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PRIVY COUNCIL.

HURRI BHUSAN MUKERJI (DEFENDANT) *v.* UPENDRA LAL MUKERJI AND OTHERS (PLAINTIFFS).

P C.*
1895
Nov. 13.

1896
May 20.

[On appeal from the High Court at Calcutta.]

Limitation Act (XV of 1877), Schedule II, Articles 92, 93 and 118—Suit to set aside adoption—Concurrent findings upon an issue of fact—Privy Council, Practice of—Admission on appeal of evidence rejected by lower Court.

The merits of a claim depended upon the authenticity of an *anumati patro* (a deed of permission to adopt) alleged to have been given to a widow by her husband, who died in 1832. She first adopted in 1884 a boy who soon after died. She then, in 1887, adopted the appellant, whose adoption the reversionary heirs of her husband brought this suit, in 1888, to have set aside.

Held that neither Article 92, nor Article 93, of Schedule II of the Limitation Act, XV of 1877, was applicable to bar the suit. There had been no "issue" of the instrument, the *anumati patro*, within the meaning of the former Article, the term "issue" having no application to such a document. There had not, within the meaning of Article 93, before this suit, been any attempt to enforce the instrument against the plaintiffs.

Article 118, as the suit had been brought within due time after the adoption, did not bar it.

The first Court found that the instrument was not genuine. The High Court, on appeal, upheld this finding, but had considered relevant, and had admitted in evidence documents rejected by the first Court when tendered by the appellant. This reception of evidence afforded no reason for making

* *Present:* LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR R. COUCH.

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the case an exception to the application of the r
Committee, against the disturbance of concurr
issue below.

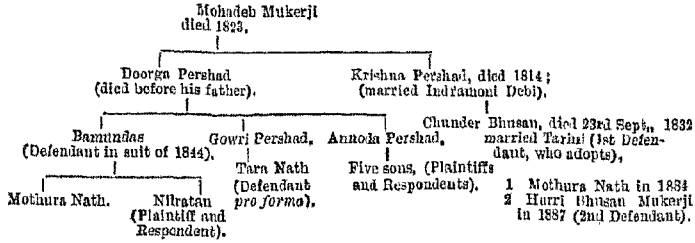
APPEAL from a decree (July 14th, 18
affirming a decree (July 22nd, 1889) of
of Nuddea.

The suit out of which this appeal arose was
29th September 1888 by the reversionary heirs
Hindu proprietor, Chunder Bhusan Mukerji, w
29th September 1832, leaving a widow, Tarini,
fendant. The plaintiffs claimed to have her ad
second defendant, Hurri Bhusan Mukerji, set aside, on
that Chunder Bhusan had given no authority to t
to adopt a son to him ; and they alleged that an *anu*
represented by her to have been executed by him on
September 1832 was a fabricated document. The Co
had concurred in finding that Chunder Bhusan M
not, in fact, executed it. And the principal questio
appeal were, first, whether it should not be dealt w
appeal in which the practice of not disturbing c
decisions on fact might be disregarded, because the Hi
had accepted as relevant evidence certain documents
first Court had rejected ; secondly, whether the suit was
not, barred by time.

In 1832 Tarini, being then very young, was not
her husband's house at Birnaghar, Ranaghat, and was n
when he died there; but was living with her father
family, the Roys, at Santipore. Under the alleged *anum*
she adopted no son until 1884 ; but a son, adopted b
that year, having died soon after, the adoption now in disp
made by her in 1887.

The plaintiffs were the respondent, Upendra Lal M
and his minor brothers, of whom he was the next frie
the record ; and another plaintiff was Nilratan Muke
cousin. The first defendant, Tarini, died pending this a
and the second defendant, Hurri Bhusan, the adopted
was then represented by a guardian *ad litem*, Girendra
Mukerji.

The relationship of the parties appears in the following table :—



After the death of Chunder Bhusan his estate, previously managed by Bamundas, continued under the same management. Bamundas then alleged that his son, Mathura Nath, had been adopted by Chunder Bhusan in his lifetime, and that the latter had also left a Will, by which he appointed Indramoni to be guardian of this said adopted son, and Bamundas himself to be manager during the boy's minority. In 1844 this was disputed by Tarini. In that year, with the assistance of her brothers, she sued Bamundas to recover possession of the properties which had belonged to her husband, denying in her suit that any such adoption or Will had been made by Chunder Bhusan, and she was successful up to the Privy Council : see *Bamun Doss Mookerjee* v. *Tarinee* (1). In that suit Tarini alleged that her husband on the day of his death had given her a written power to adopt, *anumati patro*. It did not appear, however, to the High Court, as stated in their judgment in this suit, that any such power was produced at that time.

In this suit Tarini, by her written answer, alleged that the *anumati patro* was a genuine instrument, and also defended on the ground that the plaintiffs had not, at this distance of time since its execution, any right to obtain a declaration that it was false, or to have the adoption of Hurri Bhusan set aside as unauthorized. The first and second issues, the only issues material to this report, question both these propositions.

The Subordinate Judge held that Articles 91, 92, and 93 were inapplicable to the present suit.

The suit was not one to have it declared that an instrument "issued" was a forgery. The authority to adopt, now in question,

(1) 7 Moo . A., 169.

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had never been "issued" before the present suit, nor had the defendant, in the Judge's opinion, ever attempted to enforce it against the plaintiffs in the sense of Article 93. The six years provided in Article 118 had not elapsed.

As to the second issue, the Subordinate Judge held that the burden of proof was on the plaintiffs according to a decision in the case of *Brojo Kishoree Dossee* v. *Sreenath Bose* (1). He found (after excluding several documents, tendered by the defendants, as not admissible in evidence, which were afterwards admitted by the High Court without having the effect altering the result at which both Courts arrived) that Chu Bhusan, the husband of the first defendant, had not given any authority to adopt a son to him.

The High Court (PETHERAM, C. J., and BEVI missed an appeal by the defendants. An applicatic them, while the appeal was pending, for the admis documents which the Subordinate Judge had rejec was a certified official copy of a petition purportin from Indramoni, mother of Chunder Bhusan, Magistrate of the District of her son's death, and st had executed an *anumati patro*. The copy had been in her suit of 1844. It was admitted as an assertio relevant fact within sections 9 and 11 of the Indian 1872. But the High Court did not accept as true as to the execution of the *anumati patro*, or consi that it was the statement of Indramoni.

The next document was a copy of statements sai made on an enquiry conducted by the Nazir of Court in 1833, as to who were the heirs of Chund document which had also been filed in the suit corroborate oral testimony this was admitted under the Evidence Act ; but no weight was attached to same result copies of two depositions of deceased pe 1833, were admitted.

The High Court, having examined the evidence as well as that which they admitted themselves, ca decision of the first Court that Chunder Bhusan had not executed

(1) 9 W. R., 463.

any *anumati patro* in favour of his wife. They also referred to an allegation made by Tarini that a verbal authority had been given to her by her husband some months before his death. In her written statement this had not been alleged, and no issue had been framed with regard to this point. Their finding was that neither a verbal, nor a written, authority to adopt had been given by Chunder Bhusan to his wife. With the question of limitation the High Court did not deal in their judgment, though it was raised by the memorandum of appeal.

Mr. *M. Crackanthorpe, Q. C.*, and Mr. *R. V. Doyne*, for the appellant, argued that the High Court's having disposed of the question, whether the power to adopt had been in fact given by the husband to his wife in 1832, on evidence, different, by reason of the documentary evidence admitted on the appeal, from that on which the judgment of the first Court had proceeded, should be thus regarded. It should render inapplicable the usual non-interference with the decision on fact of two Courts in concurrence; of which rule, the application was entirely within the discretion of this Committee not taking effect where reasonable doubt existed as to the correctness of that decision. [LORD MACNAGHTEN referred to *Ram Lal* v. *Mehdi Husain* (1)]. There were certain points in the evidence to which reference was made, tending to show that the judgments below could not be sustained. On the evidence taken altogether the right of the widow to adopt under the *anumati patro* of 1832 should have been maintained. It was also contended that under Articles 91, 92, and 93 of Schedule II, Act XV of 1877, the suit to have the *anumati patro* declared to be false was barred by time.

Mr. *H. M. Bompas*, Q. C., Mr. *J. D. Mayne*, and Mr. *J. H. A. Branson*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

LORD MORRIS.—The plaintiffs in this suit, who are respondents in the appeal, make claim as reversionary heirs of Chunder Bhusan, who died in the year 1832. The defendants are his widow, who became his heir, and Hurri Bhusan Mukerji, whom the widow adopted in the year 1887. The substantial object of the suit is to dispute the adoption, on the ground that

(1) I. L.R., 17 Calc., 882; L. R. 17 I. A., 76.

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no authority to adopt was given by Chunder Bhusan to his widow. The widow has died pending the appeal which is now prosecuted on behalf of Hurri Bhusan.

Soon after her husband's death the widow, or her friends, for she was then a girl of 13, asserted the existence of a written power to adopt, and she has at intervals renewed the assertion. But the instrument was never until the present suit produced in Court, though there had been previous hostility and litigation between the widow and the reversionary heirs. No action was taken on it till the year 1884 when the widow adopted a boy. That boy died, and the present appellant was adopted four years afterwards. On these facts and on the oral evidence the Subordinate Judge decided that the instrument relied on was not genuine, and that the widow had no authority to adopt. On appeal the High Court took the same view.

It appears that the Subordinate Judge rejected certain documents produced from the Courts of the Magistrate and the Collector, which the defendants tendered for the purpose of corroborating their oral evidence. The High Court admitted those documents. There was no dispute as to their construction; the only question was how far they added to the weight of the defendant's evidence, and the High Court thought they added very little. It is now contended that because the High Court had before it materials which the Subordinate Judge had not, the case ought not to be treated as one in which there are concurrent decisions on facts. It would, however, be a strange thing if concurrent decisions were to have a less conclusive effect where the evidence in the first Appellate Court has been added to entirely in the interest of the appellant than they would have if his evidence had remained untouched. Their Lordships, indeed, have heard nothing inducing them to think that they would come to any different conclusion if the facts were all re-examined, but they are quite clear that there is no ground for making the case an exception to the valuable rule against disturbance of concurrent decisions.

The remaining question is whether the suit has been brought in proper time. The material dates are the first adoption in 1884,

the second adoption in 1887, and the commencement of the suit in 1888.

The Subordinate Judge carefully discussed the plea of limitation and overruled it. The defendants appealed on this point among others, but it can hardly have been pressed, for the learned Judges of the High Court do not notice it in their judgment, and they say that the only question before them is whether the widow had power to adopt.

The Limitation Act of 1877 contains two Articles specifically relating to suits for attacking and supporting adoption, respectively. No. 118 enacts of a suit to obtain a declaration that an alleged adoption is invalid, that it shall be dismissed if brought after six years from the time when the alleged adoption becomes known to the plaintiff. This suit, therefore, even if it were affected by the adoption of 1884, would not be barred by Article 118.

It is, however, argued that the principle of the Limitation Act is not to enable suits to be brought within certain periods, but to forbid them being brought after periods, each of which starts from some defined event, and that more than one Article may apply to the same suit. So a plaintiff impugning an adoption may find himself impeded by other events, *e. g.*, a legal proceeding protected by a shorter term of prescription. And in this case it has been urged at the bar that there are two other Articles, *viz.*, 92 and 93, which compel the dismissal of the suit.

By Article 92 a suit to declare the forgery of an instrument issued or registered must be dismissed if brought after three years from the time when the issue or registration becomes known to the plaintiff. Assuming, in the defendant's favour, that this suit is one to declare forgery, is the instrument one of the kind indicated by the Article? It was not registered, but, as argued for the appellant, it was issued when the adoption of 1884 was effected with full publicity. Their Lordships think it sufficient to say on this point that in their opinion the word "issued" is intended to refer to the kinds of documents to which people commonly apply that term in business; and that it has no application to an instrument such as a power to adopt.

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By Article 93 a suit to declare the forgery of an instrument attempted to be enforced against the plaintiff must be dismissed if brought after three years from the date of the attempt. It is contended that the adoption of 1884 was such an attempt. It is, however, as the Subordinate Judge points out, very difficult to say that an adoption followed by nothing more is in any sense an enforcement of the power against other persons. Their Lordships are clear that it is not so within this Article. If it were, Article 118 would have no force in cases where the plaintiff impugns an adoption, on the ground that the power alleged for it is not genuine. They hold that this case is described by Article 118 alone, and therefore the suit is brought in good time.

They will humbly advise Her Majesty to dismiss the appeal and the appellant must pay the costs incurred in this appeal of the respondents who have appeared.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

P. C. 1896 *May* 14 & 15 *June* 27.

GRENON AND OTHERS (PLAINTIFFS) *v.* LACHMI NARAIN AUGURWALA AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Contract—Sale of goods—Brokers' bought and sold notes—Special place of delivery "to be mentioned hereafter"—Disclosure of principal—Assessment of damages—Contract Act (IX of 1872), sections 49, 94, 231—Damages.

Bought and sold notes of Purneah indigo seed provided: "The seed to be delivered at any place in Bengal in March and April 1891." It was added, "the place of delivery to be mentioned hereafter." The buyer made mention of this on the 20th March 1891 in a letter to the broker for both parties. This letter, specifying Howrah Railway station as the place, was forwarded to the vendor, who replied that he would deliver at his own godowns at Sulkea. This the buyer declined. The vendor and the buyer each insisting that the place named by him was the proper one for delivery, the buyer refused to accept at the vendor's godowns, or at any place other than Howrah station.

* *Present*: LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, LORD JAMES OF HEREFORD and SIR R. COUCH.