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have intended to deal with all her moveable property over which she had disposing power.

On consideration of the whole will their Lordships are of opinion that the Sub-Judge and the Judicial Commissioner were right in holding that the annuities or stipends given to the respondents were payable out of the testatrix's moveable property, which she had power to dispose of by will. Probably the testatrix was under the erroneous impression that she could deal with the wasika allowance, and her pension from Government, and the income of the fund settled by treaty. But their Lordships are of opinion that the words of the gift are large enough to charge the annuities or stipends in question upon the Government notes held by the testatrix, and also upon the rest of her moveable property. They may add that if the words of the will are to be taken in a more restricted sense, it appears to them that the gift of these annuities or stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the testatrix's general estate, in the event of the failure of the particular fund pointed out for their payment.

In the result, therefore, their Lordships are of opinion that the appeals ought to be dismissed, and they will humbly advise Her Majesty accordingly.

Appeals dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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*P. C.** 1892. *Feb.* 3. *March* 5.

BIRESWAR MUKERJI AND OTHERS (DEFENDANTS) *v.* ARDHA CHANDER ROY AND OTHERS (PLAINTIFFS),

AND

SHIB CHANDER ROY (DEFENDANT) *v.* GOBIND MOHINI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Hindu law, Adoption—Adoption, necessity of there being gift and acceptance of the adopted child—Construction of Will as to there being a designation, as legatee, of a child whose adoption failed.

The Court of first instance and the Appellate Court, after observing fully upon the evidence, found that, although a ceremony of adoption had taken place, there had not, in fact, been a giving and taking of the child.

* *Present:* LORDS HOBHOUSE, MACNAGHTEN, MORRIS and HANNEN, and SIR R. COUCH.

There being no reason for departing from the ordinary course, where two courts have concurred, the above finding was accepted; and it was, thereupon, *held*, that there had been no adoption.

Where, in a will, there was a clear indication of the testator's intention before making an adoption to give the greater part of his property to the boy whom he was about to adopt, and the bequest was by name to the latter, who was not selected as being the adopted son, but for reasons, which, though likely to lead to the adoption, were independent of it,—*held* that the bequest was effectual, notwithstanding that there had been no adoption.

Two appeals from a decree (21st May 1886) substantially affirming, with a modification, a decree (9th January 1884) of the District Judge of the 24-Parganas.

The two suits out of which these appeals arose were brought, in effect, for a partition of joint-family estate, with a declaration of the rights of the parties, and consequential relief.

The joint estate belonged to the Roy Chaudhri family of Panihati, in the district of the 24-Parganas, descended from Gauri Charn Roy Chaudhri, who died in 1801. He adopted, and by his will put in his place, Joygopal, who died in 1826, leaving seven sons, of whom only four left either issue or widows. The family estate had vested in their representatives at the time when these suits were brought, in 1880 and 1881.

The principal questions raised in these two appeals, which were preferred from one decree made in the High Court on three appeals filed in the two suits, were—*first*, as to the right of those representatives in reference to an adoption in which the ceremonies, but not the actual giving and taking of the child, had been carried out; *secondly*, as to whether the latter could take as a designated person under the will of the testator, who had intended to adopt him, but had not effectively done so.

Of Joygopal's seven sons three died without issue.

Pran Krishna, the third son, who died in 1863, left a son, Jagat Chander, who died in 1879, having made the will, as to the construction of which the second of the above questions was raised. The words of that will, material to this report, are set forth in their Lordships' judgment. Jagat Chander left no son, but left a widow, Kadambini, who was a party to these proceedings, and

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he left two daughters—Hemangini, mother of the present appellants, Bireswar and Sureswar Mukerji, and Ushamoyi, mother of Shib Pershad Banerji, another of the appellants.

Gopi Krishna, the fourth son of Joygopal, died in 1860 intestate, leaving a son, Tejas Chander, who died in 1879, without a son, but leaving a widow, Bamasunderi, one of the present respondents.

The sixth son of Joygopal, named Radha Krishna, died in 1864, having executed a *niyam patro*, or settlement, and leaving two sons—Shib Chander and Ardha Chander.

Sri Krishna, the seventh and youngest son of Joygopal, died without issue in 1853, leaving a widow, Gobind Mohini, who was the plaintiff in the first of these suits, and a respondent in both appeals. He also left three daughters.

The earliest in date of the present suits was filed in 1880 by Gobind Mohini against Shib Chander and Ardha Chander, sons of Radha Krishna, to establish her right, as widow and heiress of Sri Krishna, to a four-anna share of the joint-family property inherited from Joygopal. She alleged that Shib Chander had taken possession of this property, and asked for an account on partition. The second of these suits was brought by Ardha Chander against Shib Chander, Sureswar, and other descendants of Jagat Chander, with the widows Bamasunderi, Kadambini, and Gobind Mohini. His object was to have the will of his deceased cousin Jagat construed, and to have it determined whether he had been validly adopted by the latter, or not; also to have his share in the family estate. He also claimed that he was entitled to one-half of his father's, Radha Krishna's, share, as well as to come in as legatee under Jagat's will, his whole claim being for $\frac{9}{80}$ths of the joint estate.

Jagat's will, dated 13th Bhadro 1275, or 27th August 1868, referred to previous wills and dispositions made by members of the family. Among these that of Gauri Charn, dated 5th March 1800, charged the estate for religious ceremonies in the family; that of Joygopal, dated 2nd July 1826, gave the estate in equal shares to his seven sons, directing them to maintain the family worship as before; that of Ram Krishna gave his seventh share to his six surviving brothers. Sri Krishna left one-quarter of his fifth share

to Jagat, whom he made his executor as to the other three-fourths of the immoveable joint estate; giving him, also, the whole of his share of the moveables, for the benefit, after payment of debts, of his widow, Gobind Mohini, during her life, and after her death for the benefit of his daughters.

Raj Krishna, second son of Joygopal, died intestate and childless in 1855, his share devolving on the three surviving brothers—Pran Krishna, Gopi Krishna, and Radha Krishna.

The will, dated the 25th Magh 1270, or 6th February 1864, of Pran Krishna, the third of the brothers, and father of Jagat, appointed the latter to be manager of the whole joint estate. This he became, in supersession of Radha Krishna, the only surviving son of Joygopal, and he became also *shebait* of the family worship.

On the death of Pran Krishna, which occurred soon afterwards, Jagat, accordingly, became entitled to his father's share of the joint estate, in addition to what had been bequeathed to him by Sri Krishna, or, in all, to $\frac{12}{16}$ths of the whole. Gopi Krishna died intestate in 1860, his share descending to his only son, Tejas Chander, who died in 1879 without a son, his share devolving upon his widow, Bamasunderi Debi, one of the present respondents.

The *niyam patro*, executed, as above stated, by Radha Krishna, was dated 6th February 1864, and in it he stated his intention of going on a pilgrimage to Gaya, and the necessity of his framing "rules with regard to his share of the zemindari and other properties for his own benefit and that of his minor sons." He authorized Jagat to take possession of his share of the joint estate for the benefit of Shib Chander and Ardha; and reserving an allowance for himself, he directed that their mother, his wife, Kasimoni, then in ill-health, should be maintained and treated with great care. At that time Shib Chander was aged about twelve years, and Ardha about four. In the month of Baisak, 1273, or April 1866, Jagat went through the ceremony of adopting Ardha. This was found by the Court of first instance not to have been effective; and the Court being of opinion that Ardha had continued to be the son of his natural father, held him to be entitled to a one-half share of his father's estate.

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The Court also held that Ardha, though not adopted, took, upon the true construction of Jagat's will, an estate for life in the property of the latter. Gobind Mohini was, in her suit, declared entitled to a two-anna and four-ganda share of the joint immoveable estate, and to a three-anna and four-ganda share of the joint moveables, subject to the trusts declared in Sri Krishna's will. Shib Chander, a defendant in both suits, appealed in both. Bireswar and others, sons and representatives of the daughters of Jagat, appealed also, contending that Ardha was not entitled under the will. There were thus three appeals which were heard together by a Divisional Bench (PIGOT and BEVERLEY, JJ.), who gave one judgment. The decision of the lower Court that there was no adoption was affirmed, and it was held that, notwithstanding this, Ardha took, as a person designated under the will of Jagat, an absolute estate, liable, however, to be divested in the event of his dying without leaving a son or male descendant through a male.

Upon the question as to the adoption, the Court was of opinion that there having been no gift and acceptance of the adopted boy in Radha Krishna's lifetime, and no giver in a legal sense at any rate, when the forms were gone through in Baisak 1272, no effective adoption had taken place. The case, *Venkata* v. *Subhadra* (1), cited to show that a gift and acceptance of a child may be perfected after the death of the giver by the due performance of the religious ceremonies, did not apply to the facts established here. There was, in that case, a gift and acceptance in the giver's lifetime. And at the time of the religious ceremonies, the act of giving was performed by a person competent to perform it, to whom authority was imputed by the Court. In this case there never had been a gift and acceptance at any time. On the question as to the effect of the will in regard to the bequest to Ardha, the judgment referred to *Fanindra Deb Raikat* v. *Rajeswar Das* (2) and to *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (3), distinguishing the first of these cases, where it was made a condition that the donee should be the adopted son, from the

(1) I. L. R., 7 Mad., 548.
(2) I. L. R., 11 Calc., 463; L. R., 12 I. A., 72.
(3) L. R., 3 I. A., 253; 26 W. R., 91.

present one, where the testator made the gift from motives of affection generally, and not because the donee was his adopted son. And the decision was that Ardha was within the intention of the will as a designated person. The judgment dealt with Gauri Charn's will, with Radha Krishna's *niyam patro*, and with other documents mentioned above.

In addition to the questions of adoption and of designation in the will, the only other matters required to be mentioned for the purposes of this report are the High Court's decision as to the estate which Ardha took under the will, and as to the state of the family property as regarded jointness and separation and as regarded the subjection of part of it to trusts for religious purposes. In reference to these points, the following extracts from the judgment are material:—

"The property in which the testator was interested was of three kinds: (i) that left by Gauri Charn, which, it is argued, is *debuttur*; (ii) that self-acquired by Joygopal, left by him as such to his sons, and spoken of in some of the wills as the self-acquired property; and such other property self-acquired by other members of the family as had come down with the joint estate; (iii) that particular property self-acquired by Pran Krishna, Jagat's father, to which reference is made in paragraph 6.

"Jagat's will in the 1st paragraph states that he is about to dispose of the moveable and immoveable property of his ancestors. This includes the property left by Gauri Charn, so far as he could dispose of it, and the self-acquired and unpartitioned property not dedicated to religious purposes. He adds 'and the self-acquired moveable and immoveable property of myself and my father.'

"Now, in his bequest to Ardha, he gives everything; the proper share (*i.e.*, in the family property) of his late father, the 4 annas of Sri Krishna's property, and 'the self-acquired moveable and immoveable property of me and my father, which will be left.'

"But in the limitations which follow, in case of Ardha dying 'without leaving a son,' the 'share' of the ancestral and self-acquired property only are given, at any rate so far as the sons to be adopted by Kadumbini are concerned.

"The 6th paragraph gives the self-acquired and separate property therein referred to (and which is already, as we have said, included

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in the gift to Ardha) to 'the full-owned after-taker, according to the statements in paragraph 4.' We think that, having regard to this, only those who are to take in case of Ardha dying sonless are referred to in this 6th paragraph. The determination of the heir (or fixing of the after-taker) relates to them only. The gift to Ardha, the fixing or determination, so far as he was concerned, was complete from the beginning, nor does the restriction on alienation conflict with this view; for by the terms of the gift to Ardha the estate granted to him would be defeated by his 'dying without leaving a son,' and would go over to the son adopted by Kadumbini, or to the daughter's sons. Upon this point we shall only refer further to the last sentence in paragraph 8, relating to the Rs. 10,000 due to the testator by the estate. 'The sums being gradually paid off from the estate, my heir, the said Ardha, &c., *or* he who will be my heir according to the statements in paragraph 4, shall obtain it.'

"We think, therefore, that Ardha took an absolute estate defeasible upon his dying without leaving a son, which we construe to mean a male descendant in the male line."

On these appeals,—

Mr. *T. H. Cowie*, Q.C., and Mr. *J. H. A. Branson*, for Bireswar and Sureswar Mukerji, argued that the gift in the will to Ardha was to him in the character of adopted son. As he did not fill that character, the intention of the testator would not be carried out if he took under the will. They cited *Fanindra Deb Raikat* v. *Rajeswar Das* (1) and distinguished *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (2).

Mr. *C. W. Arathoon*, for Shib Chander, argued that the adoption was valid: also that, at all events, as the bequest to Ardha was expressed to be on the understanding that the share of Radha Krishna had been obtained by Shib Chander, the former brother could not take both by inheritance from his natural father, and also under the will. There were inconsistent advantages to Ardha in his so doing, and this should be held to involve election

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

(2) L. R., 3 I. A., 253; 26 W. R., 91.

on his part. *Venkata* v. *Subhadra* (1), *Atma Ram* v. *Madho Rao* (2), and *Codrington* v. *Codrington* (3) were referred to.

Sir *H. Davey*, Q.C., and Mr. *R. V. Doyne*, for the respondent Ardha, argued that he, if not entitled as having been validly adopted, was, at all events, designated in the will as the person to receive the testator's bequest. He had succeeded to one-half of the estate of his natural father before the will came into operation, and his title to that could not be divested by his taking afterwards under the will.

Mr. *H. Cowell*, for the respondents, Gobind Mohini and Bamasunderi, contended that the decree of the High Court should be upheld, as to the extent of the properties which were, respectively, joint and several; also, as to those properties which had been held subject to trusts for *deb-sheba*.

Afterwards, on the 5th March 1892, their Lordships' judgment was delivered by—

SIR R. COUCH.—The first three appellants in the first of these appeals—Bireswar Mukerji, Sureswar Mukerji, and Shib Pershad Banerji—are the grandsons of Jagat Chander Roy Chaudhri, who died on the 19th October 1869. He left two daughters—one, Hemangini, the mother of the first two grandsons, and the other, Ushamoyi, the mother of the third. The other two appellants are the daughters' husbands and guardians of their sons. The respondents, Ardha Chander and Shib Chander, are the sons of Radha Krishna, an uncle of Jagat Chander, who died in August 1865. The third respondent, Bamasunderi, is the widow of Tejas Chander, the son of Gopi Krishna, another uncle of Jagat Chander, and the respondent, Gobind Mohini, is the widow of Sri Krishna, another uncle. Pran Krishna, the father of Jagat Chander, Gopi Krishna, Radha Krishna, and Sri Krishna were four of the sons of Joygopal Roy, who died in 1826-27. He left three other sons who all died before Jagat Chander, and their shares in his property became vested in the four sons above named.

One of the suits, which are the subjects of the first of these appeals, was brought by Ardha Chander against Shib Chander

(1) I. L. R., 7 Mad., 548. (2) I. L. R., 6 All., 276.
(3) L. R., 7, H. L., Cas., 854.

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and the other persons who are parties to the appeal, and also against Kadambini, the widow of Jagat Chander, and Horendra his grand-daughter, the sister of Bireswar and Sureswar.

The plaint stated that Jagat Chander adopted the plaintiff Ardha Chander as his son in the year 1273 (April 1866 to April 1867) and made a will on the 13th Bhadro 1275 (27th August 1868) by which, after giving legacies and monthly stipends to some persons, he bequeathed all his remaining properties, moveable and immoveable, to the plaintiff. The plaint also stated that, as one of the sons of Radha Krishna, Ardha Chander was entitled to $\frac{8}{60}$th parts, and as devisee under Jagat Chander's will to $\frac{19}{60}$th parts, in all to $\frac{27}{60}$th parts of the joint estate, and it prayed that the will of Jagat Chander might be construed, and a declaration made as to what provisions in it are valid, and of the rights of the plaintiff and defendants in the estate left by Jagat Chander. It also prayed that the questions whether the plaintiff being the son of Radha Krishna was entitled to a moiety of the share of the estate left by him, and whether the plaintiff was the legally adopted son of Jagat Chander, might be determined. Other consequent declarations and directions were asked for, but they need not be stated. At the settlement of issues ten were recorded, but of these only the fourth and fifth have to be considered in this appeal. The fourth is, "Is it a fact that plaintiff is the legally *dattak* (adopted) son of Jagat Chander?" The fifth is, "Has plaintiff any interest under the will of Jagat Chander? If so, what is the nature of that interest?"

At the hearing before their Lordships the learned Counsel for Ardha Chander did not rely upon the adoption. It was contrary to Ardha Chander's interest to do so, as Shib Chander, his natural brother, in his written statement, alleged that Ardha Chander being the legally adopted son of Jagat Chander had no right and share in the estate left by his natural father, Radha Krishna. It was contended by Mr. *Arathoon*, who appeared for Shib Chander, that the adoption was valid, and this question had better be first determined.

The Subordinate Judge, after observing in his judgment upon the evidence of what took place before the death of Radha Krishna and afterwards when Jagat Chander performed a grand ceremony

of adoption, held that the adoption was invalid, on the ground that there was no giving and taking. The High Court on appeal, after also observing fully upon the evidence, came to the conclusion that there was no gift and acceptance in Radha Krishna's lifetime, and no giver, in a legal sense at any rate (his widow being mentally incapable), when the ceremony was performed. Their Lordships see no reason to depart from the ordinary rule where there are concurrent findings of fact, and therefore decide that there was no adoption.

Mr. *Arathoon* also contended that in this case Ardha Chander should be put to his election, relying on the following passage in Jagat Chander's will:—"And the share of annas 4-5-1-1 which the late Radha Krishna Roy Chaudhri had in the same way has been obtained by his son, Shib Chander Roy Chaudhri." This occurs in a paragraph of the will, in which the testator states the devolution of the property of his paternal grandfather. No case of election arises here. The testator had no power to dispose of Radha Krishna's share and did not intend to do so.

There remains the question of the effect of the will. Clause 4, which contains the bequest to Ardha Chander, begins: "Having no son, I loved and supported Ardha Chander Roy Chaudhri, the youngest son of the late Radha Krishna Roy Chaudhri, as my son. And as the said boy was very attached to me and my wife, and was an object of affection to us, I had a mind, granting to my daughters and daughters' sons a proper portion of my share of the ancestral property and self-acquired property, to give the remainder of the moveable and immoveable property to the said boy. Since then I have taken the said boy in adoption in virtue of the consent and gift of his father and mother, after getting the *vyavasthas* (opinions) of pundits, and on performing the ceremony of *jag* according to the Shastras." Here is a clear indication of his intention, before making an adoption, to give the greater portion of his property to Ardha Chander. He did not select him as being an adopted son, but for reasons independent of adoption, though they were likely to lead to it. The clause then continues: "Therefore the said dear boy, Ardha Chander, will be the heir to the whole of my moveable and immoveable property." It states the legal effect of the adoption, viz., that Ardha Chander

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would take the whole of his property, subject only to such duties of the maintenance of other persons as the law imposed. But this would not have been consistent with the testator's intention, and he proceeds to say:—"But I direct that, excepting the property granted by me as stated in paragraph 11 of this will, the said Sriman Ardha Chandra Roy Chaudhri, and after him his son, and after him his grandson, and on the death of the latter, his great-grandson shall obtain the proper share, ancestral, of my father, the late Pran Krishna, and the 4-anna share out of the proper share of my uncle, the late Sri Krishna Roy Chaudhri, obtained by me by gift under his will, and the self-acquired moveable and immoveable property of me and my father which will be left. If, through my misfortune, *the said boy* die without leaving a son, which God forbid, then I give permission to my wife, Kadumbini, that she may, for the purpose of providing for the presentation of funeral cakes and libations, take in adoption two sons in succession, one on the death of the other, from one of my paternal cousins who may have sons." And there is a direction that if no son be had of his paternal cousins, all his daughters' sons shall be in equal shares entitled to his paternal and self-acquired property.

It will be observed that he says, "the said boy die without leaving a son," not "said adopted son," or "my adopted son." The bequest is to Ardha Chander by name, and is not dependent upon the adoption. Both the lower Courts have so decided, and their Lordships are of opinion that their decision should be affirmed.

As to the second appeal, in which Shib Chander is the appellant, it was admitted by his learned Counsel that, so far as it relates to the share of Sri Krishna Roy Chaudhri, it could not be supported, and should be dismissed. The other questions in it are raised in the first appeal and decided by the above judgment. Their Lordships will therefore humbly advise Her Majesty to dismiss both appeals, and to affirm the decree of the High Court made in the appeals to it. The appellants will pay the costs of these appeals.

Appeals dismissed.

Solicitors for the appellants, Bireswar Mukerji and others: Messrs. *Barrow* and *Rogers*.

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Solicitor for the appellant, Shib Chander Roy Chaudhri: Mr. *S. G. Stevens.*

Solicitors for the respondent, Ardha Chander Roy Chaudhri: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents, Gobind Mohini and Bamasunderi Debi: Messrs. *Barrow* and *Rogers.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Tottenham, Mr. Justice Pigot, and Mr. Justice Ghose.

DULHIN GOLAB KOER (DEFENDANT No. 1) *v.* RADHA DULARI KOER (PLAINTIFF) AND OTHERS.*

1892. *March* 12.

Appeal—Order declaring the rights of parties to a partition in certain specific shares appealable before actual partition made—Civil Procedure Code (Act XIV of 1882), *ss.* 2, 396—*Partition suit.*

Held by the FULL BENCH (PRINSEP, J., doubting):—That an order in a suit for partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a decree in s. 2 of the Civil Procedure Code, and is therefore appealable as a decree.

THE question argued before the Full Bench was, whether or not, in a suit for partition by metes and bounds, an order declaring the rights of the parties to partition in certain specific shares is appealable before the partition has been made.

The order of the Referring Bench (PRINSEP and O'KINEALY, JJ.) was as follows:—

"A preliminary objection has been raised to the hearing of this appeal that the order appealed is not a final order within the

*Appeal from Original Decree No. 44 of 1891 against the decree of Babu Jodu Nath Das, Roy Bahadur, Second Subordinate Judge of zillah Tirhut, dated the 20th January 1891.