and then a similar power to the younger widow. The words are capable possibly of another construction, but certainly rather the more natural construction would be that it was a power to adopt successively. It may be observed that if it gave to the younger widow a power to make an adoption simultaneously with an adoption by the elder widow, the elder widow would not be able to adopt three sons successively, because there would be interposed an adoption of a son by the younger widow. That seems to be a reason for not putting such a construction upon the words.

Another reason for putting the construction upon it which their Lordships think is the right one, is what appears to be the state of the law on the subject of simultaneous adoptions at the time when this authority was given, because if it should even appear that the law was in such a state that it was extremely doubtful whether simultaneous adoptions could be made, or that from the state of the law it was not likely that there was a practice of that kind, that would be a reason for construing this document as not intended to give a power of simultaneous adoption. In construing it their Lordships would consider that the person giving the authority intended his widows to do that which the law allowed, and not to do something which was, if not absolutely illegal, very unusual and not practised amongst Hindus.

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Their Lordships are, therefore, of opinion upon that part of the case that this document did not give to the two widows an authority to make such an adoption as was made by them in July 1875, when they professed to adopt the two sons Norendro and Gyanendro.

But then there is the other question whether, if the authority did allow them to adopt in this manner, it could be done lawfully according to Hindu law. It had been clearly settled by this Committee in the case of *Rungama* v. *Atchama* (1), that a man having an adopted son could not during the life of that adopted son adopt a second son. The authorities were very fully gone into; and although there appeared to be a conflict of opinions amongst the pundits upon the subject, that was decided by this Committee. That case, no doubt, is distinguishable from the present. A simultaneous adoption in some respects would differ from the adoption of a son when there was already one son in existence, and the reason given for not allowing such an adoption is that there are different texts which seem to direct that that power of adoption is only to be exercised where the person adopting has not a son either natural-born or adopted. But much of the reasoning upon which that case was decided applies to the case of a simultaneous adoption. The observation which appears to their Lordships to be the strongest against such an adoption as this being allowed by the Hindu law, is that no authority and no text has been, or apparently can be, produced showing that the Hindu law allows it. It is true that the texts with regard to adoptions are but few, but still they are sufficient to lead to the conclusion, that if it was intended that such a power as this should be given to a man with regard to adoption, there would be something in the different authorities in favour of it. That it was not intended by Hindu law may be inferred from the provisions which are made for the case of a son being born after a man has made an adoption. It is laid down by Macnaghten that if a son is born after a son has been adopted, the property is to be divided between the adopted son and the natural-born son in certain proportions, giving, in the case of there being only one adopted son and one natural-born son, to

(1) 4 Moore's I. A., 1.

the adopted son a third, according to the law of Bengal, and a fourth according to the doctrine of other schools. Then he goes on to speak of the cases where there are more than one natural-born son, and he states the law for the distribution of the property in such cases. But no reference is made in any of the cases to there being more than one adopted son; and as the power of a Hindu either to adopt himself, or to give to his widows the power to do so in his place, depends upon the law, it seems to their Lordships that it is incumbent upon the party who seeks to avail himself of a simultaneous adoption to produce some authority to that effect. The entire absence of any authority in favour of such an adoption is an argument that the Hindu law did not recognise it, and that it has really not been the practice amongst Hindus; for if such a practice had prevailed to any appreciable extent, some authorities would have been found on the subject.

There is a great absence of decisions upon the question; in fact their Lordships have only been referred to one case in which the question of the validity of a simultaneous adoption has been considered, and that is a case in the High Court of Calcutta reported in Bourke's Reports at page 189. There it was held by the learned Judge who tried the case that an adoption of this description was invalid, and in a subsequent case the same learned Judge acted upon the opinion which he had thus given.

So far, then, with respect to there being any authority about it. But there is a note in a recent book published by Shyama Charan Sircar, the author of the Vyavastha Darpana. It is called the Vyavastha Chandrika, and in Vol II, page 118 of the Precedents there is this note: "It may on the whole be safely concluded that whatever may have been the law or the practice in former ages, the simultaneous adoption of two sons or the affiliation of one by a person who has a son (either his own issue or adopted) living, "is now illegal according to the concurrent testimony of the most approved authorities." This is the note of Mr. Macnaghten, Hindu Law, Vol. II, p. 201; but it is given without any comment or indication of dissent. Their Lordships do not refer to this book as being any authority as to what the law is. The author, a Hindu gentleman who is well conversant with the Hindu law,

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and who must also be well conversant with the customs of Hindus with regard to adoption, appears to consider a simultaneous adoption to be illegal; he does not suggest that what is stated is in any way contrary to the habits of Hindus, or in conflict with their usages. But independently of this, and without placing any reliance upon this book as an authority, they are of opinion that by the Hindu law an adoption of this description was not allowed. Therefore, on both grounds, that the power given by the husband did not authorise the widows to make such an adoption as this, and also that the law did not allow it, even supposing the husband had intended to give such an authority, their Lordships are of opinion that the plaintiff has failed to make out his title to recover any portion of the rent which he has sued for.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be affirmed and the appeal dismissed, and the appellant will pay the cost of the appeal.

C. B. *Appeal dismissed with costs.*

Solicitors for appellants: Messrs. *Oehme & Summerhays.*

Solicitors for respondents: Messrs. *Watkins & Lattey.*

P. C.* 1885. *July* 8 & 9.

NILAKANT BANERJI (PLAINTIFF) *v.* SURESH CHANDRA MULLICK AND OTHERS (DEFENDANTS.)

[On appeal from the High Court at Fort William in Bengal.]

Possession, Suit for, by Mortgagee—Purchase by third parties of mortgagee's interest in portions of mortgaged property—Redemption and apportionment of liability of purchaser for the mortgage charge—Joinder of parties—Mortgage account—Form of Decree.

Purchasers of the right, title, and interest, of a mortgagor in certain portions of the mortgaged property, sold in execution of a prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to

* *Present:* LORD MONKSWELL, LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.