1904
March 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

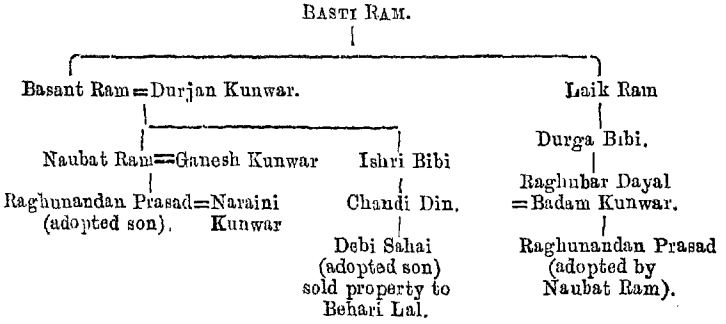
BEHARI LAL (PLAINTIFF) *v.* SHIB LAL AND ANOTHER (DEFENDANTS).*

Hindu Law—Adoption—Dwyamushyayana form—Succession—Natural mother.

Held that the natural mother of a Hindu adopted into another branch of his family by the *nitya dwyamushyayana* form of adoption does not, on account of such adoption, lose her right of succession to her son in the absence of nearer heirs.

An adoption in the absolute dwyamushyayana form depends upon and has its efficacy in the stipulation entered into at the time of adoption between the natural father and the adoptive father and does not depend upon the performance of any initiatory ceremony by the natural father.

THE suit out of which this appeal arose was brought by one Behari Lal as purchaser of the rights of Debi Sahai to recover possession of certain immovable property from one Shib Lal, who had obtained possession thereof in virtue of a compromise in the course of litigation between himself and Naraini Kunwar, widow of the last male owner of the property, Raghunandan Prasad. The following genealogical table illustrates the devolution of the titles set up by either side.



The property in suit belonged to Naubat Ram, who adopted, according to the *nitya dwyamushyayana* form, his relation Raghunandan Prasad. He died on the 26th of February 1867, leaving his widow, Ganesh Kunwar, and Raghunandan Prasad surviving him. After his death Ganesh Kunwar took possession of the property and held it until her death in 1878, Raghunandan Prasad having predeceased her. After the death of Ganesh Kunwar, Naraini Kunwar, the widow of Raghunandan Prasad, who had left no issue, took possession of the property of Naubat Singh, including the property in dispute in

* First Appeal No. 116 of 1902, from a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 10th February 1902.

this case. Thereupon Shib Lal and others claiming to be *sagotra sapindas* of Naubat Ram sued Naraini Kunwar for possession of Naubat Ram's estate. This litigation was compromised, the plaintiff Shib Lal receiving the property now claimed. On the death of Naraini Kunwar in 1893 the estate of Naubat Ram was claimed by Chandi Din, the son of Naubat Ram's sister, Ishri Bibi. Whatever title Chandi Din had devolved upon his adopted son, Debi Din, who sold his rights to the present plaintiff Behari Lal. The defendant Shib Lal set up his own title by succession as well as by adverse possession. In his written statement he denied the fact of Raghunandan Prasad's adoption; but, apparently at the hearing of the suit, afterwards pleaded that if the adoption was valid its effect was that the plaintiff could not sue so long as the natural mother of Raghunandan Prasad, Badam Kunwar, was alive. This latter contention was accepted by the first Court (Subordinate Judge of Bareilly) which dismissed the suit upon the legal question so raised without hearing the evidence or going into any other of the issues raised. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Sital Prasad Ghosh*, for the respondents.

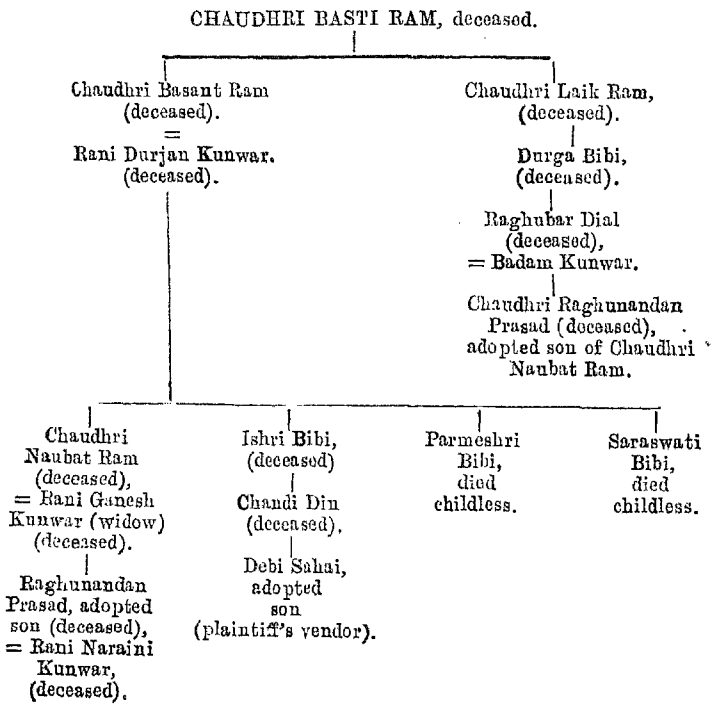
STANLEY, C. J., and BURKITT, J.—A question of some interest and novelty is involved in this appeal. It is whether the natural mother of a son who has been adopted into another branch of a family under the form of adoption known as the *dwyamushyayana*, retains her status and rights as natural mother so as to be capable of inheriting the property of her son who has been so adopted, in the absence of nearer heirs. Whether, in fact, a Hindu who has been adopted under this form of adoption can, according to Hindu Law, have two mothers, as he certainly can have two fathers. The question arises under the following circumstances:—

Naubat Ram, the grandson of one Basti Ram, prior to his death, adopted one Raghunandan when an infant under the *dwyamushyayana* form of adoption and afterwards died on the

1904

BEHARI LAL v. SHIB LAL.

26th of February 1867, leaving his widow Rani Ganesh Kunwar and his adopted son surviving him. After his death Ganesh Kunwar took possession of his property, including a share in a village called Himmatpur and the entire of another village called Lohar Nagla, which are the subject-matter of the present litigation. Raghunandan died without issue shortly afterwards, leaving a widow, Naraini Kunwar, who, on the death of Rani Ganesh Kunwar on the 7th of August 1878, was recorded as owner of the property. Naraini Kunwar died on the 24th of November 1893, and thereupon Chandi Din, the sister's son of Naubat Ram, claimed to be entitled to the property of Naubat Ram. Debi Sahai was his adopted son and he sold the property to the plaintiff Behari Lal. The defendants Shib Lal and others, who had no legal claim whatever to the property, instituted a suit against Naraini Kunwar claiming to be the *sagotra sapindas* of Naubat Ram. A compromise was entered into and under it Shib Lal obtained possession of the property now in dispute. We append a genealogical tree of the family.



The plaintiff's claim is by purchase from Debi Sahai, the adopted son of Chandi Din, and his case is that Chandi Din succeeded as a *bandhu* to the property of Naubat Ram on the death of Narain Kunwar on the 24th of November 1893.

The case of the defendant, Shib Lal, is that the adoption of Raghunandan Prasad being in the *dwyamushyayana* form his connection with his natural family was never severed, and consequently on the death of his wife, Naraini Kunwar, his natural mother Badam Kunwar became entitled to his property as his heir, and, she being alive the plaintiff has no present title to possession. It is admitted that, but for the form of the adoption of Raghunandan, the defendant Debi Sahai, would be next in succession after Naraini Kunwar. The defendant, Shib Lal, however, contends that having regard to the form of adoption of Raghunandan Prasad, his mother, Badam Kunwar, never lost her rights as his natural mother to succeed to his property, and that consequently the plaintiff has failed to establish his title.

The learned Subordinate Judge acceded to this contention and dismissed the plaintiff's suit. He held that so long as Musammat Badam Kunwar was alive a *bandhu* of Raghunandan Prasad through his adoptive parents has no right to possession of the property. This was the only point decided in the Court below.

The evidence establishes that at the time of adoption it was agreed between the natural and adoptive father that Raghunandan Prasad should remain the son of both of them, namely, the natural father and the adoptive father. It was also proved that all the ceremonies held in connection with Raghunandan Prasad, such as tonsure, investiture of the sacred thread, marriage and *sradh*, were performed by Naubat Ram and that none of them were performed by his natural father.

The argument of the learned advocate for the appellant based upon this was that, inasmuch as none of the initiatory ceremonies were performed by the natural father of Raghunandan, his connection with his natural family was severed, save that he continued to be the son of his natural father for the purpose of inheriting his property and performing his obsequies;

1904

BEHARI LAL v. SHIB LAL.

that in other respects the relations with his own family were severed, and that he could not transmit the property which he might inherit from his natural father to any member of the family of that father. A passage from the *Dattaka Mimansa*, a work of high authority, is cited in support of this contention, but it does not appear to us to do so. It is article 41, section 6, of that treatise, which describes the two forms of *dwyamushyayana* adoption; one called the *nitiya* or absolute form; the other the *anitiya* or incomplete form. This article runs as follows:—"Accordingly, sons given and the rest (who are sons of two fathers) are of two descriptions: those absolutely sons of two fathers, and those incompletely so. Of these those are named absolute *dwyamushyayana* who are given in adoption with this stipulation,—'this is son of us two' (the natural father, and adopter). The incomplete *dwyamushyayana* are those who are initiated by their natural father in ceremonies ending with that of tonsure, and by the adoptive father, in those commencing with the investiture of the characteristic thread, since they are initiated under the family names of both, even they are sons of two fathers; but incompletely so. Should a child, directly on being born, be adopted, as his initiation under both family names would be wanting, he would partake only of the family of the adopter." The learned advocate for the appellant asks us to read the last sentence in connection with and as qualifying the earlier portion of the article which treats of the absolute form of adoption and to hold that Raghunandan Prasad was adopted in the incomplete form and that his relationship with his natural parents was on adoption so severed that he could not transmit any right of succession to his natural mother. We are unable to follow him in this. It appears to us that an adoption in the absolute form depends upon and has its efficacy in the stipulation entered into at the time of adoption between the natural father and the adoptive father and does not depend upon the performance of any initiatory ceremony by the natural father.

In the *Dattaka Chandrika*, a treatise on adoption, also an authority, the author treating of this question writes:—"Relative to the subject in question (it is to be observed that) should

an agreement subsist, stipulating that the son adopted should be son of the natural father and the adopter likewise, a special rule for his participating in the family of both by reason of being a *dwyamushyayana* will be declared—" (article 24, section 2).

In the synopsis to the work edited by Whitley Stokes on the law of adoption, at p. 669, the special rules regarding the *dwyamushyayana* are given as follows :—" The adopted son may retain filial relation to his natural father, in which case he is called a *dwyamushyayana* or son of two fathers. This double filial relation proceeds *from the special agreement between the adoptive and natural father at the time of adoption* or may exist without such agreement; as mostly, if not always, in the case of the *kritrima* adopted son who is not alienated by his natural father. In the first case such son is denominated a complete (*nitya*); in the second, an incomplete (*anitya*) *dwyamushyayana*. The adopted son, who is the son of two fathers, inherits the estate and performs the obsequies of both fathers, but the relation of his issue (except in the case of the *kritrima* son as usually affiliated in the *Mithilá* country) obtains exclusively in the family of the adoptive father."

That the adoption in the absolute form depends upon the stipulation of the natural and the adoptive father is the view taken by Mr. Macnaghten in his work on Hindu Law. He says, at page 71, Volume I of his work :—" There is a peculiar species of adoption termed *dwyamushyayana* where the adopted son still continues a member of his own family and partakes of the estate both of his natural and adopting father, and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply. It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *nitya dwyamushyayana*, or otherwise when the ceremony of tonsure may have been performed in his natural family, when he is designated *anitya dwyamushyayana*, and in this latter case connection between the adopting and adopted parties endures only during the life-time of the adopted. His children revert to their natural family."

1904

BEHARI LAL v. SHIB LAL.

Sir Thomas Strange in his work on Hindu Law puts the matter very clearly. He says at page 123, Volume II:—"The result is that *nitya datta* is a son adopted from the same *gotra* before or after the ceremony of the tonsure; or a son adopted from a different *gotra* before the tonsure; *anitya datta* is a son adopted from a different *gotra* after he has received the tonsure in his natural *gotra*. The performance of the tonsure is the cause of the temporary nature of the latter species of adoption."

The adoption in the absolute form may, according to this, take place at any time before the ceremony of the tonsure and, so far as appears, before any initiatory ceremony has been performed.

It is by the gift that the relation of the son with his natural family is severed and that the right of the son in the estate of the giver ceases. This appears from Article 19, section 2 of the *Dattaka Chandrika*, which explains the text of Manu as follows:—"It is declared by this that through the extinction of his filial relation *from gift alone* the property of the son given in the estate of the giver ceases, and his relation to the family of that person is annulled." It seems to follow from this that if the gift is a qualified gift, as it is in the case of an adoption in the absolute *dwyamushyayana* form, the son who is so adopted does not cease to have filial relation with his natural parents, nor is his relation generally with the family of his natural parents severed.

In the case before us the gift was a qualified gift. The son was given and accepted in adoption upon the clear stipulation that he should continue the son of his natural father, and hence that his relations with the family of his natural father should not be severed. This being so, we know of no authority, and none has been cited to us, for holding that a son so adopted is disqualified from transmitting his property to his heirs on the side of his natural father. It appears to us that as his relations with his natural parents have not been severed, the rights of such parents to participate in his property continue unimpaired. The mother occupies a higher position in regard to succession to her son than that of *bandhus* or *sapindas*, her claim being placed on the ground of consanguinity and of the merit she possesses

1904

BEHARI LAL v. SHEB LAL.

from having conceived and given birth to her son. For the foregoing reasons we are of opinion that the conclusion arrived at by the learned Subordinate Judge is correct and that the appeal must fail. We dismiss it with costs.

Appeal dismissed.

1904
March 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BHAWANI (PLAINTIFF) *vs.* SHEODIHAL (DEFENDANT).*

Mortgage—Suit for redemption—conditions postponing redemption whilst allowing the mortgagee under certain circumstances to realize the mortgage money before due date.

The right of redemption and the right of foreclosure or sale are not always and under all circumstances co-extensive.

Hence where in a mortgage with possession for a term of 15 years there was a covenant on the part of the mortgagor to the effect that if the property "be found to have been mortgaged or hypothecated or transferred to anyone, or if there should arise any cause which might be considered likely to affect the total or partial loss of the principal mortgage money and interest, the mortgagee shall have power to realize the entire mortgage money, with interest thereon at the rate of Rs. 3-2-0 per cent. per mensem," it was *held* that this covenant, properly construed, was not an unreasonable stipulation and did not give the mortgagor any right to claim redemption before the expiry of the term of the mortgage. *Sayad Abdul Hak* v. *Gulam Jilani* (1) and *Sari* v. *Motiram* (2) referred to.

This was a suit for redemption of a mortgage brought under the following circumstances. One Mahngu, halwai, on the 13th of March 1901, mortgaged with possession to Sheodihal, teli, two houses situated in the city of Jaunpur for a term of fifteen years. The mortgagee was empowered to remain in possession of the mortgaged property, either personally or through his tenants, and the profits were to be taken in lieu of interest on the mortgage debt. The mortgagor agreed to pay on the expiry of the term, whereupon the mortgage should be redeemed. The mortgage deed further provided that "if the property be found to have been mortgaged or hypothecated or transferred to anyone, or if there should arise any cause which might be considered likely to affect the total or partial loss of

* Second Appeal No. 154 of 1902, from a decree of Saiyid Muhammad Ali, District Judge of Jaunpur, dated the 6th December 1901, reversing a decree of Maulvi Saiyid Zainul Abdin, Subordinate Judge of Jaunpur, dated the 23rd September 1901.

(1) (1895) I. L. R., 20 Bom., 677. (2) (1896) I. L. R., 22 Bom., 875.