Before Mr. Justice Kemp and Mr. Justice Glover.

1874
March 23.

ESHAN KISHOR ACHARJEE CHOWDHRY AND ANOTHER (PLAINTIFFS) *v.* HARIS CHANDRA CHOWDHRY AND ANOTHER (DEFENDANTS).*

Hindu Law—Adoption—Contract to give Son in Consideration of an annual Allowance—Contract Act (IX of 1872), s. 23.

An adoption of a son after payment of price is not recognized in the present, the *Kali, Yuga*. The only adoption now recognized is that of the *dattáka* son, or son given. A contract to give a son in adoption, in consideration of an annual allowance to the natural parents, is void under s 23 of Act IX of 1872, inasmuch as the contract, if carried out, would involve an injury to the person and property of the adopted son, and would defeat the provisions of the Hindu law.

Baboos *Srinath Doss* and *Mohini Mohun Roy* for the appellants.

Mr. *Allen* and Baboos *Hem Chunder Banerjee* and *Kishen Doyal Roy* for the respondents.

THE facts and arguments in this case sufficiently appear from the judgment of the Court, which was delivered by

KEMP, J.—The plaintiffs are the appellants in this case. The suit is brought for specific performance of a contract termed a *nirbando patra*. The plaint sets forth that the plaintiffs gave their son to be adopted by the defendant No. 1, in consideration of receiving an annual allowance during their lives of Rs. 900. They allege that the defendant No. 1 sent his gomasta Harendro Narayan Chowdhry to them to negotiate for the adoption of the plaintiff's son, Binode Kishore Acharjee. Then that it was agreed that, in consideration of the plaintiffs giving their son, the aforesaid annual allowance should be made to them. It is then said that the draft of the agreement was partly drawn out, but that the defendant No. 1, being apprehensive that the adoption might be considered defective if any consideration was paid for the boy, it was agreed that the contract should be concluded after the ceremonies necessary to the said adoption according to Hindu law had been performed, and that the defendant No. 2 should be security for the money; and accordingly the defendant No. 2 gave the plaintiffs a *rokha* on plain paper, agreeing that if he failed to procure from the defendant No. 1, an agreement for a monthly allowance to the above effect, after the ceremonies of adoption were over, he would be answerable. The plaint goes on to say that, in reliance on the verbal promise of the defendant No. 2, the boy was given in adoption on the 10th of Paus 1278, and

* Regular appeal, No. 42 of 1873, against a decree of the Subordinate Judge of Zilla Mymensingh, dated the 6th December 1872.

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the ceremonies of adoption duly performed; but that, notwithstanding repeated demands for the agreement and the money due under it, the defendants have hitherto put off the plaintiffs under various pretexts, and that neither has the *nirbando pátra* been executed, nor the amount been paid. The suit is therefore brought on a valuation of Rs. 9,500, or Rs. 9,000, being 10 times the amount of the annual allowance, and Rs. 500, the amount of the said allowance for 6 months and 20 days from the 10th of Paus 1275, when the adoption was made to date of suit, the 30th of Asar 1279. The Subordinate Judge, Baboo Bidhu Bhusun Banerjee, has dismissed the plaintiffs' suit. He was of opinion that the plaintiffs well knew that the contract was an unfair and improper one, and one which they could not declare publicly until after the performance of the ceremonies necessary under the Hindu law to render the adoption valid. Then he says that the Hindu law clearly provides that, in the present age, the *Kali Yuga*, the adoption of sons given from disinterested motives alone is valid, and that the system of purchase which obtained in former times is no longer in vogue in the present age, and cannot be considered valid. But, irrespective of the restrictions of the Hindu law, the Subordinate Judge was further of opinion that such a contract was immoral and contrary to public policy as defined by s. 23, Act IX of 1872. He therefore dismissed the plaintiffs' suit. The plaintiffs appeal against this decision, and Baboo Srinath Doss, who appears for them, argues first that there is no text of Hindu law prohibiting persons from entering into contracts of this description; and secondly, that the Subordinate Judge was wrong in applying the provisions of Act IX of 1872 to a case of this sort, as it was not against public policy for a Hindu person to sell his son for the purposes of adoption.

We entirely concur in this case with the judgment of the Subordinate Judge. In former days, before the present *Kali Yuga*, there were twelve descriptions of sons, and the eighth description, we find in the Hindu law, was the son adopted after payment of price. Such an adoption, namely, after payment of price, is not recognized in the present *Yuga*, the *Kali Yuga*, the only adoption now recognized being that of the *dattaka* son, or son given, who alone can take the place of the *aurasa* son, or son of the loins. The son given, that is the *dattaka* son, is defined in the Dattaka Chandrika, s. 1, para. 12:—"He is called a son given, whom his father or mother affectionately gives as a son, being alike;" "alike" being explained to mean of the same class. Now it could not be said if this contract were carried out, that the boy has been affectionately given; a gift of course implies an act without consideration. Then, with reference to s. 23 of Act IX, we think that the principle of that section is applicable to this case, as this contract, if it were capable of being carried out and were recognized by the Court, would involve an injury to the person and property of the adopted son, inasmuch as if it could be proved that the boy was purchased, and not given, it is very probable that the adoption would be set aside, and if such adoption were set aside, he would not only lose his status in the family of his adopting father, but also lose his

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right of inheritance to his natural parents, and such a contract would therefore involve an injury to the person and property of the adopted son, and again such a contract, if permitted, would defeat the provisions of the Hindu law, and that is one of the restrictions laid down in s. 23, Act IX of 1872. In that section it is enacted that the consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature, that, if permitted, it would defeat the provisions of any law, and it is very clear in this case that, if the Court were to recognize a contract of this description, it would be defeating the provisions of the Hindu w therefore, concurring with the decision of the Subordinate Judge, we dimiss the appeal with costs. The defendant No. 2 will be entitled to separate costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Ainslie.

1874 Jan. 6.

GURUDAS RAI (JUDGMENT-DEBTOR) *v.* R. T. STEPHENS AND OTHERS (DECREE-HOLDERS).*

Execution of Decree—Mesne Profits—Costs—Interest.

THIS appeal arose out of an application made for the execution of a decree of the Privy Council, which declared that the decision of the High Court be reversed with a fixed sum for costs, and that the decision of the Principal Sudder Ameen be affirmed with costs. The suit was brought to recover certain property, and the decree of the lower Court was in favor of the plaintiff, but that decree was reversed by the High Court, and the defendant, now judgment-debtor, obtained possession of the property. On application for execution of the decree of the Privy Council the judgment-debtor objected that the decree did not in express terms award possession to the decree-holder, and that he was not entitled to *wasilat* during the time the judgment-debtor had been in possession; and that he was not entitled to interest on any costs of which interest had not been allowed by the Privy Council. The Judge was of opinion that the decree-holder was entitled to *wasilat* with interest thereon for the time the judgment-debtor was in possession, and that he was entitled to costs incurred by him in the Court of the Principal Sudder Ameen; but that the decree of the Privy Council being silent as to the costs in the High Court, the decree-holder was not entitled to anything on account of them.—

* Miscellaneous Regular Appeal, No. 296 of 1873, against an order of the Subordinate Judge of Zilla Jessore, dated the 31st of May 1873.