

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bachoo Hurkisondas v. Mankorebai and others, from the High Court of Judicature at Bombay ; delivered the 9th May 1907.

Present at the Hearing :

LORD MACNAGHTEN.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

In the year 1900 two brothers, Hurkisondas and Bhagwandas, formed a joint Hindu family governed by the Mitacshara law as in force in Bombay, and as such they held large ancestral property.

On the 14th September 1900 Hurkisondas died without male issue, but leaving his widow pregnant. On the 30th November of the same year Bhagwandas made his will, by which he purported to make certain dispositions of the family property, and also directed his widow to adopt a son. The terms of this will will be considered hereafter. On the 17th December following Bhagwandas died, and on the next day Hurkisondas' widow gave birth to a son Bachoo, the present Plaintiff and Appellant. On the 17th February 1901 ~~Hurkisondas'~~ ^{Bhagwandas'} widow adopted Nagurdas as son to her deceased husband, with the consents prescribed by his will.

The parts of that will material for the present purpose are the following :—

By Clause 2 he appointed executors and trustees.

“ 4. I have a daughter by name Navulbai. I direct that
 “ my executors and trustees shall get her suitably married (if
 “ she is not married in my life-time), at an outlay of Rs. 5,000
 “ five thousand or thereabouts. I also direct that they shall
 “ on the occasion of her marriage present her with ornaments
 “ of the value of Rs. 10,000 ten thousand or thereabouts and
 “ wearing apparel and silver pots of the value of Rs. 5,000 five
 “ thousand or thereabouts.

“ 5. I further direct that my executors and trustees shall
 “ during her lifetime place at her absolute disposal two carriages
 “ and two horses and maintain the said carriages and horses out
 “ of my estate.

“ 6. I hereby direct my executors and trustees to set apart
 “ for my said daughter so much of my immoveable property at
 “ Kasu as will yield a net income of Rs. 200 two hundred per
 “ month. I also devise and bequeath to her my house in
 “ Bombay which opens on Narayen Dhuru Street and Bibi
 “ Jan Street, and bears Nos. 13-23, 61-69. She is to enjoy
 “ the said immoveable property and the said house during her
 “ lifetime, and on her death the said property and house shall
 “ belong to such of her children as may be born or conceived
 “ in my lifetime, but in default of her having any such children
 “ I hereby give her power to appoint the said property and
 “ house in such manner as she may in her absolute discretion
 “ deem fit. In the event of her not making any such appoint-
 “ ment, and not leaving any such children as aforesaid, I direct
 “ that the said property and house shall after her death be
 “ treated as a part of the residue of my estate.”

Clause 7 dealt with the contingency of the brother's widow giving birth to a daughter, and purported to make provision for the girl, in a manner somewhat similar to that made for the testator's own daughter.

Clause 8 contained provisions for the two widows, the testator's and his brother's.

Clause 9 said :—

“ I hereby direct my wife to adopt a son to me but such
 “ adoption must be made with the consent of Sir Bhalchandra
 “ Krishna and Rao Bahadur Ghansham Nilkant Nadkarni;
 “ such adoption is to be made even though a son is born to
 “ my brother's widow. In the event of a son being born to
 “ my brother's widow, however, my wife should, before
 “ making the adoption, enter into an agreement with the
 “ adopted son or his proper guardian that such adopted son
 “ shall be bound to accept as valid the provisions hereby made
 “ for my daughter Navalbai and my wife.”

These are all the facts relevant to the principal questions arising in the present case.

The plaint was filed in the High Court of Bombay, on the 28th February 1901, immediately after the adoption, on behalf of Bachco, the posthumous son of Hurkisondas, against a number of persons, amongst whom was the fifth Defendant, the adopted son of Bhagwandas. The main controversy in the case lay between those two parties. The plaint asked for a declaration that the Plaintiff is exclusively entitled to the ancestral property, that the fifth Defendant is not the adopted son of Bhagwandas, and is not entitled to any interest in the estate. In the alternative, in case the exclusive right of the Plaintiff should not be established, the plaint asked for partition. All these claims were opposed.

Tyabji, J., who tried the case, held that the adoption was valid, and rejected the claim of exclusive right set up on behalf of the Plaintiff. He further refused to order a partition, on the ground that it would not be beneficial to the infants concerned, or to either of them. On all these points the Court of Appeal agreed with him.

On the last point, that of partition, it is enough to say that their Lordships entirely concur with the Courts in India.

As to the adoption and its effect the first point raised by the Appellant was this: It was contended that, on the face of the will, the power to adopt was a part of a plan for the disposition of the family property which was in contravention of the law, and that the power was dependent upon that plan having effect. But this is to misread the will.

The dispositions made by the testator were within his competence, at the date of the will, and at the date of his death; they were only liable to be defeated in one event (which in fact

happened), namely, his brother's widow giving birth to a son. And the will expressly said that, supposing that event to occur, the adoption should still be made.

The next point raised was as to the effect of the adoption upon the title to the joint property. It was contended that, at the time when the adoption took place, the family estate had become vested absolutely and exclusively in the infant Bachoo, Plaintiff-Appellant, and that the adoption could not detract from the right so vested. Their Lordships are, however, of opinion, as were the Courts in India, that the case of *Sri Raghunadha v. Sri Brozo Kishoro* (L.R., 3 I. A., 154), decided by this Board, governs this case and excludes the Appellant's contention.

The point that remains for consideration is quite unconnected with the other questions in the case. Navalbai, the daughter of Bhagwandas, was made a Defendant in the suit. In her written statement she alleged that she was absolutely entitled to Government promissory notes, of the nominal value of Rs. 20,000, as given to her and transferred to her name by her father in his lifetime. As to the fact of the gift and the transfer there is now no controversy. At the time of the gift Bhagwandas was the head of the family, and indeed the only male member of it, and the estate was large. Tyabji, J., considered that the gift was not justified by the circumstances of the case. The Court of Appeal, having in the meantime ascertained that the gift was made out of income, not out of capital, took a different view, and decided in favour of Navalbai.

The question belongs to a class in respect of which this Board is always very unwilling to interfere with the decisions of the Courts in

India; and no sufficient reason has been shown why they should do so in the present instance.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant will pay the costs.

