APPELLATE CIVIL.

Before Adami and Sen, J.J.

RAJENDRA PRASAD BOSE

v.

GOPAL PRASAD BOSE.*

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June, 24, 25.

Evidence Act, 1872 (*Act I of* 1872), section 90—*proper custody—Hindu Law—adoption—power to widow to adopt subject to approval of another person— death of the latter—adoption subsequent to such death, validity of—Civil Procedure Code*, 1908 (*Act V of* 1908), *Order XLIV, rule 1—Pauper, grounds for granting application to appeal as.*

Where a Will and an *anumatipatra* were deposited by the father of the executant, a few days after the latter's death, with the Collector, together with an application praying that the Court of Wards should take over the estate left by the deceased, and the two documents were produced from the Collector's office 54 years afterwards, and filed, *held* that they had been produced from proper custody within the meaning of section 90 of the Evidence Act, 1872, and that the court was entitled to presume that they were genuine.

Semble, that were a Hindu confers power on his wife to adopt a son after his death, and the adoption is to be subject to the approval of a person who dies before the adoption is made, the power to adopt does not fail.

The language of Order XLIV, rule 1, of the Civil Procedure Code, 1908, being mandatory, an application for leave to appeal as a pauper should not be granted unless the court is satisfied that the decree sought to be appealed from is contrary to law, or to some usage having the force of law or is otherwise erroneous or unjust.

Application for leave to appeal in *formâ pauperis* by the plaintiffs.

This was an application for leave to appeal as paupers. There was an investigation of pauperism before the institution of the suit and at the investigation it was found by the Court below that the plaintiffs

* In the matter of Pauper Mis. Case no. 3 of 1923.

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came within the designation of paupers within the meaning of Order XXXIII, rule 1, and they were allowed to prosecute the suit as paupers. The Subordinate Judge held against the plaintiffs on all the material issues and against this decree they applied for leave to appeal as paupers.

S. C. Chatterji, for the applicants.

J. N. Bose (with him *G. C. Ray*), for the opposite party.

Cur. adv. vult.

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SEN, J. (after stating the facts set out above, proceeded as follows): The judgment was passed on the 6th August, 1923. In the ordinary course of things the application which was to have been made within thirty days from the date of the decree should have been made on the 5th of November, that is, the date of the opening of the High Court. But under a certain misapprehension the application could not be submitted before the 12th of November. There are therefore two points for consideration in this case. The first is whether the case satisfies the requirements of the proviso to Order XLIV, rule 1, of the Code of Civil Procedure, and, secondly, whether extension of time can be allowed under section 5 of the Limitation Act.

As regards the first point, it seems to us that we are entirely precluded from admitting the application unless we are satisfied that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. Those being the express words of the section, it seems to us that the direction is mandatory.

Three points have been urged by the learned Vakil for the applicants, Mr. *S. C. Chatterji*, in order to support his contention that the case satisfies the requirements of the proviso to rule 1 of Order XLIV.

Before I enter upon a consideration of those points, it is necessary to state in brief the nature of the suit and the points of contention between the parties.

The suit was instituted by the plaintiffs for the recovery of possession of extensive properties of the value of over two lakhs as reversioners upon the death of one Allahadini Dasi in September, 1920. One Ram Prasad Bose died on the 16th of February, 1869, leaving, as it is alleged by the defendants, a deed of *anumatipatra* duly executed as also a Will. He died rather suddenly on the day aforementioned having been stricken with cholera. It is said that as he was very anxious to see that his line was continued after his death, he took particular care to have a deed of *anumatipatra* executed on that date. After his death, on the 26th of February, his father Golak Prasad Bose, who had been in the interior of the district, hurried to Balasore, the place where his son had suddenly died, and obtained from an old and faithful servant of his son the deed of *anumatipatra* and the Will and on that date, namely, the 26th February, 1869, he deposited these two documents with the Collector of the district together with an application praying that the Court of Wards might take over charge of the whole of the estate. Thereupon, it is said, an order was passed by the Collector on that very day in the following terms :

"Two documents filed along with a petition; not to be given to anybody until further orders."

These two documents lay in the Collector's office all these years and it was after repeated applications by the defendants that they succeeded in obtaining a production of these documents from the Collector's office at the trial of the suit.

It was contended by the plaintiffs at the trial that both these documents were forged and fabricated, that in point of fact Ram Prasad Bose was too ill on that day to be able to execute them, that he had no sound disposing capacity, that no adoption ever took place in pursuance of the instrument of *anumatipatra*, and that the contention that the adopted son, and since his death his son the present defendant, had been in possession

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of the estate was entirely a myth, the person who had been in possession being Sreemati Allahadini Dasi the widow of Ram Prasad, deceased.

Mr. *Chatterji* has raised three points before us: the first is that the instrument of *anumatipatra* has not been produced from proper custody and, therefore, should not have been admitted as evidence under the provisions of section 90 of the Evidence Act. In support of this contention he cites the ruling in *Gudadhur Paul Chowdhry* v. *Bhyrub Chunder Bhattacharji* (1), where there is an observation that the mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of section 90. As a general proposition we have no doubt that it is perfectly correct but it depends upon the circumstances of each particular case. In the present instance we find that this document was submitted to the Magistrate and Collector with the express purpose that he might take the necessary steps in order to bring the estate under the management of the Court of Wards. It cannot be doubted that it is the Collector who is the person to be approached in the first instance for any such proceeding. The Collector records an order which on the face of it does not at all appear to throw any doubt upon the genuineness of the document. It is contended by Mr. *Chatterji* that the very fact that such an order was passed would show that the Collector doubted the genuineness of the document; but it seems to us that unless there is some evidence to that effect it is difficult to construe the order in that sense. In the above circumstances, the Court below was apparently entitled to accept the document, fifty-four years old, as presumably genuine under the provisions of section 90 of the Evidence Act.

The second point that is raised by Mr. *Chatterji* is that the *anumatipatra* is a forged document. Now there are two grounds that he advances in support of

(1) (1880) I. L. R. 5 Cal. 918.

this proposition. The first ground is that when a man is stricken down with a fell disease like cholera, it is impossible for him to think rationally or to act rationally, and that it would, therefore, be unnatural if not impossible for him to execute a document of this character.

Now it is clear that for a Hindu at the moment of his death to realize that there is no one who can continue his line after him, is a very strong incentive for making due provision for adoption, and although it cannot be doubted that cholera is a disease which would very greatly impede a person's action in a serious matter such as this, it is also important to remember that in the circumstances of this case it would not be at all unnatural or improbable that he would strain all his nerves and take all the necessary steps to continue his line. The instrument of *anumatipatra* runs as follows:

"In the present situation I find it absolutely necessary that some one should be taken as an adopted son or *snehaputra*, so I, of my free-will and in a sound state of mind, authorize you, my wife Allahadini Dasi, to adopt a son, that is to say, my father's youngest son nick-named Chemo should be adopted for enjoyment and possession of my following properties after my death. Should there be any legal bar to take him as an adopted son, in that case you are to make him a *snehaputra* otherwise (or else) you are to adopt some other boy according to your liking or choice but with the opinion (or approval) of my father."

From the terms of the *anumatipatra* it will be seen that there was an anxiety on his part to have a son adopted. There were, no doubt, certain restrictions laid down in the *anumatipatra* with which I shall have occasion to deal later with reference to another objection raised by Mr. *Chatterji*. We are not in a position to come to a conclusion that the determination of this point by the learned Subordinate Judge was wrong. We are inclined to think that there is nothing in the judgment of the learned Subordinate Judge, so far as it respects this issue, which can be open to the charge of being manifestly wrong or unjust. The learned Subordinate Judge has taken great pains to show that the charge of forgery has been, for the

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first time, seriously brought forward now. There was a suit in the year 1894 by Sananda Prasad, the full brother of the present plaintiff, and there is also a statement of plaintiff no. 2 Sananda Prasad, otherwise called Chemo, that he and his other full brothers really litigated their claim through Sananda in that suit That being so, it is very striking that in that suit there was no charge of forgery brought forward against this instrument of *anumatipatra*. Upon these and other considerations the learned Subordinate Judge, after having carefully surveyed the evidence, has come to the conclusion that he would not be justified in declaring the instrument of *anumatipatra* to be a forgery, and we do not think that we can take exception to that finding at this stage.

The last objection which the learned Vakil has put forward is that even conceding that the instrument was genuine, the actual adoption of Krishna Prasad Bose was not in accordance with the *anumatipatra*, and that, on the contrary, it was in direct violation of the terms of the *anumatipatra*.

The authority to adopt distinctly states that the plaintiff no. 2 known as Chemo should have the first chance of being adopted provided that there was nothing illegal in such adoption, and failing him some other boy according to the liking or choice of Allahadini Dasi might be adopted but with the opinion or approval of the father, Golak Prasad.

Now it so happened that Golak Prasad died four years after the death of Ram Prasad, that is to say, in 1873, and it was not till the year 1884 that the adoption took place. It is also proved in the case that Allahadini Dasi was a mere girl, a minor of tender years, at the time when Golak Prasad died. Subsequently she found that there were troubles with regard to the estate and there were conflicting claims set up by other parties and with a view to set at rest all these disputes she thought that she would exercise the power given to her under the instrument to adopt. At that

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time the condition which was laid down in the *anumati-patra* that the approval and the opinion of the father should be obtained was impossible of performance. The question is whether in the circumstances the power to adopt failed altogether. The learned Subordinate Judge has held to the contrary and he has given his reasons which appear to be quite cogent and we do not see any reason to dissent from his view, unless and until all the evidence is placed before us at the time of the hearing of the appeal.

All that we are concerned with at the present moment is whether on the face of them the judgment and decree are erroneous or unjust. We feel constrained to say that we are not in a position to take that view. If the appeal is heard as an ordinary appeal it will be for the Court, before which it comes, to form its own conclusions upon all the evidence placed before it. In the view that we take, the application must be dismissed on this ground, and, therefore, we do not think it necessary at all to deal with the other matter, namely, as to the extension of time under section 5 of the Limitation Act.

ADAMI, J.—I agree.

Application dismissed.

REFERENCE UNDER THE INCOME-TAX ACT. 1922.

Before Dawson Miller, C.J. and Foster, J.

SRI SRI RAJA SHIVA PRASAD SINGH

v.

THE CROWN.*

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June, 17, 18; July, 3.

Income-Tax Act, 1922 (Act XI of 1922), sections 4 and 66—Reference to High Court—duty of Commissioner to state the facts clearly—Salami, *royalty and rent, under a mining*

* Miscellaneous Judicial Case no. 66 of 1923.