Privy Council Appeal No. 100 *of* 1916.
Bengal Appeal No. 21 *of* 1915.

Musammat Bhagwat Koer and another - - - - *Appellants*

v.

Dhanukhdhari Prashad Singh - - - - - *Respondent.*

Privy Council Appeal No. 131 *of* 1916.
Bengal Appeal No. 58 *of* 1913.

Dhanukhdhari Prashad Singh and another - - - - *Appellants*

v.

Musammat Bhagwat Koer and others - - - - *Respondents.*

Privy Council Appeal No. 117 *of* 1917.
Bengal Appeal No. 20 *of* 1915.

Musammat Bhagwat Koer and another - - - - - *Appellants*

v.

Dhanukhdhari Prashad Singh and another - - - - *Respondents.*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JUNE, 1919.

Present at the Hearing:

VISCOUNT CAVE.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* VISCOUNT CAVE.]

These are consolidated appeals against three decrees of the High Court of Calcutta dated the 22nd May, 1913, two of which affirmed decrees of the First Subordinate Judge of Saran dated respectively the 17th March and the 12th May, 1910, while the third modified a decree of the same Court dated the 18th July, 1910.

The facts leading up to the litigation may be shortly stated as follows: Srikishun Singh, Bachchu Singh and Jugalkishore Singh were three Hindu brothers governed by Mitakshara law and possessed of considerable properties in the districts of Saran and Gya and in Oudh. Jugalkishore died on the 5th July, 1872, without issue, leaving a widow Mussummat Anandi Koer; Srikishun died on the 18th July, 1872, without male issue, leaving a widow and two daughters; and Bachchu died on the 9th February, 1874, leaving a son, Mahabir Singh.

After Jugalkishore's death Bachchu applied to the District Judge of Saran, under Act 27 of 1860, for a certificate to collect debts due to the estate of Jugalkishore, alleging that the three brothers had been joint in estate and that he was entitled as survivor to Jugalkishore's estate. This application was opposed by Jugalkishore's widow, Anandi Koer, who claimed that a partition between the three brothers had been effected in the year 1864 and accordingly that at the date of her husband's death the brothers were separate and she was entitled to succeed to her husband's estate. Bachchu died while this dispute was pending, but in the result the District Judge decided that the alleged partition had not taken place and accordingly that the three brothers were joint, and granted the certificate to Mahabir. This decision, being given only upon a question of representation, did not preclude Anandi Koer from raising the question of title again in a suit properly instituted for that purpose; but in fact Anandi, acting through her brother and attorney, accepted the decision and executed an agreement dated the 17th May, 1874, agreeing, in consideration of certain property being allotted to her for maintenance during her life, not further to contest the matter; and thereupon Mahabir took possession of the estate. This transaction, the effect of which is in dispute, will be referred to at greater length hereafter.

Mahabir died on the 21st June, 1894, leaving no issue but leaving two widows, the defendant Mussummat Bhagwat Koer and Mussummat Rupkali Koer, the latter of whom was then enceinte and gave birth, on the 11th October, 1894, to a daughter named Ramdulari Koer. Mahabir before his death executed a will (to be referred to later), probate of which was, on the 5th January, 1895, granted to his two widows. The posthumous daughter, Ramdulari, died on the 4th June, 1895, her mother, Rupkali, on the 8th February, 1899, and Anandi, the widow of Jugalkishore, on the 4th August, 1904. On the 13th February, 1906, Bhagwat Koer, the surviving widow of Mahabir, purporting to act under a power conferred upon her by her husband's will, adopted the defendant Ragheshwar Indar Sahi as his son and executed in his favour a deed of adoption dated the 17th February, 1906.

The plaintiff Dhanukhdhari Prashad Singh is the nearest reversionary heir to Jugalkishore and Mahabir, and claims to be entitled to their estates; and on the 20th August, 1907, he instituted the three suits out of which these appeals arise against the

surviving widow and the alleged adopted son of Mahabir in the Court of the First Subordinate Judge at Saran. One Ambika Prashad Singh, the purchaser of a part of the property, joined as co-plaintiff in two of the suits, but need not be further referred to. The causes of action in the three suits are different, and it will be convenient to deal with them separately.

In suit No. 200 of 1907 (out of which Appeal No. 100 of 1916 arises) the plaintiff Dhanukhdhari sued to set aside the adoption of the defendant Ragheshwar as invalid and contended that the power of adoption conferred by the will of Mahabir had, in the events which had happened, no operation. The terms of that will must now be referred to in detail.

The will of Mahabir, which was dated the 20th December, 1894, was divided into paragraphs. By paragraph 1 the testator, after reciting that he had then no male issue but had two wives living, directed that if any child should be born of either wife, or if children should be born of both wives, they should after his death become possessors of all his movable and immovable properties, whether ancestral or self-acquired, whereby the name and reputation of his ancestors might be perpetuated and the religious merit of his family might be preserved. By paragraph 2 he directed that if at the time of his death his children should be minors his wives successively should act as their guardians and manage the estate. It was contended that, although the word "children" (*aulad*) is used in the above two paragraphs, they were in fact intended to operate in favour of male children only; but it is unnecessary to determine this question, as in any event the first two paragraphs are controlled, so far as female issue are concerned, by the third paragraph of the will. The third and fourth paragraphs of the will are in the following terms :—

> "3. If there be no son born of either of my wives and only (a) daughter be born, in such a case also the management of the *reasat* shall be conducted by either the senior or the junior wife whoever may be existing and her (the daughter's) guardianship and training and education shall be conducted as provided in paragraph 2, She will have the daughter married in a good family as is the custom in my family. My wives up to the terms of their respective lives shall remain proprietresses and possessors as provided in paragraph 2. After the death of both of them my daughter shall become the proprietress, and she shall perpetuate the name and reputation of my family by residing in my house and maintaining the same as the absolute proprietress.
>
> "4. If by the will of Providence no male or female child be born to me, in that case both my wives, one after another as provided in paragraph 2, shall remain, in concord, proprietors and managers and perpetuate the name and reputation of the family up to the terms of their lives. I also authorize my wives that, if both of them exist, they in concurrence, or if either of them die, the surviving wife alone shall select according to her choice some worthy boy from my family or the families of my relatives and adopt him, who shall remain obedient and dutiful as a son up to the terms of the lives of my wives; and the said adopted son after the death of my two wives shall remain absolute proprietor in my place as my son, and he shall have all authority such as is possessed by me."

In the suit now under consideration it was contended by the plaintiff that under the express terms of the will the power of adoption conferred by paragraph 4 was contingent on no male or female child being born to the testator, and that as a daughter was born to him (although after his death) the power of adoption never arose. He also contended that Ragheshwar was not a member of the class, consisting of the testator's family (*khandan*) or the families of his relatives, from which alone any adoption could be made. Both these contentions were upheld by the Subordinate Judge, who accordingly set the adoption aside; and on appeal the High Court, while holding that Ragheshwar was within the class described in the will, agreed with the Subordinate Judge in holding that in the events which had happened the power of adoption did not arise, and accordingly dismissed the appeal.

On appeal by the defendants to this Board the appellants relied on the strong presumption that the testator, a Hindu, would have desired that, in the event (which happened) of his having no child who survived him and attained maturity, a son should be adopted to him by his widow, and contended that the will must be construed as having that effect. The presumption is no doubt strong, and in a case of this kind the Courts would not be astute to defeat an adoption not clearly in excess of the power; but in the present case it appears to their Lordships to be impossible, without unduly straining the words of the will, to put upon it the construction contended for on behalf of the defendants. The words "if no male or female child be born to me" clearly govern the whole of paragraph 4 of the will, including the power of adoption; and it is impossible without going outside the terms of the will and in fact making a will for the testator, to hold that in the events which happened the power took effect.

The result is that the decision of the High Court in this suit is right and that this appeal must fail.

In the suit No. 198 of 1907 (out of which Appeal No. 131 of 1916 arises) the plaintiff Dhanukhdhari sued for a declaration that under the terms of the will of Mahabir and in the events which had happened the plaintiff was entitled to immediate possession of Mahabir's estate. He based his claim on the contention that on the true construction of paragraph 3 of the will the widows were only entitled to be guardians of the testator's daughter and to manage the estate during her lifetime, and that upon her death the estate passed to her mother Rupkali and on the death of the latter to the plaintiff. The Subordinate Judge held that, on the true construction of paragraph 3, the widows took life estates in succession and that on the death of the surviving widow the property passed to Ramdulari or her representatives under section 106 of the Succession Act. He therefore dismissed the claim for possession, but added to his judgment a declaration, under section 42 of the Specific Relief Act, of the right of the plaintiff as heir of Ramdulari to succeed to the estate of the testator after the death of the surviving widow Bhagwat

Koer. Both sides having appealed to the High Court, that Court affirmed the decree of the Subordinate Judge dismissing the suit for possession, but struck out the declaration as to the plaintiff's reversionary right, holding that his plaint contained no claim for such a declaration and that the plaintiff had not made out his title to succeed to the estate of Ramdulari. The plaintiff thereupon appealed to this Board. Their Lordships agree with the decision of the High Court in this case. They are satisfied that on the true construction of the will and in the events which happened the estate was given to the testator's widows successively for life, and after the death of the survivor to Ramdulari, so that Ramdulari became entitled at birth to a reversionary estate under section 106 of the Succession Act; but the plaintiff has not in this suit adduced evidence proving his claim to be entitled to her estate, and accordingly no declaration should be made in his favour under the Specific Relief Act. This appeal, therefore, also fails.

In the suit No. 199 of 1907 (out of which Appeal No. 117 of 1917 arises) the plaintiff sued to recover the estate of Jugalkishore, alleging that in the year 1864 the three brothers, Srikishun, Bachchu and Jugalkishore separated and partitioned their properties between them, and that accordingly on the death of Anandi in 1904 the plaintiff as the next reversionary heir succeeded to Jugalkishore's estate. The plaintiff also alleged in this suit that certain properties in Gya held under *mokurrari* leases in favour of Bachchu alone in fact belonged to the three brothers jointly and were partitioned with the other properties. The defendants denied the alleged partition and as an alternative relied upon the agreement of 1874 above referred to as amounting to a relinquishment by Anandi of her estate to the next reversionary heir Mahabir so as to vest the whole proprietary right in the latter. They also alleged that the Gya properties belonged to Bachchu alone.

Upon the issues so raised a large amount of oral and documentary evidence was adduced, and in the result the Subordinate Judge was satisfied, notwithstanding the decision in 1874, that the alleged partition had in fact taken place, and accordingly that Jugalkishore at his death was separate in estate. He also held that the Gya properties belonged to the three brothers and were included in the partition. With regard to the transaction in 1874, the learned Judge held that the agreement executed on behalf of Anandi was not within the authority of her agent and was obtained by corruption, and that such agreement was never ratified by Anandi. He accordingly made a decree in favour of the plaintiff. An appeal to the High Court against this decision was dismissed. On the appeal by the defendants to the Board it at once appeared that upon the question of the partition and upon the question of the ownership of the Gya properties there were concurrent findings of fact in favour of the respondents which could not well be questioned; and accordingly the argument of the appellants turned on the legal effect of the transactions of 1874, which must now be more fully stated.

After the decree of the District Judge delivered on the 18th April, 1874, by which he held that the three brothers were joint in estate and accordingly that Mahabir was entitled to a certificate, negotiations were entered into between Mahabir and the attorney of Anandi, her brother, Babu Dukharan Singh, and on the 17th May, 1874, two *ekrarnamas* or agreements were executed. By one of these *ekrarnamas*, which was executed by the attorney on Anandi's behalf, after a recital of the recent litigation and the grant of the certificate to Mahabir, it was stated that Anandi, "in admission and acceptance of the judgment and order of the District Judge," and in consideration of the fact that Mahabir was the heir, proprietor and possessor of the estate of the three brothers, and that she had no proprietary interest therein and was entitled to maintenance according to the position of the family, "ceased from litigation," and that Mahabir, as the heir of the three brothers, had given her an 8-annas share of a certain *mouzah* out of the joint estate of all the three brothers for her maintenance during her life; and after reciting that Mahabir had on the same day executed an *ekrarnama* to the same effect, the agreement concluded: "Now contrary to the terms of these *ekrarnamas* my principal shall have no right, claim, dispute or demand in respect of the estates of the deceased persons against Babu Mahabir Prashad Singh." On the same day Mahabir executed another *ekrarnama* in similar terms, whereby he secured the agreed maintenance to Anandi during her life. In pursuance of these documents Mahabir was forthwith let into possession of the whole property of the three brothers; and from the date of these documents until her death in 1904 Anandi duly received the agreed maintenance without dispute or objection.

It was considered both by the Subordinate Judge and the High Court that these documents were executed by the agent of Anandi without authority and in consideration of the payment of a bribe to him. Their Lordships cannot accept that view. There was indeed some evidence to show that a sum of Rs. 3000 was paid by Mahabir to the attorney some time after the execution of the documents; but it was not proved that this sum was not paid in due course to the attorney as agent for Anandi and duly accounted for to her. In any case, the agreement having been accepted and acted upon by both parties for a period of thirty years without objection, and the stipulated maintenance having been duly received by Anandi during the whole of that period, it is not open to the plaintiff now to dispute the authority which was plainly admitted by Anandi herself during her lifetime; and in view of this circumstance it appears to the Board that the agreements in question must be treated for all purposes as binding upon Anandi and the transaction cannot now be disturbed. In this aspect of the matter it became necessary for their Lordships to consider what was the true legal effect of the transactions referred to.

The power of a Hindu widow to surrender or relinquish her interest in her husband's estate in favour of the nearest rever-

sioner at the time has often been considered and was fully dealt with by the Board in the recent case of *Rangasami Gounden* v. *Nachiappa Gounden* (L.R. 46. I.A. 72). As pointed out in that case, it is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a *bonâ fide* and total renunciation of the widow's right to hold the property. In the present case there was indeed no formal surrender by the widow of her estate; but there was an express agreement, binding upon her, that for considerations which appeared to her sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist; but in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate. The question is no doubt one of difficulty, but upon the whole their Lordships have come to the conclusion that the execution of the two *ekrarnamas*, followed by the acceptance for thirty years of maintenance under the terms of those documents, amounted to a complete relinquishment by Anandi Koer of her estate in favour of Mahabir, and accordingly that the title of Mahabir's representatives is established and the plaintiffs' action should have been dismissed on this ground.

Their Lordships will accordingly humbly advise His Majesty that the appeals in suits 200 and 198 be dismissed and the appeal in suit 199 allowed and that the last mentioned suit be accordingly dismissed. The plaintiffs will pay to the defendants their costs of the hearing of suit 199 before the Subordinate Judge except the costs of issues 4 and 5 (relating to the partition and the Gya estates) on which they succeeded, and will also pay to them their costs of the appeal to the High Court in that suit. The defendants will pay the plaintiffs' costs of issues 4 and 5, with the usual set-off. Upon these consolidated appeals to the Board, in which each party has partly succeeded and partly failed, there will be no costs on either side.

In the Privy Council.

MUSAMMAT BHAGWAT KOER AND ANOTHER

v.

DHANUKHDHARI PRASHAD SINGH.

DHANUKHDHARI PRASHAD SINGH AND ANOTHER

v.

MUSAMMAT BHAGWAT KOER AND OTHERS.

MUSAMMAT BHAGWAT KOER AND ANOTHER

v.

DHANUKHDHARI PRASHAD SINGH AND ANOTHER.

(*Consolidated Appeals.*)

[DELIVERED BY VISCOUNT CAVE.]

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