

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Luchmun
Lal Chowdhry v. Kanhya Lal Mowar, from the
High Court of Judicature at Fort William in
Bengal ; delivered 15th December 1894.*

Present :

LORD HOBHOUSE.

LORD SHAND.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Shand.*]

The Plaintiff, the Respondent in the present appeal, is according to natural relationship the nearest bundhu or heir of Kishen Lal Chowdhry, who died on the 16th February 1846 without issue, but survived by his widow Bhuina Chowdhraïn who possessed his estates till her death on the 30th October 1886, when the Appellant took possession.

The present suit was instituted on the 9th January 1888. The Respondent asked that his right of inheritance in respect of the properties left by Kishen Lal Chowdhry should be declared by decree and that he should be awarded possession. The title set up by the Defendant and Appellant was that of a son, on the statement that Kishen Lal Chowdhry before his death had given permission to his wife to adopt a son to him, and that after his death she had exercised the power

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given to her and had adopted him as the son of her deceased husband.

This ground of defence has failed. There are concurrent findings of the Subordinate Judge of Gya, and of the High Court, that the Appellant had failed to prove that Bhuina Chowdhraïn had authority from her husband to adopt or that she did validly adopt the Appellant as a son to her husband. Accordingly the argument for the Appellant under this appeal was not rested on any title which he himself had, but entirely on the possession he had gained of the properties in dispute.

In this view his Counsel maintained two grounds of Defence. The first of these was that the Respondent had no title to succeed, because admitting his natural relationship to the deceased Kishen Lal Chowdhry, it was alleged by the Appellant, and had been proved, that the Respondent had been adopted into another family with the result that he ceased in law and in fact to be a member of the Chowdhry family and therefore could not take up the succession of Kishen Lal Chowdhry. The second was the defence of limitation. The judgments of both courts were against the Appellant on these grounds of defence also.

It will be convenient to deal with the plea of limitation in the first instance. The Subordinate Judge held that the limitation of twelve years which was pleaded had no application, because the suit had been raised within two years of Bhuina Chowdhraïn's death, and she alone in her own right and not as representing her alleged adopted son had after her husband's death possessed his properties till she died. The High Court held that the alleged adoption even if made was to the widow herself and not to her husband, and that such adoption could not give any right to the

property of the husband and could not therefore found any plea of limitation against the Respondent's claim to that property.

The Appellant's Counsel, founding on Section 118 of the Schedule to the Limitation Act, argued that the limitation of six years from the date of the alleged adoption of the Appellant barred the suit. It was maintained that the suit was one in effect to obtain a declaration that the adoption of the Appellant was invalid or had never in fact been made, and that six years had elapsed after the alleged adoption had become known to the Respondent before the suit was instituted. If the adoption was really made by Bhuina Chowdhraïn of a son to herself and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit which relates entirely to the husband's estate. But in the opinion of their Lordships there is another ground in respect of which also this defence clearly fails, viz., that it has not been proved that the alleged adoption did become known to the Respondent till the death of Bhuina Chowdhraïn which occurred within two years of the institution of the suit. It has been held by both Courts that the Appellant, who is said to have been adopted about two years after the death of Kishen Lal Chowdhry, when he was about five years of age, had no possession until after Bhuina Chowdhraïn's death. So far as possession was concerned the Respondent had therefore no notice of the alleged adoption so long as Bhuina Chowdhraïn lived. Further there is no direct evidence that the Respondent was in any way made aware of the Appellant's alleged adoption until after her death. The only evidence to a different effect to which the Appellant's Counsel could refer in

order to show the requisite knowledge was a passage in the Respondent's own deposition (Record p. 143) in which after a denial that the Appellant had been adopted he says:—"Had " Bhuina Chowdhraïn adopted the defendant, I " must have known it," on which it was said that his knowledge must be inferred, as it was proved that he was frequently in Bhuina Chowdhraïn's house after the alleged adoption took place, and that in this way he must have become aware of it. It is clear that such evidence is plainly insufficient to prove the requisite knowledge, and the plea of limitation therefore fails.

The other ground of appeal maintained, and which formed the subject of the 3rd issue settled by the Subordinate Judge, was that the Respondent's deceased grandfather, Mulchand, through whom the Respondent now claims, and who with Kishen Lal was descended from Amir Chand as their common ancestor, had been adopted into the family of Tirbhuwan Nakphopha, and thereby for himself and his descendants " went out of his father's family into the family " of Tirbhuwan Nakphopha who adopted him " (Appellant's written Statement, para. 5, p. 8). This averment was denied in the written Statement of the Respondent who alleged (para. 2, p. 11) " that Mulchand Chowdhry was never adopted as a " dattaka son by his maternal uncle Tirbhuwan " Nakphopha, nor could he have been adopted " according to the Shâstras, nor was he severed " from his Chowdhry family."

The third issue relating to this defence was in these terms (Record, p. 175):—" Was Mulchand " Chowdhry adopted in *dattaka* form by " Tirbhuwan Nakphopha, and was that adoption " valid? Whether by that adoption, even if " invalid, he had lost his status in his father's " family?" The evidence showed that amongst

the Gyawals, a sect of Brahmans residing in the district of Gya to which the parties to the present suit and their families belong, there exist peculiar and loose customs in regard to adoption; and in particular that although adoption of a son may be made so as to give him rights of succession to his adopting father this will not necessarily sever his connection with his own natural father or his family. In the district of Gya there exist many places of sanctity connected with the ancient Buddhism, and the Gyawal Brahmans have the privilege of acting as guides to the pilgrims who visit these places, and thereby make considerable sums; and by adoption into different families, facilities are given for the acquisition of property, without severing the adopted son's connection with his own family. The witness Kishen Lal Kharkhoka (Record, p. 172) deponed that a Gyawal might become the malik or successor of four families, and be called the adopted son of all the families, adding to his own name the designation of all those families in which he became the malik, and various other witnesses give evidence to the same effect.

On this part of the case the Subordinate Judge says:—"There is no direct evidence to prove that Mulchand was adopted, and much less in dattaka form by his maternal uncle Tirbhuwan Nakphopha. In some documents allusions to and inferences of Mulchand's adoption appear; but the question is how far those will establish an adoption in dattaka form. None of those documents show that Mulchand was adopted in that form." And after a reference to certain of the documents produced, he again observes in dealing with the evidence (Record, p. 177):—

"It further appears from the evidence of witnesses adduced by both parties, that very loose practices prevail amongst the

Gyawals regarding adoption. Even a person who gets another property by gift, assumes the surname of his donor and calls himself as his adopted son. This loose practice had its origin in order to induce the pilgrims of his donor to acknowledge the donee. These form the bulk of their property and the greatest source of income of these Gyawals. In adoption even, they adopt anybody quite contrary to Hindu Law. They adopt daughter's and sister's sons, only son; and widows even adopt without their husband's authority previously given. From what time such practices arose, does not appear from the evidence; but apparently from the decline of the Gyawal dynasty. These people are found in Gya alone, and their marriages, &c., are confined to this place. The fabulous 1,484 families of Gyawals have now dwindled to 200 or 300. Hence every one, more for the pilgrims than for their properties, makes such gifts or adoption in favour of those whom he or she loves, and the donees call themselves adopted sons. This practice also does away with escheats.

"In face of such loose practices and change of surnames, I cannot, without any satisfactory evidence of adoption, hold that Mulchand was adopted by his maternal uncle, and much less in the *dattaka* form. The fact of Mulchand retaining his surname Chowdhry, and being described in Kishen Lal's lease (Ex. E) as his grand-uncle or grandfather's brother in 1836, leaves no room to doubt that even after Gopal Chand's adoption by Sahar Chand, he continued to be the member of Chowdhry family, and was the manager and guardian of Kishen Lal in respect of properties inherited by him from Sahar Chand. Mulchand's adoption by his maternal uncle is also invalid under Hindu Law as obtains in Bengal and established by case law of the Calcutta High Court. Under such circumstances, I cannot hold that Mulchand was totally estranged from the family of Chowdhry or lost the status in his father's family. I find 3rd issue against defendant."

On appeal the High Court came to the same conclusion. The learned Judges say (Record, p. 188):—

"The first point strongly pressed for the appellant is, that Mulchand was adopted in the *dattaka* form by his maternal uncle Tirbhuwan Nakphopha; and of course if this be established, the plaintiff's suit must fail, because he claims through Mulchand. Now there is, as the Subordinate Judge observes, no direct evidence that Mulchand was adopted in the *dattaka* form by Tirbhuwan Nakphopha, and such an adoption, too, would not be valid under Hindu Law, which prohibits a brother from adopting his sister's son. Several documents are relied upon as evidencing the adoption. One of these, exhibit B, being a copy of a copy, is, we think, clearly inadmissible and was rightly so treated by the Subordinate Judge; and even if admitted, it does not show that Mulchand was adopted by Tirbhuwan Nakphopha in the *dattaka* form.

Exhibit A (a judgment of the Principal Sudder Amin, dated the 24th August 1844) shows that the adoption of Mulchand was alleged by the defendant Kishen Lal in that suit, but the question was not determined. We observe also, that in this document Mulchand is called Chowdhry and Nakphopha, as if he belonged to both families. In exhibit E, dated 4th July 1836, he is described as Mulchand Nakphopha and Mulchand Chowdhry; and in exhibit L, dated 18th October 1866, he is described as Nakphopha only, so that we cannot infer from these documents that he had completely lost his status in his natural family. The strongest point in favor of the appellant's contention is, that the family properties in suit all vested in Sahar Chand, Mulchand's elder brother. This appears from exhibit A, which we have just referred to; but we do not think that this fact is of itself conclusive proof that Mulchand was completely severed from his natural family. In several documents, extending from 1820 to 1841 (see exhibits LIV, LII, LVI, LVII, LVIII, LX and LI) he is called Mulchand Chowdhry and not Nakphopha, which, we think, indicates that he had not ceased to belong to his natural family. Again in exhibit E he is described as the grand-uncle of Kishen Lal Chowdhry, which he would be if he was still a member of his natural family, and if his son Gopal, Kishen Lal's father, had, as is alleged by the plaintiff, been adopted by Sahar Chand. We think, therefore, that the Subordinate Judge's view as to Mulchand's status in his natural family is correct, whatever may have been his status by some sort of *quasi* adoption in the family of Tirbhuvan Nakphopha, according to the undefined customs and usages prevailing amongst the Gyawals."

There are thus concurrent findings against the Appellant on this question, which is a question of fact, and the determination of which depends on the evidence. It was argued for the Appellant that as this evidence to an important extent consists of writings the ordinary rule that this Board will not disturb the judgment of both courts on facts does not apply. Their Lordships cannot accept this view. The question is not one of construction of one or more deeds, which would be a question of law, but is a question as to the effect to be given to decrees leases and other documents as evidence of the fact of adoption, and its consequences. Their Lordships may add however that having heard the Appellant's argument on the documents on which he specially founded they see no reason for holding

that there was any such adoption of Mulchand by his maternal uncle as took away from him his status or right of succession in his own natural family.

The decree of 1800 printed as a separate appendix does not appear to be specially mentioned in either of the judgments appealed against. It no doubt orders "that Mulchand as heir *i.e.* "adopted son be put in possession of the property "left by Tirbhuwan and Mussummat Jhuna," but the judgment is based on the special and peculiar customs of the Gyawals which are twice referred to in the grounds of judgment stated. In its concluding part it bears:—

"Since Mulchand has been adopted in accordance with the customs prevailing among his caste people, therefore the Judges of this Court think that there is left no room for the question that the adoption was not made according to the Shastra. Because a custom which prevails in a certain community for many centuries and from the time of forefathers cannot be stopped, and it is proper that such custom should be acted upon. This is in accordance with and not opposed to the Shastras."

Although the adoption was so made it has not been shown, and it does not follow, that Mulchand ceased to be a member of his own natural family or lost his right of succession in that character.

The Appellant's Counsel further referred to the decrees in 1843 and 1844 by the principal Sudder Amin of Behar, and by the District Judge of Behar on appeal in a suit between Sunker Lal Nakphopha alleging himself to be the "adopted son and heir of Mulchand Nakphopha "Chowdhry" against Kishen Lal Chowdhry. The claim made was for one half of certain properties to which Kishen Lal Chowdhry had succeeded on the death of his father Gopal Chand, the son of Mulchand who had been adopted into the family of Sahar Chand and who had succeeded to the properties on the death of his adoptive father. The ground of the claim was that Sahar Chand and Mulchand who were

brothers had on their father's death jointly succeeded to the properties in dispute, that one half of these belonged to Mulchand, and afterwards to his heir, being the Plaintiff as his adopted son. The defence was that no part of the properties ever belonged to Mulchand; that they were acquired exclusively by Sahar Chand and were settled in title entirely in his name; **and** it was added that Mulchand had been adopted as the son of Tirbhawan Nakphoha and had no connection with the properties. The suit was dismissed on the ground that from all the documents produced it appeared that the properties in question had been acquired by Sahar Chand himself and that in his name only the title to these properties stood, and the Court had no occasion to consider or decide any question as to Mulchand's alleged adoption into the family of Nakphoha, or the effect of such adoption if it took place as removing him from his own family of Chowdhry. The statements of the parties made in that litigation for the purposes of that suit cannot be taken as evidence in this case on the matter now in dispute, viz. the alleged adoption of Mulchand into the Nakphoha family so as to take him out of his own natural family.

Their Lordships will humbly advise Her Majesty that the present appeal ought to be dismissed with costs.
