

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mutsaddi Lal (since deceased, and now represented by Jet Mal and another) and Umrao Singh v. Kundan Lal, alias Kanhaiya Lal, from the High Court of Judicature for the North - Western Provinces, Allahabad; delivered the 14th February 1906.

Present at the Hearing:

LORD MACNAGHTEN.

SIR FORD NORTH.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Andrew Scoble.*]

The suit which gives occasion to this Appeal was brought by one Balmakund, claiming to be the reversionary heir of one Badri Das, deceased, against Mussamat Jamna, the widow of Badri Das, and Kundan Lal, the present Respondent, whom she was alleged to have illegally adopted after her husband's death. Balmakund and Jamna have both died since the institution of the suit. The present Appellants are Balmakund's representatives, and the whole question between them and the surviving Respondent is whether the adoption of the latter by Mussamat Jamna was a valid adoption.

Badri Das was one of a family of Marwari Banias from Jaisalmere, who had settled at Jalalabad, in the Saharanpur district of the United Provinces, where he died childless on the 27th October 1888. After his death, his widow

entered into possession of his property, in which she had, at all events, a life estate. On the 17th of August 1891 she executed a deed of sale of a village which had been purchased with money left by her deceased husband; and three years later, on the 14th of August 1894, Balmakund filed a suit in the Court of the Munsif of Kairana for a declaration of his rights as reversioner against Mussamat Jamna and the purchasers of the village. Prior to the institution of this suit, on the 12th of May 1894, the widow adopted the present Respondent, and on the 28th of August 1894 she executed a deed confirming the adoption. The Munsif held the adoption valid, and dismissed Balmakund's suit on the 15th of August 1895. This decision was upheld on Appeal by the Subordinate Judge of Saharanpur. Balmakund thereupon brought the present suit to set aside the adoption.

An attempt was made, in the early stages of the suit, to set up a custom among the Marwari Banias of Jaisalmere, under which the power of widows in regard to adoption was greatly extended; but the attempt failed, and the Subordinate Judge held that the case was governed by the Mitakshara law. This is probably true, but the High Court pronounced no decision upon this point, and it is unnecessary for their Lordships to determine it. All the schools of Hindu law recognise the right of the widow to adopt a son to her husband "with the assent of her lord." It is equally well established that this assent may be given either orally or in writing; that, when given, it must be strictly pursued; that she cannot be compelled to act upon it unless and until she chooses to do so; and that, in the absence of express direction to the contrary, there is no limit to the time within which she may exercise the power conferred upon her.

In the present case both Courts below held the fact of the adoption proved, but they differed upon the question whether the widow had been authorized by her husband to adopt. The learned Subordinate Judge did not believe the witnesses. "They not only," he says, "contradict each other on material points, but have made improbable and false statements, and at least" (three of them) "are partial to the Defendant, and their evidence cannot be considered to be as good as that of independent and disinterested witnesses." The learned Judges of the High Court, on the other hand, say :—

"We are wholly unable to agree with the Subordinate Judge in rejecting the evidence adduced to establish this fact. On the contrary we think that the evidence is worthy of credit, and amply sufficient to justify a finding in favour of the Appellant. Not merely is it ample in itself, but it is supported by the probabilities of the case, and under these circumstances, we find the authority to adopt has been proved."

Their Lordships have had the difficult task of deciding between these conflicting opinions, without having seen or heard the witnesses, and without the assistance which is not unfrequently derived from documentary evidence. It is worthy of notice, however, that the story told in this suit is the same as that told in the suit before the Munsif of Kairana one or two years previously; and that in the meantime the Appellants had ample opportunity to test its accuracy; but they produced no evidence in rebuttal, and were unable materially to shake the witnesses for the Respondent on cross-examination. Mussamat Jamna had died before she could be examined in this suit; but her statement made in the previous suit in the Munsif's Court was put in evidence. What she says is this :—"Six or seven days before his death Badri Das told me in the forenoon to adopt a boy He did not mention any boy, but said, 'Adopt whomsoever you may like.

“ ‘ Adopt the boy of the man of Sirsawa only.’ ”

The Sirsawa man was one Hardeo Das, a friend and caste-fellow of Badri Das, one of whose sons was ultimately adopted by her. Further on she says :—

“ Badri Das gave authority to adopt during his illness. He had been ill for three months, and when he told me to adopt a son, he perhaps had no hope of his life. It was in the three-arched room facing the east, and forming part of this house that he told me to adopt a boy. I and my three sisters-in-law (husband's sisters) were there at that time . . . These three sisters-in-law are now dead.”

And later on, she says :—

“ Badri Das told me to adopt a boy within a year or two, *i.e.*, at any time I liked after his death.”

The statement of the widow is corroborated by three witnesses, Chiranji, a brother-in-law of her husband ; Baldeo Das, her own brother ; and Chhajju Mal, her nephew. All three appear to have been frequently with Badri Das during his last illness, and all concur that he authorized her to adopt one of the sons of Hardeo Das of Sirsawa ; but none say that he named the boy to be adopted, or the time within which the adoption was to be made. It is true that two of these witnesses belonged to the widow's family ; and it was matter of just observation by the learned Counsel for the Appellant that Hardeo Das, the father of the boy adopted, who is said to have been present also when the authority to adopt was given, was not called. But the evidence forthcoming in cases of this character is seldom entirely complete or satisfactory. Here, so far as it goes, it is all on one side ; and their Lordships see no good reason for discrediting it altogether. They accordingly concur with the opinion of the learned Judges of the High Court on this point.

But, it was argued, assuming the authority to adopt to have been given, it was not “ strictly pursued.” The direction to adopt one of the sons of Hardeo Das must, it was urged, be taken

to mean one of the sons of Hardeo Das then living; and the boy adopted was not then born. The direction was also to adopt "within a year or two"; and the adoption was in fact not made until about six years after the death of Badri Das. Their Lordships are not disposed to place so narrow a construction upon the words said to have been used by Badri Das. Hardeo Das had at that time four sons, but no one of them was specially named, and all the dying man apparently desired was that one of this particular family should be selected; and their Lordships consider that the direction was sufficiently complied with by the adoption of the Respondent who was of a more suitable age for affiliation than his elder brothers. As regards the period within which the adoption was to be made, the widow expressly says that the words "within a year or two" were qualified by the further words "at any time I liked," and these are wide enough to cover the period which actually elapsed before the adoption was made.

Upon a review of the whole case their Lordships will humbly advise His Majesty that the decree of the High Court ought to be confirmed and the Appeal dismissed. The Appellants will pay the costs of the Appeal.

