PRIVY COUNCIL.

MOHESH NARAIN MUNSHI (PLAINTIFF) *v.* TARUCK NATH MOITRA AND OTHERS (DEFENDANTS).

*P. C.** 1892 *November* 15 *and* 16.

[On appeal from the High Court at Calcutta.]

Limitation Act (IX of 1871), *sch. II, Art.* 129—*Suit questioning an adoption —Invalidity, by Hindu law, of second adoption.*

An adopted son, proprietor in possession of half of the estate of his adoptive father, deceased, sued to obtain the other half which was in the defendant's possession. The defence was that the latter was entitled to the half share in dispute, having been adopted to the deceased under a power given by him to his widow, and exercised by her.

Held, that the suit, having, in order to succeed, brought into question the second adoption, was a suit to set aside an adoption, within the meaning of Art. 129, schedule II, Act IX of 1871, the Limitation Act in force for a period after the cause of suit had arisen. *Jagadamba Chowdhrani* v. *Dakhina Mohan* (1) referred to and followed. With reference to the coming into operation of the subsequent Limitation Act XV of 1877, section 2 of the latter Act prevented the revival of any right to sue already barred by the previous Act, as the right now claimed had been. *Appasami Odayar* v. *Subramaniya Odayar* (2) referred to.

It was nevertheless clear that if this suit had not been barred, the second adoption could not have been held valid under Hindu law as an adoption; because, by that law, a second adoption cannot be made during the life of a son previously adopted. *Rungama* v. *Atchama* (3) referred to.

APPEAL from a decree (4th September 1889) reversing, so far as it was in favour of the plaintiff, a decree (14th June 1887) of the Subordinate Judge of Pabna and Bogra.

In this suit, brought on the 21st November 1885, the plaintiff sued as the adopted son of Shib Narain Munshi, a Brahman of Bogra, who died on the 30th November 1850, the adoption having taken place in 1848. Before that adoption, in 1844, Shib Narain

* *Present:* LORDS MACNAGHTEN and SHAND, SIR RICHARD COUCH and SIR EDWARD FRY.

(1) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.
(2) I. L. R., 12 Mad., 26; L. R., 15 I. A., 167.
(3) 4 Moo. I. A., 1.

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had executed an *anumatipatra* giving power to his two wives, Harosunderi and Tripura Sunderi, who were childless, to adopt. Under that power the latter acted in 1851 by adopting Taruck Nath Moitra, by the name of Girish Narain Munshi, the first and principal defendant in this suit.

The question now raised was whether the appellant, Mohesh Narain Munshi, who, as the adopted son by Shib Narain himself, had succeeded to a moiety of the estate of his adoptive father, was entitled to a decree for the other moiety, or whether the suit was barred under Art. 129 of schedule II, Act IX of 1871, more than twelve years having elapsed from the date of the adoption to that of the institution of the suit.

The clauses in the *anumatipatra* of 1844, which was addressed to the two co-wives, were the following:—

"If no son be born of either of you, then on my death each of you shall, according to this *anumatipatra* of mine, adopt five sons, that is to say, on the death of the first one a second, and on his death a third, and on his death a fourth, and on his death, up to a fifth; otherwise, as long as one adopted son is alive you shall not find fault with him for no reason and adopt a second son. If I die during the lifetime of my mother, then as long as she lives she will hold all the properties, moveable and immoveable, left by me, and maintain you both together with the adopted sons. You will not be able to hold possession yourselves without her consent. On her death you will yourselves hold the management and enjoy the proceeds for life, and both of you will get in equal shares also the moveable and immoveable properties which I may acquire hereafter, whether in my name or *benami*. You shall have no power to effect sale or gift, and as long as you live the adopted son shall not be able to dispossess you, or register their own names in lieu of your names in the sudder, or effect sale or gift. On your death they will themselves have the management."

In 1845 and in 1848 Shib Narain addressed to the Deputy Collector petitions, stating that he had given his adopted son to his elder wife, and referred to the *anumatipatra* as authorizing an adoption of a son to him by his younger wife, such son to be hers. After Shib Narain's death in 1850, his mother, Nobodurga, applied in a petition in which the widows joined for mutation of names by entry of theirs. But this was deferred, and meantime Tripura, the younger widow, adopted Taruck Nath on the 16th September 1851, the petition being afterwards renewed, with a statement of

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the fact of both the adoptions. Nobodurga died in 1854, and on 31st March 1855 the widows, describing themselves as mothers respectively of the two minor adopted sons, petitioned for a certificate under Act XX of 1841. This was granted by the District Judge to them as guardians of the two minors. Down to 1869 the widows lived jointly with the adopted sons as an undivided family. After that time the widows separated, each taking her son with her; and the income of the estate was divided and a moiety was paid to each and her son, separate collections being made till the death of Tripura in 1884. The plaintiff came of age about 1861 and the first defendant in 1862-63.

The plaint was filed against Taruck Nath and his children, and against the surviving widow, Haro Sunderi. It alleged that the adoption of the first defendant was invalid, and claimed the property left by Tripura, at whose death, on the 10th August 1884, the cause of action was stated to have occurred. The property sued for was divided into four schedules, the first comprising the estate in Shib Narain's possession at his death; the second, moveable property; the third, other moveables in the possession of the defendant; the fourth, estate acquired by Tripura after the death of her husband.

The first defendant in his written statement asserted his own adoption, relying on the continued recognition of himself as an adopted son. He claimed part of the property in suit as his own and part as the property of Tripura, which she had given to him by her will. He also relied on limitation under Art. 129 of schedule II of Act IX of 1871. The other defendants, except Harosunderi, who supported the plaint, and who died pending the suit, set up, in effect, the same defence. Much of the evidence was directed to establish the making of the two adoptions, matters not material to this report, for the first adoption was no longer disputed at the stage of this appeal, and the validity of the second could only come into question if the suit should be held not to be barred by limitation.

The Subordinate Judge's judgment was for the plaintiff as to the property in the first schedule of the plaint;—that was the property in land left by Shib Narain, which at his death came into the possession of Tripura. He dismissed the suit as to the

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property in the other schedules on the ground that the plaintiff had failed to show that it was the estate of Shib Narain. The reasons given were that the plaintiff had a good title as adopted son, while the defendant had no such title, he having been in effect only the nominal son of Tripura, and not a son legally adopted to Shib Narain. He held, upon the construction of the *anumatipatra* that it was testamentary, conferring life estates upon Shib Narain's mother and the widows in succession. The result was, in his opinion, that the plaintiff's right to the estate held by Tripura till her death in 1884 did not arise till that occurred, and that the plaintiff's suit was not barred by limitation.

Both parties appealed from this decision. The High Court (TOTTENHAM and GHOSE, JJ.) on the appeal of the defendant reversed, on the 4th September 1889, the decision of the original Court in favour of the plaintiff, and on the 25th February 1890 the same Bench dismissed the plaintiff's cross appeal, holding that the latter decision was governed by the former.

In their judgment the High Court arrived at a different conclusion from that of the original Court as to the effect of the *anumatipatra*. They considered that that document, if it stood alone, would have interposed life estates of the widows before the interests of the adopted sons arose. They thought, however, that this intention had been changed so early as June 1845, when Shib Narain's petition was presented to the Deputy Collector, and that the documents which were exchanged at the time of the plaintiff's adoption excluded the idea that his estate as heir to his father was to be postponed to that of the widows. The subsequent petition to the Collector in May 1848 did not revive the *anumatipatra* in its entirety, but merely repeated the authority it gave for a second adoption. That being so, the plaintiff's title accrued at the death of Shib Narain in 1850, and the adverse possession of Tripura and her son accrued at the latest in 1869, when the separation between the widows took place. The result was that the suit was barred by Article 141 of Act XV of 1877.

The Court also considered that long before the Act of 1877 came into force the suit had been barred by Article 129 of Act IX of 1871, inasmuch as the plaintiff could not have recovered

the whole property at any time after the second adoption in 1851 without setting it aside, and therefore, according to the decision in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1), the limitation of twelve years ran from the date of the adoption of the principal defendant by Tripura in 1852. The plaintiff's suit was accordingly held to be barred, so that no occasion arose for considering whether the adoption of the first and principal defendant was valid in law or not, a decision which in effect determined the result of the plaintiff's appeal as well as that of the defendant.

On this appeal preferred by the plaintiff,

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the appellant, argued that the judgment of the High Court had wrongly applied limitation. The suit was not barred as a suit for property that had been held adversely to the plaintiff for more than twelve years, nor was it barred under Art. 129 of schedule II of Act IX of 1871, by reason of the appellants not having sued "to set aside the adoption" of the defendant within twelve years from the time when it purported to have been made. Upon a right construction of the *anumatipatra* of 1844 followed by the acts of the parties, the High Court should have decided that estates vested in the mother and in the widows preceded the interests of the plaintiff and of the first defendant, in such a manner that the plaintiff was not entitled to bring this suit until after the death of Tripura in 1884. The directions in the *anumatipatra* that the widows should not be dispossessed, and that their management was not to be disturbed, had been carried out; and the result was that the plaintiff having sued within twelve years from the time when his right had accrued, was within time. This referred to the limitation imposed upon suits generally for the possession of property; and neither Art. 141 of schedule II of Act IX of 1871, nor Art. 140 of schedule II of Act XV of 1877, barred the present one. A double limitation had, however, been put forward; and besides the above, the special bar in suits involving the question of an adoption had been set up. Article 129 of schedule II of Act IX of 1871 on this point did not apply to this case. Article 118 of schedule II of Act XV of 1877, an amended law, related to suits for declaration of the invalidity of the adoption or that it had not

(1) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.

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in fact taken place and the distinction pointed out in *Basdeo* v. *Gopal* (1) should be referred to. This was that when the suit was for the possession of property to which a limitation, other than that of Art. 118 of schedule II of Act XV of 1877, was applicable, that other limitation might govern, although the question of the validity of the adoption might arise. *Jagadamba Chowdhrani* v. *Dakhina Mohun* (2) was not identical with the present case.

Sir *H. Davey*, *Q.C.*, and Mr. *J. D. Mayne* for the respondents, argued that the suit was barred by limitation under Art. 129, schedule II, Act IX of 1871. They referred to the judgment in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (2), and contended that the appeal involved only a repetition of the argument which did not prevail in that case. They also referred to *Appasami Odayar* v. *Subramaniar Odayar* (3) as showing that a suit, once barred, as this had been, under Act IX of 1871, could not be treated as falling within Act XV of 1877. Upon the alternative bar applicable to this as to other suits, without reference to the alleged adoption, they relied on the plaintiff's having been out of possession from the time when there was a separation of the members of the family in 1869, arguing that from 1873 onwards there had been, upon the facts, a possession adverse to the plaintiff.

Mr. *R. V. Doyne* replied.

Afterwards, on 10th December 1892, their Lordships' judgment was delivered by

LORD SHAND.—The plaintiff is in possession, as proprietor, of one moiety of the estate, moveable and immoveable, of the deceased Shib Narain, and in this suit he seeks to have it declared that he is entitled as proprietor to possession of the other moiety of that estate. The plaintiff's undisputed right to the half of the estate in his possession arises from the fact that Shib Narain, who died in 1850, had adopted him as his son in 1848. The principal defendant, Grish Narain (hereinafter referred to as the defendant), in possession of the other half of the estate, maintains his right to continue in possession, and to have the plaint dismissed on the

(1) I. L. R., 8 All., 644.
(2) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.
(3) I. L. R., 12 Mad., 26; L. R., 15 I. A., 167.

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ground (1) that he also is an adopted son of the late Shib Narain, having been adopted as such by Tripura Sunderi Debi, the second of two surviving wives of Shib Narain, who made the adoption by authority of her husband, alleged to have been conferred in a deed of *anumatipatra* granted by him in 1844, about six years before he died, and (2) that in any view the suit is barred by limitation on two separate and independent grounds, one being the defendant's possession of the property claimed for upwards of twelve years before the present suit was instituted, the other the lapse of twelve years after the defendant's adoption without any suit having been raised to set the adoption aside. The Subordinate Judge held that the suit was not barred by limitation on either of the grounds now stated, and gave a decree in favour of the plaintiff, but on appeal to the High Court this decree was reversed, and the suit was dismissed, the Court having held that the suit was barred by limitation on each of the separate grounds pleaded.

The validity of the plaintiff's adoption has not been disputed in this appeal. On the other hand it is clear that the adoption of the respondent was invalid, for it has been long settled, according to the Hindu law of adoption and succession, that a valid second adoption cannot be made when a son under a previous adoption is alive; *Rungana* v. *Atchama* (1). The plaintiff accordingly would be entitled to succeed, if his suit were not barred by limitation; and on the question of limitation the decision of the appeal depends.

Shib Narain was survived by his two wives, Harosunderi, to whom he had given the plaintiff as a son at the time of his adoption, and Tripura Sunderi, who, as already stated, after her husband's death, adopted the respondent. Tripura Sunderi survived till the year 1884, and in the following year 1885, the present suit was instituted, Harosunderi (who has since died) having been called as a "*pro formâ* defendant." The plaintiff's answer to the plea of limitation, in so far as founded on adverse possession, is that Tripura Sunderi and not the defendant was the person in possession of the moiety of the estate in dispute till her death, and that consequently until that event occurred, no

(1) 4 Moo. I. A., 1.

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cause of action for possession arose. The plaintiff, referring to the provisions of the *anumatipatra* by Shib Narain of 1844, alleges that it gave to each of his two widows a right to a life-rent of a moiety of his estates, and that, at least after the death of Shib Narain's mother (to whom the plaintiff maintains that a life-rent of the whole estates was given by the same deed, and who died four years after her son), Tripura Sunderi obtained and continued in possession of the moiety now in dispute till she died. In reply to this defence the defendant has maintained, first, that any life-rent right intended to be conferred by Shib Narain on his wives by the *anumatipatra* was conditional on his death without having adopted a son, and that as he afterwards adopted the plaintiff no such right of life-rent existed on his death. Again, it was maintained that at least the plaintiff's adoption, taken in connection with certain subsequent actings by his father, prevented the acquisition of any life-rent by his widows; and further that, in any view, in point of fact, neither of the widows were in possession or maintained a right to possession as for themselves. The defendant alleges that after Shib Narain's death, and after his adoption by Tripura Sunderi, possession was all along held by the plaintiff and defendant as adopted sons. He contends that their respective mothers, in so far as they acted, did so originally as guardians of their adopted sons, who were minors, and that such possession as the widows continued to have after the sons respectively came of age, was held on behalf of their sons as having the right of ownership of the estates.

Much of the argument on the appeal related to the points just mentioned, and involved a critical examination of the provisions of the *anumatipatra*, and the actings of the parties, particularly as bearing on the character of the alleged possession of the widows. Their Lordships have however come to the conclusion (without expressing any dissent from the view of the High Court that the suit is barred by adverse possession) that it is unnecessary to form any opinion on these questions, for their Lordships are satisfied that the defence of limitation has been clearly established on the other ground, viz., the long unchallenged adoption of the principal defendant, notwithstanding his assertion of the *status* and right of an adopted son, and his enjoyment, with the complete

knowledge of the plaintiff, of the advantages which that *status* gave him.

The Limitation Act of 1871, which applies to the time when the period of limitation was running in this case, required by Article 129 of the second schedule that any suit to set aside an adoption should be instituted twelve years from "the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father." The present is not a suit in which the plaintiff expressly asks for a decree to "set aside" the defendant's adoption, or to obtain a declaration that the "adoption was invalid," which would probably be a more apt expression to use. The plaintiff merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute. But this, in the circumstances, obviously involves the setting aside of the defendant's adoption, or in effect a judgment or finding by the Court that the adoption is invalid, for the defence of possession founded on the adoption directly involves the decision of the question,—was the adoption invalid? In the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1) which was very fully argued and carefully considered, it was settled that a suit to set aside an adoption within the meaning of these words in the Limitation Act need not be a suit having declaratory conclusions, but that any suit in which the decree prayed for involves the decision of the question of validity of an adoption set up in defence is a suit to set aside an adoption. It was there said: "It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

The present suit is, therefore, within the meaning of the Limitation Act of 1871, a suit "to set aside an adoption." The adoption was made by Tripura Sunderi, on the alleged authority of the *anumatipatra* by her husband in the year 1851, with all the usual ceremonies, and was duly reported to the Government

(1) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.

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Collector. Thereafter, on the 20th February 1852, it was ordered —on a petition by Nobodurga, the mother of Shib Narain, and his two widows in which it was stated that Nobodurga "together "with the said two sons" had taken possession of all the moveable and immoveable properties of the deceased—that the names of Nobodurga, of Harosunderi as mother of Mohesh Narain, minor, and of Tripura Sunderi as mother of Girish Narain, minor, should be registered in respect of the deceased's property. After the death of Nobodurga, the two widows, describing themselves as mothers of their respective minor sons, presented an application under Act XX of 1841 to obtain a certificate of title for the administration of their late husband's estate, which would enable them to sue all debtors to the estate. In this petition they stated that their two minor sons had got the right of inheritance in all the properties, moveable and immoveable, of the deceased, and that they, the petitioners, became entitled thereto as guardians on behalf of the said two minor sons, and were in possession on their behalf; and in 1855 a certificate was granted to them accordingly "as guardians of the said minors," under the authority of which they thereafter administered the estate. It need only be further stated that from the time of his adoption in 1851, the defendant lived with his mother, Tripura Sunderi, as the adopted son of her late husband, till she herself died in 1884, being for about 33 years; that down to 1869, a period of 18 years, the two widows and their adopted sons (the plaintiff and the defendant) lived in family together; and that even after that date down to 1880 the collections of rents and income of the deceased's estates were made jointly by the widows and divided in equal moieties, the widows having their respective sons in family with them. It is thus quite clear—apart from any question of possession, and whether the possession for so long a period of time as elapsed at Tripura Sunderi's death was truly the possession of her son, for whom she acted as guardian and after he attained majority as his manager, or was possession by herself in virtue of a right of life-rent conferred by her husband's *anumatipatra*, and in any view—that the right of the defendant to the *status* of an adopted son of Shib Narain was openly and constantly asserted, not only in all actings connected with the estates, but also in his daily life in family with

the plaintiff, who, indeed, in many ways acknowledged or acquiesced in the assertion of this right.

The plaintiff came of age in 1861-62, and the defendant in 1862-63. The period of twelve years after the defendant's adoption expired in 1863, and eight years more had elapsed when the Limitation Act of 1871 was passed. By section 1 of that statute, which received the assent of the Governor-General on the 24th March 1871, it was provided that the clauses of limitation should not come into force until the 1st April 1873. The plaintiff had thus upwards of two years after March 1871, within which he might have brought his suit to set aside the adoption, and had notice under the statute that the period of limitation of twelve years from the date of the adoption would be applicable on the expiry of that time. Accordingly, on the 1st April 1873, no such suit having been raised, the plaintiff's right of action was barred.

It was suggested that the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to, as necessary to save the limitation, being described as one "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.". It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage. But the statute of 1877, in its second section, provides as follows:—

"All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

It is clear that, on the 1st April 1873, the plaintiff's suit was barred by limitation under the Act of 1871, and the Act of 1877 could not revive the plaintiff's right so barred, a point which was indeed decided, in regard to the Limitation Acts of 1859 and 1871, in the case of *Appasami Odayar* v. *Subramanya Odayar* (1).

(1) I. L. R., 12 Mad., 26; L. R., 15 I. A., 167.

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Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the appellant will pay the costs of the appeal.

Appeal dismissed.

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

Solicitor for the respondents: Mr. *J. F. Watkins.*

C. B.

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*P. C.** 1892 *December* 6 *and* 16.

SURJA KANT ACHARYA (DEFENDANT) *v.* HEMANTA KUMARI (PLAINTIFF.)

[On appeal from the High Court at Calcutta.]

Right of Suit—Enhancement of rent, Suit for—Right of a Hindu widow to sue for enhancement of rent as representing the estate of the deceased zamindar or as guardian of a minor son adopted to him by her—Bengal Rent Act (Bengal Act VIII of 1869), ss. 31, 46, 47.

A Hindu widow, representing a zamindari interest in a *mahal*, sued for the rent upon a rent-paying tenure at an enhanced rate. She had, in former years, adopted a son to her deceased husband. The defendant objected throughout that this son (deceased in 1884) having been of full age in 1881 when this suit was brought, the widow was not entitled to sue at that time, he having that right;

Held, that the Courts below had rightly disallowed this objection. There was no sufficient evidence to show that the adopted son had attained majority when this suit was brought, and the plaintiff could sue either in her character as widow of the deceased, or as guardian of the minor adopted son.

To bring into operation the special limitation enacted in section 31 of Bengal Act VIII of 1869, where deposit had been made under section 46, the deposit could only have been effectively made of rent that had accrued due before the date of such deposit.

Two appeals, consolidated, from two decrees on one judgment (1st February 1869) of the High Court, affirming two decrees (28th February and 28th May 1887) of the Subordinate Judge of Mymensingh.

Both these suits related to the enhancement of the rent of a separate ten-annas portion of an ancestral tenure named Tarati, comprised within a ten-annas share of zamindari Pakhoria

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