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[965] APPELLATE CIVIL.

JOGESH CHANDRA BANERJEE *v.* NRITYAKALI DEBI.*

[21st, 26th May and 16th June, 1903.]

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Hindu Law—Adoption—Power of widow to give a son in adoption—Authority to give in adoption.

According to Hindu law, a widow, even in the absence of any authority from her deceased husband, is competent to give one of her sons in adoption.

Sri Balusu Gurulingaswami v. *Sri Balusu Rama Lakshmamma* (1), *Mahalsabai* v. *Vithoba Khandappa Gulve* (2), *Hurosoondree Dossee* v. *Chundermoney Dossee* (3) and *Tarini Charan Chowdhry* v. *Sarada Sundari Dasi* (4), referred to.

Rangubai v. *Bhagirthibai* (5) distinguished.

APPEAL by the plaintiff, Jogesh Chandra Banerjee.

This appeal arose out of an action brought by the plaintiff to recover possession of certain moveable and immoveable properties after having it declared that the defendant Kalikanta was not the legally adopted son of the plaintiff's maternal grandfather, Radha Krishna Ghosal; that the *sulehnama* dated 15th Chaitra 1284 B. S. (27th March 1878), and the decree of the High Court, dated 29th April 1878, were not binding upon him.

The plaintiff alleged that his maternal grandfather, Radha Krishna Ghosal, died in the month of Bhadra 1282 B. S. (August 1875), leaving him surviving as his heirs, his widow and his three daughters—Karunamayi Debi, Nrityakali Debi the plaintiff's mother, and Swarnomayi Debi, who was a childless widow when her father died; that the defendant No. 4, Kalikanta, was brought by Radha Krishna to his house, having purchased him at Calcutta; that the said defendant on the death of Radha Krishna took out a certificate under Act XXVII of 1870 to collect the debts due to [966] the estate by Radha Krishna: that thereupon his (the plaintiff's) mother, Nrityakali, brought a suit to nullify Kalikanta's claim as an adopted son of Radha Krishna, and obtained a decree on the 19th May 1877; that against that decree Kalikanta preferred an appeal to the High Court and made the plaintiff, who was a minor at that time, a party to that appeal under the guardianship of his mother; that his mother fraudulently in collusion with Kalikanta got the said appeal disposed of by a *sulehnama* dated the 15th Chaitra 1284 B. S. (27th March 1878); that he (the plaintiff) on attaining majority came to know that his mother, grandmother and his mother's sister had fraudulently sold different properties to the defendants; that the defendant Kalikanta was not the legally adopted son of his maternal grandfather, inasmuch as Kalikanta was bought and was brought to the family within one year of the death of his father, and at a time when there was none competent to give him in adoption.

The defence was that the *sulehnama* was binding upon the plaintiff; that the suit was barred as *res judicata*; and that Kalikanta Ghosal was

* Appeal from Original Decree No. 417 of 1900, against the decree of Upendra Nath Bose, Subordinate Judge of Dacca, dated July 23, 1900.

(1) (1899) I. L. R. 22 Mad. 398; L. R. 26 I. A. 113.
(2) (1862) 7 Bom. H. C. Appx. 26.
(3) (1863) Sev. Rep. 938.
(4) (1869) 3 B. L. R. (A. C.) 145; 11. W. R. 463.
(5) (1877) I. L. R. 2 Bom. 377.

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the legally adopted son of Radha Krishna Ghosal. It appeared that the *sulehnama* did not purport to have been sanctioned by the High Court on behalf of the minor.

The Court of first instance being of opinion that the *sulehnama* was binding upon the plaintiff, and that Kalikanta was the legally adopted son of Radha Krishna, dismissed the plaintiff's suit.

Babu *Harendra Narayan Mitter* for the appellant contended that the adoption of Kalikanta was invalid, inasmuch as his natural mother had no authority from his deceased natural father to give him in adoption. The following passage from Vasistha was referred to:—" Let a woman neither give nor receive a son in adoption except with her husband's permission;" and *Sri Balusu Gurulingaswami* v. *Sri Balusu Rama Lakshmamma* (1). The text of Vasistha being express and clear, the views of the authors of the Dattaka Mimansa and the Dattaka Chandrika, as deviating from such text, should not be accepted: see the remarks of the Judicial Committee in the case referred to above. The opinion of the **[967]** pundits accepted by the Sadar Dewany in the case of *Debee Dial* v. *Hur Hor Singh* (2) supports this contention: see also the remarks of Mr. Justice Markby in the case of *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (3). Jagganath also supports this view: see Colebrook's Digest, Vol. II, Book V, verse 272, p. 387.

Dr. *Ashutosh Mookerjee* (Babu *Govind Chunder Dey Roy* with him) for the respondent, contended that the question was concluded by the authorities against the appellant, and referred to the case of *Tarin Charan Chowdhry* v. *Saroda Sundari Dasi* (4), and also to Mayne's Hindu Law, 5th edition, para. 120, and G. C. Sarkar's Tagore Law Lectures (1888), p. 276.

Babu *Harendra Narayan Mitter* in reply.

Cur. adv. vult.

MACLEAN, C. J. This is a suit to set aside the decree of this Court dated the 29th of April 1873, as null and void as against the plaintiff; to have it declared that the defendant No. 4 was not the duly adopted son of one Radha Krishna Ghosal, for a declaration that the plaintiff is the sole heir of the latter, and for consequential relief.

Three questions arise for decision: (*i*) Is the above decree binding on the plaintiff, (*ii*) Whether in fact there was an adoption of defendant No. 4, (*iii*) Whether his mother could validly give him in adoption.

A short history of the case is this: Radha Krishna Ghosal died in September 1875, leaving a wife, one Janaki Debi, and three daughters—Karunamayi Debi, (defendant No. 1), Nrityakali Debi (defendant No. 2), whose son is the present plaintiff, and Swarnomayi Debi who was a childless widow and who is now dead. In 1876 the defendant No. 4 who was alleged to have been adopted by Radha Krishna in 1863, and claiming to be the adopted son of Radha Krishna Ghosal, applied for a certificate under the Succession Certificate Act, in relation to the **[968]** estate of his adoptive father and obtained it. On the 24th of July 1876, the daughter Nrityakali, defendant No. 2 in this suit, instituted a suit to set aside the adoption, and, in her plaint, she described herself as " Sreemati Nrityakali Debi, wife of Nabin Chandra Bandopadhya, mother and guardian of Jogesh Chandra Bandopadhya, the plaintiff." On the

(1) (1899) I. L. R. 22 Mad. 398; L. R. 26 I. A. 113.
(2) (1882) 4 S. D. R. 320.
(3) (1878) I. L. R. 3 Cal. 448, 451.
(4) (1869) 3 B. L. R. (A. C.) 145; 11 W. R. 468.

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19th of May 1877 a decree was made in that suit by the Second Subordinate Judge of Dacca, who set aside the adoption. In the judgment in that suit, it was held that the plaintiff was suing on her own behalf and not on behalf of the present plaintiff. There was an appeal to the High Court, and, on the 26th April 1878, the defendant No. 2 in the present suit presented a petition for herself, and as mother and guardian of the present plaintiff, for the compromise of the suit upon the terms which had been agreed upon by a *Sulehnamah* dated the 28th of March 1878. The petitioner asks that it might be declared, agreebly to the terms of the *Sulehnamah*, that the adoption of the defendant No. 4 was valid; and, under the compromise, the property of Radha Krishna Ghosal was divided between the defendant No. 4, the widow of Radha Krishna and his three daughters whom I have named, in certain shares. So far as the *Sulehnamah* goes, there is nothing to show that the defendant No. 2 was purporting to act for her son, the present plaintiff.

On the 29th of April 1878, a decree was made in the High Court in accordance with the terms of the Compromise, purporting to be a consent decree, and, under it, the defendant No. 4 was declared to be the adopted son of Radha Krishna Ghosal. In the Muktearnamah dated the 24th of Magh 1284, the defendant No. 2 does not purport to act for her son, the present plaintiff. At this time the father of the plaintiff was alive; and the mother was neither his natural nor his certificated guardian, and no order was made in the suit making the present plaintiff a party, and the compromise does not purport to have been sanctioned by the Court on his behalf. Under these circumstances the plaintiff contends that he was not a party to that suit; and that the compromise decree is not binding upon him. This contention must prevail. In any event the compromise was not sanctioned on his behalf by the Court.

[969] The next question is whether in point of fact there was an adoption. The adoption is alleged to have taken place in 1863, and Radha Krishna died in 1875, and, there can be no question that for the whole of that period, twelve or thirteen years, he acknowledged and treated the defendant No. 4 as his adopted son. The Court below has found in favour of the adoption.

It is urged for the plaintiff that there was no valid adoption because the requisite ceremonies were not performed. There is no doubt that Radha Krishna was anxious to adopt a son; that he went from the country to Calcutta for the purpose of finding a son for adoption if he could, and that he went back to the country with a boy, the defendant No. 4. It appears that the defendants Nos. 2 and 4 have parted with all the properties, they severally obtained under the compromise, and, that there is strong ground for suspecting that they are now making common cause with the plaintiff against the present defendants who are *bona fide* purchasers for value from them. There can be no doubt that in 1863 there was a public giving and taking in Calcutta; and, if the evidence of Krishna Dhone Chatali is to be believed,—and the Court below has believed him—and of Kali Krishna Chuckerbutty, there can be no doubt that the ceremonial rights in connection with the adoption were duly performed: and there can be no doubt that when the defendant No. 4 was married Radha Krishna treated him as his adopted son. The defendants who are *bona fide* purchasers for value under deeds, some of which are attested by the plaintiff himself, are in a difficulty, being strangers in proving the fact of the adoption. But upon the evidence I have referred to, a strong presumption arises in favour of the fact of

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the adoption, a presumption which to my mind, the plaintiff has not been able to rebut. As against the adoption it was urged that, by reason of the death of the natural father of the defendant No. 4 within one year from the date of the adoption, the boy adopted was in condition of *impurity* and therefore could not be validly adopted. But as to this, there is really no evidence to support this part of the case.

Then it was urged that the boy was really purchased by Radha Krishna, and, that he gave the mother Rs. 700 for him. [970] According to the evidence of the plaintiff's witness, Iswar Chandra Chakravarti, this was done openly. It is almost idle to suppose that this could have happened, and, that Radha Krishna who was anxious to adopt, should, at the same time openly, do an act which would invalidate the adoption. I do not think we can give any credence to this part of the case. There is no doubt that in connection with the adoption, a deed of gift was executed in January 1863; and, according to the evidence of Iswar Chandra Chakravarti, one of the plaintiff's witnesses, the deed of gift is in the possession of the defendant No. 2 the mother of the plaintiff. He says:—"I saw that deed of gift with Nrityakali. She has got the deed of gift with her." The defendants have put in an authenticated copy of this deed, but it is perhaps, questionable whether that was properly admissible in evidence. I think it is proved that there was a public giving and taking and that the defendants, witnesses, Kali Krishna Chakravarti and Nanda Kumar Ghosal, prove that the requisite ceremonies were duly performed. The letter from the plaintiff's father of the 1st of Assin 1282 (Exhibit A4) shows that he, at any rate, regarded the defendant No. 4 as adopted son of Radha Krishna. The fact of the adoption and that all the requisite ceremonies were performed has been substantiated by the evidence, which also shows that Radha Krishna throughout treated the defendant No. 4 as his adopted son, and that he was always so treated by relations and neighbours.

The last point is that the mother of the defendant No. 4 had no authority from her predeceased husband to give the defendant No. 4 in adoption to Radha Krishna, and that without such authority it was not open to her, according to Hindu Law, to do so. The boy was one of three sons. The deed of gift, had it been produced, might, perhaps, have thrown some light upon this question of authority, but, in its absence, there appears to be no evidence that any such authority was expressly given. But it is contended for the defendants, that, in the absence of any such direct authority it was competent for the mother, after the death of her husband, according to Hindu Law, to give one of her sons in adoption. It is laid down by text-writers of authority whose opinion is entitled to much consideration, that a wife [971] may give away her son in adoption after her husband's death, or when he is permanently absent, as for instance, an emigrant, or has entered a religious order, or has lost his reason, provided the husband was legally competent to give away his son, and has not expressly prohibited his being adopted (see Mayne's Hindu Law, 5th Edition, paragraph 120). There is no suggestion of prohibition in the present case. The same view is taken by a very learned author, Babu Golap Chandra Sarcar, in his Tagore Law Lectures of 1888, on the subject of "The Hindu Law of Adoption," p. 276. The weight of authority to be given to the views of recent text-writers has been considered by the Judicial Committee of the Privy Council in the case of *Sri Balusu*

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Gurulingaswami v. *Sri Balusu Ramalakshmamma* (1), at p. 427, and I only refer to the views of the writers I have mentioned subject to that criticism. In the Mitakshara, section 11, sub-section 9, it is stated: "He who is given by his mother with her husband's consent while her husband is absent [or incapable though present] or [without his assent] after her husband's decease . . . . becomes his given son." So Manu declares :—

"He is called a son given, whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress."

The disjunctive particle would appear to imply that after the husband's death the widow could give a son in adoption without his express authority. The decision in the case of *Mhalsabai* v. *Vithoba Khandappa Gulve* (2) supports this view, as also that in *Hurosoondree Dossee* v. *Chundermoney Dossee* (3).

The observations of the Court in the case of *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (4) may also be referred to. The case of *Rangubai* v. *Bhagirthibai* (5) dealt with the case of the giving in adoption by a wife, whilst her husband was alive, and without his assent, which is not the case we are [972] now considering. Referring for a moment to the authority of Dattaka Mimamsa, section 4, Articles 10-12, and to Dattaka Chandrika, section 10, Articles 31 to 32, the same view is expressed though, in referring to these authorites, their views, so far as they deviate from or add to the *Smritis*, are to be accepted with caution [see per Privy Council in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1). The appellant, however, lays great stress on the precepts of Vasishtha, which, according to the Judicial Committee of the Privy Council, in the case I have just cited, are beyond dispute, but the meaning of which is open to various interpretations which must be determined by ordinary processes of reasoning. The precepts are as follows :—

"(*i*) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause.

(*ii*) Therefore the father and the mother have power to give, to sell and to abandon their son.

(*iii*) But let him not give or receive in adoption an only son.

(*iv*) For he must remain to continue the line of ancestors.

(*v*) Let a woman neither give nor receive a son except with her husband's permission.

In the same case it was also held that the rule that a wife's power to adopt, or to give in adoption an only son, at least with the concurrence of the *Sapindas* in cases when that is required, is co-extensive with that of her husband, is most consistent with principle.

The appellant relies principally upon the precept :—" Let a woman neither give nor receive a son except with her husband's permission." But if the precept No. (*iii*) as to the adoption of an only son may be read as monitory and not mandatory, it is difficult to see why the precept, now under discussion, cannot be so read with the superadded reasoning that precept No. (*v*) may be reasonably interpreted as meaning that the giving in adoption by the wife is not to be effected without the husband's permission, if the situation be such that he can give such permission. If

(1) (1899) I. L. R. 22 Mad. 398; L. R. 26 I. A. 113.
(2) (1862) 7 Bom. H. C. Appx. 26.
(3) (1862) Sev. Rep. 938.
(4) (1869) 3 B. L. R. (A. C.) 145; 11 W. R. 468.
(5) (1877) I. L. R. 2 Bom. 377.

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he were dead, he could not give such permission, at the immediate date of the giving in adoption.

[973] In my opinion, the weight of the precepts and of the authorities is in favour of the view that the mother had power to give her son in adoption, and that the adoption was valid.

The appeal, therefore, fails and must be dismissed with costs.

GEIDT, J. I concur.

Appeal dismissed.

30 C. 973.

APPELLATE CIVIL.

JOGA KOER, *In re.** [15th May, 1903.]

Lunatic—Management of lunatic's estate—Custody of lunatic's person—Lunacy Act (XXXV of 1858) ss. 7, 9.

Under s. 9 of the Lunacy Act (XXXV of 1858) it is incumbent upon a District Judge to appoint a manager of the estate of a person adjudged to be of unsound mind.

If a lunatic be well taken care of by his own people at home, he should not be forced to go to a lunatic asylum, there being apparently no provision in the Lunacy Act authorizing a District Judge to send such a person to the asylum.

APPEAL by Musammat Joga Koer.

The appellant, the widow of Jaiwanti Sahu, applied to the District Judge of Arrah on the 1st March 1902 for the grant of a certificate of guardianship of her son, Rajendra Prosad Sahu, aged 32 years, on the ground that he had been imbecile for about two months. The property of the imbecile was worth about Rs. 31,993, and was within the jurisdiction of the District Court. The petition further stated that the property and person of the said imbecile had been under her management. A certificate from the Assistant Surgeon of Dumraon was filed with the petition, stating that the said Rajendra Prosad was of unsound mind.

On the 18th April, 1902, the District Judge ordered that the imbecile be sent to the Patna lunatic asylum, and added that upon this being done, the petition would be granted. Joga Koer, on the 25th April 1902, filed another petition stating that her son, Rajendra, was residing in his family house at Dumraon, and was [974] under the treatment of a doctor, and that under these circumstances it would be difficult to take him to the Patna lunatic asylum; that the zemindary being large and the mahajani business extensive, the estate would suffer for want of a certificate of guardianship, and she prayed that the order dated the 18th April be not carried out, but that a certificate of guardianship as well as the management of the lunatic's property be granted to her. She further stated in her petition that, if the Court so desired, she would produce the lunatic before it. On the 29th April 1902, the District Judge refused this application, and on the 15th May 1902 passed a further order as follows: "Orders not obeyed. Application refused."

From that order Joga Koer preferred this appeal.

Babu *Promatha Nath Sen* for the appellant.

GHOSE AND PRATT, JJ. This is an appeal against an order of the District Judge of Shahabad dismissing an application made by one

* Appeal from Order No. 248 of 1902, against the Order of H. R. H. Coxe, District Judge of Shahabad, dated May 15, 1902.

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Musammat Joga Koer, mother of Rajendra Prosad Sahu. This individual was described in the application presented by Joga Koer to be a lunatic, and the lady asked that she might be appointed guardian of the person and manager of the estate belonging to the lunatic under Act XXXV of 1858. The application was accompanied by a certificate from the Assistant Surgeon of Dumraon, stating that Rajendra Prosad Sahu was suffering from unsoundness of mind and was under his treatment, and that he was unfit to attend to his business. The District Judge apparently took it for granted that Rajendra Prosad was a lunatic, and expressed an opinion (that opinion being recorded on the 18th April 1902) that Rajendra Prosad being well off, his property should be devoted, first of all, to his welfare ; and he directed that the lunatic be sent to the Patna lunatic asylum, where he would be properly looked after, and perhaps cured. And the learned Judge added as follows :—" When this has been done this petition will be granted. Put this up on the 15th May if nothing further has been done by them." On the 25th April 1902, a petition was presented to the District Judge by Musammat Joga Koer, stating that Rajendra Prosad was residing in his family house at Dumraon **[975]** and had been put under the treatment of the medical officer there; that he was the only male member in the family, and that it would be difficult to take him to Patna and put him under medical treatment there, and further, that the zemindary being large and the mahajani business being extensive, the state would suffer for want of a certificate of guardianship; and she prayed that the order made by him (the District Judge, on the 18th April be not carried out, and that a certificate of guardianship be granted to her. She stated at the same time that she was willing to produce the lunatic before the Judge, if so required. On the 29th April 1902, the Judge recorded the following order :—" The petition to excuse the lunatic being sent to Patna put in—Refused,"—and this was followed by another order, which was on the 15th May 1902 :—" Orders not obeyed. Application refused." The result is that no manager in respect of the estate of the lunatic has been appointed, and the lunatic has been ordered to be sent to the lunatic asylum at Patna.

Section 9 of Act XXXV of 1858 runs as follows :—" When a person has been adjudged to be of unsound mind and incapable of managing his affairs, if the estate of such person or any part thereof consists of property which by the law in force in any Presidency subjects the proprietor if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorized to take charge of the same. In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a manager of the estate. Any near relative of the lunatic or the public curator, or if there be no public curator, any other suitable person, may be appointed manager." So that, if a person be adjudged to be of unsound mind, and incapable of managing his own affairs, it is incumbent upon the District Judge to appoint a manager of the estate belonging to such person. In the present case, the District Judge has simply passed the order that Rajendra Prosad Sahu, the lunatic, be sent to the Patna lunatic asylum. And he has refused the application made by the mother of the lunatic apparently without any consideration, whether it was incumbent upon him to appoint a manager to the estate belonging to the said lunatic. Referring to the order which he made on the 18th April 1902, it would appear that **[976]** the Judge meant to reserve the question of the appointment of a manager to the estate of the lunatic,

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pending the treatment which he desired the lunatic should be put under at the Patna lunatic asylum. For aught we know, the lunatic might have to be detained for the purpose of treatment for some years together; and we do not understand whether the learned Judge seriously meant that all this while the estate of the lunatic should be left uncared for, and without a manager.

We observe that the learned District Judge, although some evidence was produced before him as to the unsoundness of mind of Rajendra Prosad, has not determined whether that person is a lunatic, as he was bound to do under Act XXXV of 1858 (see section 7), and it is necessary that this should now be done.

Turning then to the question whether Rajendra Prosad should be sent to the lunatic asylum, we observe that there is apparently no provision in Act XXXV of 1858 authorizing a District Judge to send a person adjudged to be a lunatic to the lunatic asylum; but it is not necessary in the view that we take of the matter to express any decisive opinion upon the point at the present stage. Rajendra Prosad is evidently a man of means. According to the statements made by his mother, he has been residing at Patna with his family, and been under medical treatment there; and, if he is not absolutely violent, and may be well taken care of by his own people at Dumraon and can get proper medical treatment at that place, there is no reason why he should be forced to go to the lunatic asylum. We think that the District Judge should reconsider this matter before he makes up his mind to take the step which he intended to take by his order of the 18th April 1902.

We need hardly add that, in any event, it would be incumbent upon the District Judge, in view of the provisions of section 9 of Act XXXV of 1858, to appoint a manager to take charge of the estate of Rajendra Sahu, and he will now be required to appoint a person as manager. If the mother be a fit and proper person, we do not see why she should not be so appointed.

With these remarks the orders of the District Judge of the 18th April 1902 and 15th May 1902 will be set aside and the case sent back to him for reconsideration with reference to the [977] remarks which we have already made. The learned Judge is requested to take up this matter, if possible, out of turn.

Appeal allowed. Case remanded.

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30 C. 977 (=7 C. W. N. 878.)

APPELLATE CIVIL.

AMIRUDDI BEPARI *v.* BAHADOOR KHAN.*

[19th April, 1903.]

Notice of dishonour—Negotiable Instruments Act (XXVI of 1881), ss. 30, 93, 98—Hundi—Liability of drawer.

In order to make the drawer of a *hundi* liable in case of dishonour by the drawer or acceptor thereof, it is necessary for the plaintiff to show that due notice of dishonour was given to the drawer, or that he (the drawer) did not suffer any damage for want of such a notice.

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* Appeal from Appellate Decree No. 2155 of 1900 against the decree of Mohim Chunder Ghose, Subordinate Judge of Dacca, dated June 21, 1900, affirming the decree of Upendra Nath Dutt, Munsif of that District, dated January 26, 1900.