PRIVY COUNCIL

Nagindas Bhagwandas

Vs.

Bachoo Hurkissondas

P.C.A.No. 16 of 1915
(Viscount Haldane, CJ, Lords Parmoor Wrenbury, Sir John Edge and Mr. Ameer Ali. J)

26.11.1915

JUDGMENT

Sir John Edge J.

1. The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujrathi Hindus, of which the plaintiff by adoption and the defendant by birth are the male members. The question in this appeal is one as to the share in the joint family property to which the plaintiff is on partition entitled.

2. The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissondas Nagardas died on the 14th September 1900, leaving his wife surviving; she was then pregnant, and the defendant, who was the posthumous child was born on the 18th December 1900. Bhugwandas Nagardas died childless on the 17th December 1900, leaving his widow surviving him; he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the plaintiff as a son to her deceased husband. The parties are governed by the *Mitakshara*, as altered or interpreted by the *Vyavahara Mayukha*. The plaintiff claimed that he was entitled on partition to a moiety of the family property. On the other hand the defendant contended that the plaintiff, as an adopted son, was entitled to a reduced share only of the family property; in support of that contention the defendant relied upon paragraphs 24 and 25 of section 5 of the *Dattaka Chandrika* as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss*[1]

3. This suit was tried in the High Court at Bombay by Macleod, J., who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural born son of the same father (which is not the case here), and he gave the plaintiff a decree for an equal share. From that decree the defendant appealed.

4. On appeal Sir Basil Scott, C.J., and Batchelor, J., holding, as their Lordships understand their judgment, that there is nothing in the Mitakshara which is inconsistent with paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as these paragraphs were construed by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss*., adopted the construction of Markby and Prinsep, JJ., of those paragraphs, and decided that the plaintiff as an adopted son was on partition entitled only to a reduced share in the family property. From their decree this appeal has been brought.

5. The learned Judges of the High Court on the appeal from Macleod, J., in this suit had before them Sutherland's translation of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika, the translation of those paragraphs which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss*, and a translation made by Sir Ramkrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit. Sutherland's translation was not a complete translation of the Sanskrit text. The translation which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss* and is apparently accepted as a correct translation by Mr. Mayne in paragraph 169 of his Hindu Law and Usage, is as follows :-

> Paragraph 24 :-
> "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. and in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son. Where such son may not exist, the adopted son takes the whole estate even." Paragraph 25 :-
> "Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grand-father, is entitled to an equal share even with a paternal uncle, who is also such description of son; therefore a grandson who is an adopted son

> may (in all cases) inherit an equal share even with an uncle. This must not be alleged (as a general rule). For there would be this discrepancy: where the father of the grandson were an adopted son, he would receive a fourth share; but the grandson, if he were such son (of him) would receive an equal share (with an uncle in the heritage of the grand-father). And accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question (viz., the adopted son of one adopted) succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also."

6. The translation which was made by Sir Ramkrishna Bhandarkar is as follows:-

> "It should be understood by this that an adopted son acquires the ownership wherever possible of his proper share by a relation similar to the relation, brotherhood, etc., by which a natural-born son acquires a right to the property of his brothers, etc., similarly, an adoptive grandson whose adopting father is dead acquires the ownership of the share proper for an adopted (son) when the owner of the property has got another son or other sons and of the whole when he has got no son or sons. It should not be argued that because a grandson is necessarily the owner of the share proper for his father, the taker (in adoption) of the adoptive son being a natural-born son of the grand-father and entitled to a share equal to that of the uncle similarly born, the adoptive grandson should take a share equal to that of the uncle; for it involves impropriety, inasmuch as the adopted son gets one-fourth and the adoptive grandson an equal share. Therefore that share is proper for a son's father which he would get by law if he were of the same description (adopted or natural-born) as the son. This way should be followed in the case of great grandsons also."

7. Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the Dattaka Chandrika other than that at which their Lordships have arrived.

8. The author of the Dattaka Chandrika was in paragraphs 24 and 25 of section 5 of his commentary, relying upon the text of Vasishta according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." The text of Vasishta is quoted by Nanda Pandita in paragraph 1 of section 10 of the Dattaka Mimansa, who added, "on the death of him (the naturally-born son) he (the adopted son) is entitled to the whole." It is obvious that Vasishta and Nanda

Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally-born son of a brother or a nephew of the adoptive father.

9. The author of the Dattaka Chandrika expressed his views somewhat obscurely and confusedly in paragraphs 24 and 25 of section 5 of his commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was. For the purposes of his commentary he paraphrased the text of Vasishta that "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," and in paragraphs 24 and 25 of section 5 he illustrated the text of Vasishta, as he understood that text, by examples of its application.

10. His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son.

11. The author of the Dattaka Chandrika, applying the well-established rule of Hindu law that a son takes no greater share than his father if a qualified person would have been entitled to, illustrated the application of the principle of the text of Vasishta by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive father's adoptive father, in other words his uncle through the adoption of his adoptive father. In the first case, as the author of the Dattaka Chandrika pointed out, the adopted son would take a share equal to that of his uncle by adoption; in the latter case, as a son cannot take a greater share than his father would have been entitled to, the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally-born member of the family, and who would have taken a greater share than his brother by adoption.

12. As their Lordships construe paragraphs 24 and 25 of section 5 of the Dattaka Chandrika those paragraphs are not in conflict with any principle of the Mitakshara or

of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasishta in paragraph 1 of section 10 of the Dattaka Mimansa. To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss*. would bring them into conflict with what are now well-established principles of Hindu Law. The attention of Mr. Markby and Prinsep, JJ., in *Raghubanund Doss v. Sadhu Churn Doss* which was decided by them in 1878, does not appear to have been drawn to the case of *Tara Mohun Buttacharjee v. Kripa Moyee Debia*[2] which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse, JJ., held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral relative of his adoptive father. In *Tara Mohun Bhattacharjee v. Kripa Moyee Debia* the plaintiff by birth and the defendant by adoption were in equal relationship to the deceased collateral; their respective grandfathers were the first cousins of the collateral and their respective fathers were his first cousins once removed. Loch and Hobhouse, JJ., were pressed in argument to put a construction upon paragraph 25 of section 5 of the Dattaka Chandrikha adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born; and that there was no reason why the plaintiff and the defendant in the suit before them should not each take the share to which their respective fathers were entitled. The parties to the suit which was in appeal before Loch and Hobhouse, JJ., were governed by the law of the Dayabhaga, but that fact does not distinguish that case in principle from the case which is now before this Board. The decision in *Tara Mohun Bhuttacharjee v. Kripa Moyee Dibia* was followed in 1881 by McDonell and Field, JJ., in *Dinonath Mukerjee v. Gopal Churn Mukerjee*[3]. In *Raja v. Subbaraya*[4] which was, however, a case relating to Sudras, Sir Charles Turner, C.J., and Muttusami Ayyar, J., in 1883 doubted that paragraph 25 of section 5 of the Dattaka Chandrika had been correctly construed in *Raghubanund Doss v. Sadhu Churn Doss* Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep, JJ., of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika has been adopted.

13. In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the defendant that the position of a member by adoption in a joint Hindu family and his interest in the joint family property are inferior to the position and interest of a member by birth of the family, and it was suggested that an adopted son does not on his adoption become a

coparcener in the joint family property. It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could, now be ascertained, would be beside the point and could throw no light on the construction of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika or upon the position and rights of an adopted son. Hindu law and customs have not stood still, and what we are now concerned with is the position at the present time of an adopted son in a Hindu family. As early as 1833 this Board in *Sumboo Chunder Chowdry v. Naraini Dibeh*[5] considered that according to Hindu law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881 in *Pudma Coomari Debi v. Court of Wards*[6]. approved of the decision of this Board in *Sumboo Chunder Chowdry v. Naraini Dibeh* and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. To the same effect is the decision of this Board in *Kali Komul Mozumdar v. Uma Sunker Moitra*[7]. In the last-mentioned case when it was before the Full Bench of the High Court at Calcutta, Romesh Chunder Mitter, J., held that -

> "According to Hindu law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it."

14. With that statement as to the Hindu law of adoption their Lordships agree.

15. Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside

and the decree of Mr. Justice Macleod should be restored.

16. The respondent must pay the costs of this appeal and of the appeal in the High Court.

Appeal allowed.

Cases Referred.

1. (1878) 4 Cal. 425 : 3 C.L.R. 534.

2. [1868] 9 W.R. 423

3. [1881] 8 Cal. L.R. 57

4. [1835] 3 Knapp. 1. Suther 25. (P.C.)

5. [1883] 7 Mad. 253

6. [1883] 10 Cal. 232 : 10 I.A.138 : 13 C.L.R.379 : 4 Sar.458 : 7 Ind.Jur.553 (P.C.)

7. [1881] 8 Cal.302 : 8 I.A.229 : 6 Ind.Jur.148 : 4 Sar.285(P.C.)