

Privy Council Appeal No. 15 of 1914.

Allahabad Appeal No. 5 of 1913.

Adwaitya Prasad and others - - - *Appellants,*
v.
Baldeo Das and another - - - *Respondents,*

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN
PROVINCES, ALLAHABAD.**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 28TH FEBRUARY, 1916.**

Present at the Hearing :

VISCOUNT HALDANE.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by VISCOUNT HALDANE.*]

Raghunath Prasad, a Hindhu mahanjan and dealer in money, in the City of Benares, died on the 11th February, 1896, leaving property, partly ancestral but mainly acquired, of the value of over three lakhs of rupees. He was about 50 years of age at the date of his death. He had married three times, and his third wife and a daughter by her survived him. He had no son by any of the three wives. Until the end he appears to have been hopeful that a son might be born to him who would perform for him the posthumous ceremonies which the Hindh religion enjoins. Nearly seven years after his death, his widow by deed adopted to him a boy of about five years old. The only question left in this appeal is whether the dead man gave her authority to make the adoption. It is a question of fact, and the answer depends on what reliance ought to be placed on the testimony of certain witnesses.

On the 25th November, 1895, Raghunath Prasad executed a will. Before referring to its terms, which are material in estimating the probabilities on the question of the authority to adopt, it is necessary to state what were the relations of the testator to other members of his family. He had three brothers, and from these he had separated, so that the family had for

some time ceased to be joint. He had a nephew, Jadunath Prasad, the son of a younger brother, and several sisters, one of whom had a son, the respondent, Baldeo Das. The surviving one of the testator's wives, afterwards his widow, was named Musammat Saraswati Bibi. She is a respondent in this appeal. The nephew Jadunath, who lived in the house next door to the testator, was a young man of doubtful character, by his own testimony in the witness-box given up to dissipation. He had squandered his fortune, and the testator had no confidence in him. In the respondent, Baldeo Das, on the other hand, he obviously had confidence. Indeed, Baldeo and his family lived in the same house with him.

Turning to the will, the testator begins with a narrative of his family history. He goes on to make a very modest provision for his surviving daughter. He then leaves the bulk of his property to his wife, but in a fashion which, as is subsequently made plain, gives her only a life interest. He puts her under restrictions which are designed to prevent her from visiting the members of her own family. As she is young, he appoints guardians to see that she regulates her conduct, and behaves as becomes a "pardanashin" lady. If she violates the injunctions of this will she is to forfeit all right to the enjoyment of the property, and is to be lodged in a suitable house and put on an allowance of 50 rupees a month. He then goes on to refer to his family deity, an idol named Sri Girrajji, the Thakur particularly worshipped by him. He dedicates to this idol the house in which it is located, and makes full provision for its maintenance and continued worship. He gives directions as to his funeral ceremonies, gaya and shradh, and says that these funeral ceremonies are to be performed by his nephew, Baldeo Das, or, if he cannot officiate, by Chhatarbhuj Das, another son of one of his sisters. His nephew, Jadunath, by reason of his profligacy and irreligion, is not to join in any of the ceremonies. He then directs the payment of various legacies and annuities. He goes on to provide that, if Jadunath, with whom he has severed all connection, falls, as he probably will, into want, he is to be supplied with food and clothing, but adds that he is excluded from all rights. The executors are not to allow him to visit their houses, and all connection with him is to be severed. It appears from the tenor of the will that the persons whom he appointed as guardians were intended to act as executors along with the widow, and they ultimately proved the will. It remains to refer to its concluding paragraph. The material part of this paragraph was in these terms:—

"The will now made is only for my wife. If, by the grace of God, a son is born to her, he will be the sole executor, donee, and owner, and my wife aforesaid shall be his guardian in the same way as the other guardians whom I have appointed. If my wife die and the male issue also does not survive, all my estate will be owned by Sri Girrajji" [the Thakur].

It will be observed that the will contains no power to adopt a son. It will also be observed that it was made more than two months before the testator's death. He had been suffering for some time from phthisis, a disease which appears to have become acute at the end, and to have caused his death, but it is not clear that he knew the nature of his disease, or realised the approach of danger at the time when he made his will. From the hope expressed that he might still have a son, and other expressions used by him in the document, it is doubtful whether he regarded himself as even near his end when he made the will. Up to just before the last his medical adviser was a native hakim, and it is not clear that either the nature or gravity of the disease from which he suffered had been made plain to him. Later on, when he learned his real condition, he may well have altered his mind and desired to provide for an adoption. If he could bring himself to contemplate a son of Jadunath as a possible adoptive son, such a son of a brother's son would be the person most suitable to fulfil the obligations which exist according to Hindhu tradition. Jadunath cannot be regarded as a reliable witness, but when he says that Mr. Straight, the superintendent of police, sent him to see his uncle in the interval between the will and the death of the latter, and that he began to be received by him after the interview, it is at least possible that the statement may not be without foundation, and that the testator's feelings became in consequence of the interviews somewhat softened.

The question whether, assuming authority to adopt to have been given to the widow, the adoption of Jadunath's son would make him a son of the testator capable of taking under the terms of the will, was raised before the Judge of First Instance. He decided the point in favour of the adopted son, and it was not argued again in the Court of Appeal and cannot be raised now. As has already been said, the only question to be disposed of is whether the testator, just before his death, gave to his widow the alleged authority to adopt. It is not in dispute that a son was born to Jadunath in September 1898, some two and a half years after the testator's death, and that more than four years later, by deed dated the 30th January, 1903, the widow formally adopted him as her own and her late husband's son. Her delay may be accounted for by hesitation to give up personal benefits to which she was entitled so long as there was no son.

The story of the alleged authority to adopt is the subject of acute controversy. The Indian judge who tried the case, the Subordinate Judge of Benares, decided for the version of the appellants. All the witnesses except one had been before him in the box, and he believed their evidence and rejected the very different story put forward by the respondent Baldeo Das and his witnesses. The High Court at Allahabad, on the other hand, consisting of Sir Henry Richards C.J. and Tudball J.,

disbelieved the appellants' version, and accepted that of Baldeo Das. This conflict of opinion has imposed on their Lordships the necessity of giving close consideration to the details of the evidence. The acceptance or rejection of the testimony put forward on each side must depend on two considerations. The first question relates to the form of the evidence itself, and the character of the witnesses who gave it. The second is as to the antecedent probability of the evidence actually given. Their Lordships now proceed to the first of these questions.

At the trial the plaintiff was Baldeo Das, who was, as has already been stated, one of the executors, and was also a trustee under the will. The defendants were the minor, the adopted son Adwaitya Prasad, Musammat Bibi Saraswati, the widow, and the remaining executors or trustees, either original or subsequently appointed, Motichand, Kesho Das, and Dwarka Das. The widow was at first named as guardian *ad litem* to the minor, but on its being alleged that she was colluding with the plaintiff Baldeo Das, the natural mother of the minor, Musammat Gajjo Bibi was appointed guardian in her place. Musammat Saraswati originally put in a written statement to the effect that she had lawfully adopted the minor, but at a later stage she appears to have gone over to the side of Baldeo. She had obviously a certain motive for doing this, for her position as taking for life under the will would have been impaired, under the terms of the final clause of the will, had her adoption been operative. It was alleged by the plaintiff that she had at the earlier stage been under the influence of Jadunath, and in collusion with him put forward the story of the adoption. The other side subsequently took the view that she had come under the influence of Baldeo Das. She was called by neither side as a witness—an omission which appears under the circumstances to have been justifiable on the part of both sides—and she has now been made, along with Baldeo Das, a respondent to the appeal, which is that of the other defendants.

The suit was for a declaration that the adoption was invalid. It appears that the executors had disagreed, partly about the management of the estate and partly about the adoption. One of them, who is now dead, Chhatarbhuj Das, sided with Baldeo. He and Baldeo had filed objections to an application in 1903 by the widow to be appointed guardian to the minor after she had formally adopted him; they took among other points what Baldeo now urges, that there was no authority for the adoption. The Subordinate Judge of Benares, however, appointed the widow, but without, as far as can be seen, deciding the question whether the son was adopted to the testator as well as to the widow. The family generally appear to have throughout held the view that the adoption to both was valid.

Evidence in support of their allegation of authority to

adopt was given in the first instance by the defendants, on whom the burden of proving it lay. They put into the box five witnesses, all of good position, who deposed to having been present in the testator's bedroom very shortly before his death on 11th February, 1896, when verbal authority to adopt was said to have been given. There are some discrepancies of a minor kind in their stories, but none that, in the opinion of their Lordships, are important, or that are surprising in accounts of a conversation which took place thirteen years before the evidence was given. They all agree in saying that Musammât Saraswati, being a pardanashin lady, was summoned by the testator, her husband, to come into the room where he lay, and sit behind a curtain in order that he might give her instructions. They further agree that he informed her that if Jadunath should have a son born to him she might adopt him. Some of them say that he added that if Jadunath should have no son she might adopt any boy of the testator's family.

Taking these five witnesses severally, the first was Dr. Ganga Singh, a civil surgeon who had retired on a pension. He had, before he retired, received from the Government the title of Rai Bahadur, and was a man of some standing and property. He had been in charge of the Prince of Wales's Hospital. He explained that he was on friendly terms with the testator, but had been called in by him only towards the end. He saw the dying man three times. On the last occasion he was clearly dying and could not speak. But when he saw him on the second occasion, shortly before his death, he told the testator that he was very ill and probably would not recover. Dr. Ganga Singh then went on to say this: "He then called his wife from another room to behind a curtain which hung up close to him, and said: 'The doctor says my illness is serious. I have a nephew; if a son be born to him, you may adopt him, in order that water and cakes may be offered to me.'" The witness was unshaken in cross-examination. The suggestion was made that there had been a quarrel between him and Baldeo Das about a druggist's shop, occupied by his brother-in-law, one Khem Singh, from which Baldeo had threatened to have the latter ejected. Dr. Ganga Singh declared that he knew nothing about the matter, and that he had no share in the shop. Their Lordships agree with the Subordinate Judge who saw this witness and with the High Court in thinking that on this ground there was no reason to doubt his testimony.

The second of the five witnesses called by the defendants as to the authority to adopt was Kali Das Mittar, an Honorary Magistrate and a Municipal Commissioner nominated by the Government. He too knew the testator, who was his fellow-magistrate, well. He had gone to see him, and was present at the conversation described by the doctor. He confirms the doctor's account of the material point of the conversation, and was not shaken on cross-examination.

The third witness was Dwarka Das, one of the trustees of

the will. He was a silk manufacturer and a man of substantial property. He says the testator sent for him and told him that he had done so in order that in his presence he might give his wife permission to make an adoption. He then gives an account of what passed, which is substantially the same on the material points as that given by the two preceding witnesses.

The fourth witness was Jugal Kishore, an owner of zamindari property of considerable extent. His evidence about the conversation and the authority to adopt was similar in all material respects to that of the three preceding witnesses. He says that the testator told him that he wished him to bear witness to the fact that he had given the authority.

The fifth witness was Kesho Das, who was examined on commission. He stated that his occupation was zamindari and banking. His property appears to have been substantial. He confirms the account of the authority. He added that the testator said to him that he had written a will to frighten Jadunath, whose conduct was very bad, and that perhaps the fear of it might bring him to the right path. It is possible that the testator said this, but the occasion was thirteen years before the witness gave evidence, and much turns on the exact words. Their Lordships do not attach much importance to this part of Kesho Das's evidence, but they see no reason to question the accuracy of his recollection of the general direction given about adoption. All the witnesses agree that the testator was in full possession of his faculties.

The evidence on the crucial part of the case called on the other side was that of three witnesses, Baldeo Das, the plaintiff himself, Gobind Das, and Narain Das. Baldeo, who was the testator's sister's son, says that the testator treated him like a son, and that he and his family lived with him until his death. He speaks of the vicious life of Jadunath. He declares that the testator never had confidence in Dr. Ganga Singh, and that during his illness the latter never visited him. He further asserts that Kali Das Mittar never visited him, nor Dwarka Das, nor Jugal Kishore. Of the remaining one of the five witnesses, Kesho Das, he makes no mention. He goes on to say that the testator called Harakh Chand, Chhatarbhuja Das, Jagarnath Das, and Kishan Das, and told them there was no hope of his life, and asked them to open the will, which had been deposited in the Judge's Court, and have it registered and act according to it, and that all of them said that they would act accordingly if he did not recover. He admits, what is significant, that the expenses of the minor were entered in the accounts of the estate and paid out of it. Of those whom he names as having been present when the testator gave the alleged directions, two, Harakh Chand and Chhatarbhuja Das have died, and the other two were not called as witnesses. It will be observed that Baldeo, in his statement in the box, denies that Dr. Ganga Singh was ever called in, and asserts that neither he nor the other witnesses for the minor ever saw the testator during his last illness.

Baldeo Das called two witnesses, Gobind Das and Narain Das, neither of whom gave satisfactory confirmation of his evidence. Gobind Das even says that he regarded the minor as the adopted son of the testator, because the widow adopted him; and Narain Das says that he saw the testator just before his death, and that there was a talk as to whether or not adoption should be made, a talk of which Baldeo had said nothing.

On the evidence their Lordships are of opinion that the balance of testimony is distinctly in favour of the story told on behalf of the minor. It further seems to them that the probabilities are at least not adverse to it. The testator may well, as has already been said, have modified his original view, expressed in his will, before he had come to realise how short his life was likely to be. His dislike of Jadunath, and his repugnance to making him his heir, seemed to have remained. But any son Jadunath might have, it was far from being improbable that he should regard in a different light from Jadunath himself. Such a son, if adopted, might turn out differently and could make offerings to him of a religious efficacy superior to any that could be made by a sister's son. Having regard to the character and standing of the five witnesses called for the minor, and to the way in which they gave their evidence, their Lordships think that their evidence ought to be preferred to what was alleged in the box by Baldeo. The discrepancies in the evidence of the five witnesses are comparatively slight, and may well be accounted for when it is remembered that the conversation which they described took place some thirteen years previously. The widow's vacillation in attitude may well have been due, partly to a desire not to be deprived by the provisions of the will which would take effect in case of an adoption, of her enjoyment and control of the property, and partly to the influence which Baldeo Das himself appears latterly to have had with her. Moreover, Baldeo had had differences with his co-executors, and was obviously filled with dislike for Jadunath, a dislike which may have had excellent grounds, but which does not affect the merits of the controversy further than as supplying a motive which may explain Baldeo's bitterness. The Judge who tried the case and saw nearly all the witnesses takes this view, and on a question of evidence such as is this, his view is obviously entitled to great weight.

The learned Judges of the High Court have reversed the decision come to on these grounds. They dwell on the minor discrepancies in the evidence of the five witnesses to which reference has already been made, and on the circumstance that Jadunath admitted in the box that he had been to see Dr. Ganga Singh about giving evidence. The circumstance that the latter speaks of the authority verbally, given as one for the adoption of the nephew's son simply, while the others, though agreeing with him as to this, add that the testator

said that, should Jadunath have no son, the widow might adopt a boy in the family, is what the learned Judges call a "great discrepancy." Their Lordships do not take this view. The five witnesses were in agreement and were unshaken on the important point as to the adoption of Jadunath's son. The Judges of the High Court appear to have attached too little weight in estimating probabilities to the likelihood that the language of the will, made more than two months before the testator's last illness, might, under the new sense of approaching death, be departed from. They appear to have disregarded the not unnatural change in attitude which might result when the testator found that he had no longer any chance of having a natural son, and that death was staring him in the face. So far from the Judge who tried the case having approached the case with bias, their Lordships think, after a close consideration of the judgments in both Courts below, that he has taken a fairer and less one-sided view than that which prevailed in the High Court.

They will, therefore, humbly advise His Majesty that the appeal should be allowed and the decree of the Court of First Instance restored. The respondent Baldeo Das must pay the costs of this appeal and of the appeal to the High Court.



In the Privy Council.

ADWAITYA PRASAD AND OTHERS

vs.

BALDEO DAS AND ANOTHER.

DELIVERED BY VISCOUNT HALDANE.

PRINTED AT THE FOREIGN OFFICE BY G. R. MARRISON,
1916.