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N.-W. RAILWAY ADMINISTRATION *v.* N.-W. RAILWAY UNION.

ADDISON J.

Federation, whatever that may be, while it is contained apparently in various *communiqués* and reports and not in any regular document. There should have been something more than that on the record before an injunction should have issued. It is not open to a Court frivolously and vexatiously to issue such a process without proper cause and due consideration.

Sufficient has been said to show that the temporary injunction dated the 10th of October, 1932, should not and could not be issued.

I, therefore, accept the appeal with costs and set aside the order of the Subordinate Judge dated the 10th October, 1932, issuing the temporary injunction.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Harrison and Addison JJ.

BAIJ NATH AND OTHERS (DEFENDANTS) Appellants

versus

RATTAN LAL (PLAINTIFF) Respondent.

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Nov. 16.

Civil Appeal No. 2793 of 1928.

Hindu Law—Adoption — by widow — validity of—when authority by the deceased husband has not been strictly complied with.

One Basheshar Nath left a will by which he appointed four executors namely: *P.L.*, *P.M.*, *M.C.* and *B.N.* Paragraph 5 of that will stated: "After my death the aforesaid executors shall be competent to choose a boy from a good family in the brotherhood and have him adopted by my wife on my behalf." The factum of the adoption of *R.L.* was established, the only question being whether the adoption was valid under the authority given by the will.

Held, that as the will gave power to the widow to adopt a son to her husband provided that the boy had been chosen from a good family in the brotherhood by the *executors* and

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as on the evidence only one executor *P.L.* gave express consent to the adoption of *R.L.* (and the others' consent was not proved) the adoption was invalid and against the authority of the deceased husband.

Chowdry Pudum Singh v. *Koer Ooday Singh* (1), *Rajendra Prasad Bose* v. *Gopal Prasad Sen* (2), and *Amrito Lal Dutt* v. *Surnomoye Dasi* (3), relied upon.

Bal Gangadhar Tilak v. *Shirinivas Pandit* (4), and Mulla's Hindu Law, 7th Edition, para. 454, referred to.

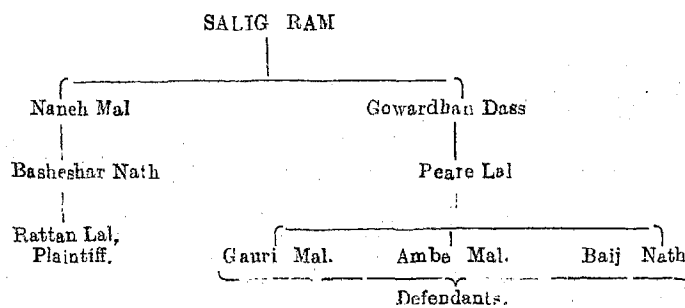
First Appeal from the decree of Lala *Munshi Ram, Subordinate Judge, 1st class, Delhi, dated the 5th November, 1928, decreeing the plaintiff's suit.*

KISHAN DAYAL, BISHAN NARAIN and BHAGWAT DAYAL, for Appellants.

NAWAL KISHORE, AJIT PARSHAD and MEHR CHAND MAHAJAN, for Respondent.

ADDISON J.

ADDISON J.—The following pedigree-table is necessary in order to understand the facts of this case :—



Basheshar Nath was the brother of the three defendants in the suit, *i.e.* Peare Lal was his father. He was, however, adopted by Naneh Mal, who separated from Peare Lal. This adoption was contested in the trial Court, but it was admitted before us that he

(1) (1869) 12 M. I. A. 350.
(2) (1931) I.L.R. 10 Pat. 187 (P.C.).
(3) (1900) I.L.R. 27 Cal. 996 (P.C.).
(4) (1915) I.L.R. 39 Bom. 441 (P.C.).

was duly adopted. The minor plaintiff Rattan Lal claims to be the adopted son of Basheshar Nath. He was found by the trial Judge to be the validly adopted son of Basheshar Nath and a preliminary decree was, therefore, granted him for partition of his half share in the suit property as well as for accounts. Against this decision the defendants have preferred this appeal.

The only questions argued before us in the appeal were the factum and the validity of the adoption of Rattan Lal by Basheshar Nath's widow. Basheshar Nath died of cholera on the 26th April 1909. He left a will dated the 25th April 1909, by which he appointed four executors, namely, Peare Lal, his natural father, Peshi Mal, Mul Chand and Bashambar Nath. In paragraph 5 of that will he stated as follows :—

After my death the aforesaid executors shall be competent to choose a boy from a good family in the brotherhood and have him adopted by my wife on my behalf.

In paragraph 5 of the plaint it is alleged that, according to the directions of Basheshar Nath contained in the will *Mussammat* Saraswati, his widow, adopted the plaintiff in 1911 while the ceremonies in connection with the adoption were also performed in 1913. In the pleas the allegations contained in paragraph 5 of the plaint were totally denied. Further, plaintiff's counsel stated before issues on the 3rd December, 1927, that the plaintiff was adopted in or about September 1911 by the widow. It is obvious that paragraph 5 of the plaint is badly worded; for it does not make clear how the plaintiff could have been adopted in 1911 and the ceremonies performed in 1913. In particular it is not stated when the all important

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ceremony of giving and taking was performed, *Balak Ram High School, Panipat* v. *Nanun Mal* (1).

The plaintiff's witnesses have deposed that Peare Lal brought Rattan Lal when an infant some ten months old from Matan and kept him in the house until the formal giving and taking took place some two years later. This, of course, means that there was no adoption in 1911, but that the adoption took place in 1913; for without giving and taking there can be no adoption. On the other hand, Peare Lal applied in the Court of the District Judge, Delhi, on 27th October, 1911, to be appointed the guardian of Rattan Lal, adopted son of Basheshar Nath. It was stated in this petition that the adoption was completed on the 25th September, 1911, a fact now admitted to be incorrect. This petition was not decided on the merits, but was allowed to be dismissed in default.

There are discrepancies in the statements of the witnesses as to who placed the child in the lap of Basheshar Nath's widow and on other points. But, in my opinion, the evidence is sufficient to establish that the plaintiff was taken to the joint house of Peare Lal and the widow of Basheshar Nath, when he was an infant and that the formal adoption, evidenced by the giving and taking, took place in 1913 in the presence of members of the brotherhood. I, therefore, hold the factum of the adoption proved and consider that the words about adoption in 1911 in paragraph 5 of the plaint must be freely construed to mean that the boy was brought to the house in 1911, while the formal adoption took place in 1913. This may also explain why Peare Lal did not pursue his petition to be appointed guardian of the child, but allowed it to be dismissed in default.

(1) (1930) I. L. R. 11 Lah. 503.

The much more difficult question of the validity of the adoption must now be decided. Three of the executors named in Basheshar Nath's will applied for probate of that will in the Court of the District Judge, Delhi. Peare Lal, the fourth executor, filed a caveat and resisted the grant of probate. He, however, added that if probate was granted it should be granted to him jointly with the three executors applying for probate. This was agreed to. After a strenuous contest the validity of the will was upheld and probate granted to all four executors on the 30th July, 1910. It is in evidence that after that the executors instituted suits, took accounts and prepared lists of property. Two of the executors Peshi Mal and Basheshar Nath (P. Ws. 13 and 14) have stated that afterwards they left the management of the estate to Peare Lal. Further, Peshi Mal has stated that he was present at the adoption of the child and that it was Peare Lal who, in accordance with the provisions of the will, brought the plaintiff from Matan and had him adopted by the widow. But there is nothing in his evidence to the effect that he was consulted in advance or that he agreed to the adoption of this boy, unless this can be presumed from his presence at the giving and taking. The other executor Bashamber Nath was not present at the adoption and has not stated that he was consulted about the choice of this boy or that he agreed to it. He too has clearly said that it was Peare Lal who chose the boy from the members of his own family. There is no evidence of any kind about the fourth executor, Mool Chand, and it is not known whether he was present, whether he was consulted before the adoption, whether he knew about it or whether he acquiesced in it. The other witnesses emphasize the fact that it was Peare Lal alone who had the boy

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adopted. Sundar Singh (P. W. 16) has said that Peare Lal brought him in order to be adopted by the widow, as the will directed Peare Lal and the widow, to make the adoption. Rangi Mal (P. W. 17) deposed that Peare Lal said that he had brought the boy. Panna Lal (P. W. 20) stated that the plaintiff was adopted, having been brought by Peare Lal according to the wishes of Basheshar Nath. Mini Mal (P. W. 21) said that Peare Lal brought a boy who was adopted. Even Sukhan Lal (P. W. 30), who is the father of the plaintiff, has deposed that it was Peare Lal who brought him for adoption and had him adopted by the widow. He too, makes no mention of the other executors.

Another very important fact in this connection is the will of *Mussammat* Saraswati, widow of Basheshar Nath, dated the 30th October, 1920, in which occur the following words :—

" After the death of my husband, I the testator, according to his instructions and with the consent of Peare Lal, my husband's uncle, have adopted Rattan Lal in the name of my husband."

There is no escape, therefore, from the conclusion that the only one of the executors who chose the boy and had him adopted by the widow was Peare Lal. Though the implied consent of one of the other executors, namely, Peshi Mal, may be deduced from his presence at the giving and taking, it is clear that he took no active part of any kind. As regards Mool Chand there is no evidence of implied or expressed consent and the same remark is true of Bashambar Nath whose own statement as a witness makes it clear that he had nothing to do with it.

It remains, therefore, to find out the meaning of paragraph 5 of Basheshar Nath's will. The words have been given above. In my judgment they give the widow power to adopt a son to Basheshar Nath provided that the boy has been chosen from a good family in the brotherhood by the executors. At the time of Basheshar Nath's death his wife was 15 or 16 years old and this restriction upon her power of adoption was obviously made in the interests of her husband so that a proper child should be adopted into the family. Some argument was addressed to us on behalf of the appellants that the power of adoption was given jointly to the executors and the widow, but I do not think that the clause bears that construction.

In *Chowdry Pudum Singh* v. *Koer Ooday Singh* (1) their Lordships of the Privy Council said that an authority conferred upon a widow to adopt by her husband must be strictly carried out as the adoption is for the benefit of the deceased husband and not for that of the widow. Their Lordships said the same thing in *Rajendra Prasad Bose* v. *Gopal Prasad Sen* (2). In that case the authority was to the widow to adopt with the permission of her deceased husband's father, who died before the adoption was made. After his death the widow adopted a son to her husband. It was held that she had no power to do so and that the adoption was invalid. In another case the authority was to the effect that the widow and two persons, who were made joint executors along with her, should adopt a son to the testator. It was held that this was not a valid authority as the authorization must be in favour of the widow alone, though her

(1) (1896) 12 M. I. A. 350. (2) (1931) I. L. R. 10 Pat. 187 (P.C.).

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power might be restricted by requiring the consent of the other executors. It was held that the authority would not bear the latter construction and the adoption was thus invalid—*Amrito Lal Dutt* v. *Surnomaye Dasi* (1).

This subject is also discussed in paragraph 454 of Mulla's Hindu Law, 7th edition. Another case which may be referred to is *Bal Gangadhar Tilak* v. *Shirinivas Pandit* (2). In that case five trustees were appointed by a Hindu testator who gave power to his widow to adopt a son with their consent and advice. One of the executors declined to act and probate of the will was taken out by the other four. It was held that the consent of the declining trustee was not necessary and that the adoption made with the consent of the other four trustees was valid. In the case before us all four executors took out probate while the consent of only one, namely, Peare Lal was taken to the adoption of the plaintiff. Even assuming that the presence of Peshi Mal at the ceremony of giving and taking is enough to prove his implied consent to the selection, it is clear that the other two executors who took out probate were not consulted and that the adoption was made by the widow with the express consent of Peare Lal alone. The will of the husband must be strictly construed as it was meant to restrict the widow's power of adoption. Under the authority of the husband the executors had to choose the boy and not Peare Lal alone. In fact, if it had not been for the appointment of the three other executors in the first instance, Peare Lal might have succeeded in getting the will shelved, as he strenuously contended during the probate proceedings that it had not been duly

(1) (1900) I.L.R. 27 Cal. 996 (P.C.). (2) (1915) I.L.R. 39 Bom. 441 (P.C.)

executed. This is not a case in which one of the executors did not take out probate as in *Bal Gangadhar Tilak* v. *Shirinivas Pandit* (1). All did so. All, therefore, had to concur in choosing the boy and this they did not do. It follows that the adoption was invalid and against the authority of the deceased husband.

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For the reasons given, I would accept the appeal and dismiss the suit. As the appellants have to give up their contention that Basheshar Nath was not validly adopted to Naneh Mal and as they have failed to disprove the factum of the plaintiff's adoption, I would leave the parties to bear their own costs throughout.

HARRISON J.—I agree.

HARRISON J.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

UMRAO SINGH (DEFENDANT) Appellant

versus

BALDEV SINGH (PLAINTIFF)
SUKH DEV SINGH (DEFENDANT) } Respondents.

1932

Nov. 22.

Civil Appeal No. 531 of 1932.

Hindu Law — Will — bequeathing absolute estate—to several minor sons—but restricting alienation and partition of it till youngest of them has attained majority—whether restriction is valid.

P, a Hindu, governed by the Mitakshara executed a will declaring that " the heirs to his property, both moveable and immoveable," were his three minor sons, and in a subsequent

(1) (1915) I. L. R. 39 Bam. 441 (P.C.).