Appellate Jurisdiction.(a)

Regular Appeal No. 80 *of* 1872.

SHRI BROZO KISHORO PATO DEVU, adopted son of the late SHRI ADIKONDA DEVU, ZEMINDAR OF CHINNAKIMEDY, by his adoptive mother and guardian SHRI KUNDONO DEVI PATA MAHADEVI, widow of the said SHRI ADIKONDA DEVU....... *Appellant.*

SHRI VIRA SHRI VARADHI VIRAPRATAPA SHRI RAGHUNATHA ANANGA BHIMA DEVU Keshari Maharaza, Zemindar of Pratapagiri or Chinnakimedy...................... *Respondent.*

In a suit by an adopted son to recover the property of his adoptive father the plaintiff alleged that he was adopted by the widow in pursuance of a written authority given to her by her husband, and with the consent of the sapindas of the adoptive father. There were two sapindas, one of whom consented, but the defendant, the nearest sapinda, refused his consent. The District Judge, finding against the written authority, and being of opinion that the consent given was not sufficient to render the adoption valid, dismissed the suit.

Held, on Appeal, by the High Court, that the authority was sufficiently established by the evidence.

Held, also that the consent of one of the two sapindas was sufficient.

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THIS was a Regular Appeal against the decision of J. G. Thompson, the Civil Judge of Berhampore, in Original Suit No. 1 of 1871.

The suit was brought by the plaintiff to recover the Zemindary of Chinnakimedy and certain movable property. The plaintiff claimed as the adopted son of the lSh ateri Adikonda Devu, who died on the 23rd of December 1868. After his death his widow gave birth to a daughter, whereupon the Government recognised the defendant, the brother of the late Zemindar, as successor. The plaintiff alleged that he had been adopted on the 20th November 1870 by the widow in pursuance of a written authority given to her by her husband and with the consent of the relatives of the deceased.

The defendant denied that the adoption of the plaintiff was valid.

The late Zemindar left only two sapindas, the plaintiff's father and the defendant. It appeared that the plaintiff's

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father consented to the adoption, but the defendant refused to give his assent to the adoption of the plaintiff. There was evidence that the defendant was willing to consent if his own son were taken in adoption.

The District Judge dismissed the suit, finding against the written authority to adopt, and being of opinion that the consent of one of the sapindas was not sufficient to render the adoption valid.

The plaintiff appealed to the High Court against this decision as being wrong in law and contrary to the weight of evidence in that:—

I.—He should have found that the deceased Zemindar had given to his widow a written authority to adopt.

II.—In the absence of such authority, he should have found that there was a sufficient assent by sapindas, even though the defendant had never authorised any adoption.

III.—He should have found that the defendant had consented to an adoption by the widow, and that such consent was sufficient to give validity to the present adoption.

Mayne, for the appellant, the plaintiff.

Miller and *Ananda Charlu*, for the respondent, the defendant.

The judgment of the Court was delivered by

HOLLOWAY, J.:—Two questions have been argued. 1. Whether the Civil Judge was right in rejecting the evidence as to express authority. 2. Whether the assent of the Kimedy Rajah, the only sapinda, except the defendant, is insufficient to validate the adoption as the Judge has decided.

On the first question my impression is against the finding of the Civil Judge. I am by no means insensible to the weight of the arguments derivable from the sort of evidence adduced to the attestation and from the form of that attestation.

The substantial fact, however, remains that the Maharanee, a witness whom the Judge himself considers truthful, if believed, proves the case beyond all doubt. The Judge,

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I understand, for I do not feel very confident upon the matter, seems to have arrived at the conclusion that the signature is not that of the deceased Rajah. I confess to very great distrust of this sort of comparison of signatures, even in the hands of a Chabot, where the human hand is the instrument creating the impression. Where the genuineness of a seal is in question such comparison may be and has before been applied by the Civil Judge with very great advantage. I cannot agree with Mr. Mayne's argument that it was not open to the Civil Judge to find in favor of the defendant upon grounds other than those upon which he put his case. Undoubtedly however the fact that the defendant undertook to shew how the genuine signature of the deceased came to be attached to this document is a circumstance of some weight against the conclusion of the Civil Judge, for it shows that persons well acquainted with the habits of the people did not consider the mode of attestation so improbable as the argument before us treated it. The views of the people of this country as to attestation are very peculiar, and it frequently, even in honest transactions, means no more than that the persons signing are acquainted with the truth of the matter. Then the case comes to trial and with the knowledge that in the last resort the matter will be considered on English principles, the witnesses profess to have been eye-witnesses of what they never saw. Bound to decide according to what I believe to be the truth, I should by no means consider this transaction proved false, because I come to the conclusion that those, whose signatures are attached, were not eye-witnesses. I confess my belief to be that this written authorisation was given by the deceased. The terms on which he lived for thirty-three years with his brother and the affection admittedly felt for his wife are strongly in favor of such an arrangement.

On the second point, however, I am of opinion that under the doctrine of the Ramnad case, this adoption is perfectly valid. I will only refer to that judgment, necessarily tedious from my being compelled to work out a subject with

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which I was not acquainted. I am unable to see that the doctrine of that case is touched by the judgment of the Judicial Committee. They assent to the proposition that the question of property is wholly out of the case and only suggest that, perhaps, persons living in coparcenery might have a right to object to the introduction of another coparcener. Whether this is so or not, it has no application to the present case, in which the property is to be held in severalty and not in coparcenery.

To rule that the assent must always be insufficient unless the nearest sapinda agrees, would be to render the right altogether illusory, for that nearest sapinda is a person whose succession will be intercepted by the adoption. The meaning of the law is simply to supply the widow's supposed incapacity for action. I will suppose, merely for the sake of argument, that the purity or impurity of the intention can, on the principles of Hindu Law, have any influence, and testing the matter in that view it is impossible not to be struck by the consideration that the deceased husband, if he could have had a voice in the matter, would strenuously have objected to the succession of a man from whom he had received in a long course of years nothing but injury and insult upon the most tender point, the purity of his caste. If his presumed wish could have any influence, none can doubt what that wish would have been. As to the specific object, it cannot be doubted that the son of a man of rank and of his only near relative with whom he was on terms of friendship would have been considered appropriate.

In this point of view it would not be unimportant to see that the propriety of an adoption was admitted by the defendant himself and a reward promised (E.E.) to the man who should procure the adoption of his son. We have, therefore, both the sapindas agreeing in the propriety of the adoption, and the question is therefore narrowed to the question of whether the assent of one of them to the specific object is enough. No attempt has been made even to suggest that choice, if there was power to make it, was otherwise than wise. If regard for the husband's feelings were to have

any influence upon the choice, there would again have been obvious disrespect to his memory in the choice of the defendant's nominee, and there would be strong ground for saying that the opposition of the defendant dictated by self-interest ought not to prevail.

I have no doubt however that all these arguments from the intention of the agents are wholly beside the question in Hindu law. I have stated at great length the grounds upon which I come to this conclusion at Volume VI, p. 337 of the Reports of this Court. As that case will eventually be heard by the same tribunal as the present, I shall not repeat those arguments here.

The great lawyer whose views are there embodied was the by no means unequal adversary of Savigny.

I am unwilling to refer to a judgment for which I am responsible, but, after nine years' further consideration and examination, I continue of opinion that the judgment in the Ramnad case with many crudities and notably in its importation of questions of intention into a law upon which they have no bearing, is substantially sound, and that in all essential points it was confirmed by the Judicial Committee. I adhere to its substance, and I consider the following propositions unquestionable :—

1. The adoption by the widow with the assent of a sapinda is a substitute for the actual begetting by a sapinda.

2. That the argument from analogy is in favour of the assent of one sapinda rather than of more.

3. That his assent is not to supply a capacity for rights but a capacity for action.

4. That proximity to the deceased with respect to rights of property is wholly beside the question, and that if this were not so the rule would be entirely defeated.

5. That in the present case that capacity has been sufficiently supplied, as, in the law which this assent of sapindas has superseded, a child begotten by this assenting sapinda would have been undoubtedly legitimate.

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An attempt was made to show that in the place from which this case comes the rule of the special Bengal treatises and not that of the general law prevails. This argument was never put forward in the Lower Court, and so far as I can see from the authorities within my reach it is wholly unfounded.

There was no argument as to the mesne profits, the amount of which was, I believe, admitted, and the decree will be, reversing that of the Court below, for the return of the Zemindary to the adopted son with mesne profits from the date of suit.

KINDERSLEY, J. :—I agree to this judgment but would disallow interest on the jewels and money.

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Regular Appeals, Nos. 95 *and* 123 *of* 1872.

NALLATHAMBI BATTAR. *Appellant in No.* 95.

NELLAKUMARA PILLAI. { *Respondent in No.* 95 *and Appellant in No.* 123.

NALLATHAMBI BATTAR and another............ } *Respondents in No.* 123.

The suit was brought by the trustees of certain pagodas for the recovery of six villages from the defendant, on behalf of the pagodas, and to declare a copper sannad, purporting to be an ancient grant on which defendant based his title, a forgery. The District Judge considered that the evidence sufficiently established that the title to the villages was in the temples and not in the defendant, but he was also of opinion that as defendant had been lawfully placed in management by the Board of Revenue in 1858 he was entitled to hold the villages for life. He therefore declared plaintiff's reversionary title as trustee of the temples on the death of the defendant.

Defendant appealed from this decision as to the title and plaintiff appealed as to the part of the decree which refused him immediate possession of the property. *Held* by INNES, J. that the title to manage must reside in the pagoda if it did not reside in the defendant, that the evidence abundantly negatived the title of the defendant, and that plaintiff was entitled to possess and manage the property as trustee of the temples. Upon the question whether plaintiff was precluded from recovering during the life-time of defendant, by reason of the order of

(a) Present :—Innes and Kindersley, JJ.