PRIVY COUNCIL.*

P. C.* 1915.

October 27, 28, 29; November 6, 1.

NAGINDAS BHAGWANDAS (PLAINTIFF) *v.* BACHOO HURKISSONDAS (*DEFENDANT*).

[On appeal from the High Court of Judicature at Bombay.]

Hindu law—Partition—Shares of adopted son in joint Hindu family and natural born son of another father—Construction of Dattaka Chandrika, section 5, paragraphs 24 and 25—Position of adopted son in joint Hindu family.

A Hindu joint family in Bombay governed by the Mitakshara law as altered or interpreted by the Vyavahara Mayukha, consisted of two sons H and B. H died in September 1900 leaving a widow who was then pregnant. B died on 17th December of the same year leaving a widow to whom he gave authority to adopt. On 18th December the widow of H gave birth to a son, the respondent; and in February 1901 the widow of B adopted the appellant as a son to her husband. In a suit for partition by the appellant against the respondent,

Held (reversing the decision of the appellate High Court, and restoring that of the Trial Judge of the same Court) that, on the construction of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika, the adopted son was entitled to a share equal to the share of the natural born son. The doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only to cases in which the competition is between an adopted son and a subsequently born natural son of the same father.

Raghubanund Doss v. *Sadhu Churn Doss*[1] dissented from.

Tara Mohun Bhuttacharjee v. *Kripa Moyee Debia*[2] and *Dinonath Mukerji* v. *Gopal Churn Mukerji*[3] followed.

As so construed, paragraphs 24 and 25 of section 5 of the Dattaka Chandrika are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasistha in paragraph 1, section 10 of the Dattaka Mimansa.

* *Present*:—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

(1) (1878) 4 Cal. 425. (2) (1868) 9 W. R. 423.
(3) (1881) 8 Cal. L. R. 57.

An adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the Dattaka Chandrika and the Dattaka Mimansa and relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father.

Sumboo Chunder Chowdry v. *Naraini Dibeh*[1]; *Pudma Coomari Debi* v. *Court of Wards*[2]; and *Kali Komul Mozumdar* v. *Uma Sunker Moitra*[3] followed.

The position of an adopted son in the family cannot now be decided by reference to the place which was assigned by Manu to the twelve then possible sons of a Hindu, who whatever their rights may have been then are long since obsolete.

APPEAL 16 of 1915 from a decree (2nd February 1914) of the High Court at Bombay in its Appellate Jurisdiction, which varied the decree (13th November 1913) of a Judge of the same Court in the exercise of its Ordinary Original Civil Jurisdiction.

The suit giving rise to this appeal was brought by the appellant for partition between himself and the respondent of certain joint ancestral property in which he and the respondent were the only males interested.

The parties were Gujerathi Hindus governed by the Mitakshara and Mayukha, and the only question in the appeal was whether the appellant (as a member of the joint family by adoption) took on partition a share equal to that of the respondent (a member by birth), or a reduced share which according to the Bombay authorities was one-fourth of the share of the respondent. Nagardas Shobhagdas, the grandfather of both parties, was in possession of the property in question, and died many years ago leaving two sons Bhagwandas and Hurkissondas, members of the joint and undivided family. Hurkissondas died on 14th September 1900, leaving

(1) (1835) 3 Knapp 55.
(2) (1881) 8 Cal. 302: L. R. 8 I. A. 229.
(3) (1883) 10 Cal. 232: L. R. 10 I. A. 138.

1915.

NAGINDAS BHAGWANDAS v. BACHOO HURKISSONDAS.

only his widow Gungabai, who was then pregnant. Bhugwandas died on 17th December of the same year, leaving one daughter, Navalbai, and his widow, Mankorebai to whom he gave express authority to adopt. On 18th December 1900 Gungabai gave birth to a posthumous son, the present respondent, and on 17th February 1901 Mankorebai adopted the appellant.

The validity of that adoption was contested on behalf of respondent by litigation in which the status of the appellant as the adopted son of Bhugwandas was finally established in the case of *Bachoo* v. *Mankorebai*[1] on appeal to the Privy Council.

The appellant on attaining his majority brought the present suit against the respondent and the two widows, contending that on a partition, per stirpes, between brothers' sons he was on partition entitled to the full share that his father would have taken, that is, one-half. The main contention of the respondent was that the appellant being the adopted son, and not the natural son of Bhugwandas, was not entitled to a half share, but only to a reduced share of one-fifth.

The suit was tried by Macleod J. who held that a text of the Dattaka Chandrika (section 5, paragraphs 24, 25) on which the respondent relied, did not apply to a case of partition of joint family property under the Mitakshara law, but only to cases of succession by inheritance to the estate of a deceased person, and he therefore refused to follow a decision of the Calcutta High Court in *Raghubanund Doss* v. *Sadhu Churn Doss*[2] which was opposed to that view. He was further of opinion that on such a partition there was a primary division per stirpes irrespective of the quality or quantity of the members of the stirpes, and that it was only when the

[1] (1907) 31 Bom. 373 : L. R. 34 I. A. 107.

[2] (1878) 4 Cal. 425.

secondary division per capita took place that an adopted son took a reduced share. He therefore held that the appellant was entitled to share equally with the respondent, and made a decree for partition on that footing.

An appeal by the respondent from that decision was heard by Sir Basil Scott C. J. and Batchelor J. who were of opinion that the passage in the Dattaka Chandrika applied to the case of a partition such as that before them, and was binding on the parties unless it was inconsistent with the law as stated in the Mitakshara. After an examination of the passages relating to the subject in the Mitakshara they considered that the passage in the Dattaka Chandrika, so far from being inconsistent with the Mitakshara, was in accordance with its doctrines and principles and was in fact a correct interpretation of them. They also pointed out that the text from which Macleod J. appeared to have taken his view of the primary and secondary divisions on a partition, had reference to the number of sharers, not to their quality, and did not lay down that they must take as much as their father irrespective of their own status. They agreed with the decision in *Raghubanund Doss* v. *Sadhu Churn Doss*,[1] and held that the appellant was only entitled on partition to a one-fifth share, and varied the decree of the first Court accordingly[2].

On this appeal,

Sir R. Finlay K. C., *De Gruyther K. C.* and *A. M. Dunne* for the appellant contended that on a partition (per stirpes) between brothers' sons he was entitled to the full share that his father would have taken of the joint ancestral property, namely, a one-half share.

[1] (1878) 4 Cal 425.

[2] The judgment of the High Court appealed from will be found in (1914) 16 Bom. L. R. 263.

1915.

NAGINDAS BHAGWANDAS v. BACHOO HURKISSONDAS.

The only case in which an adopted son takes a less share than a natural son is where both are sons of the same father, and the natural son has been born to him after the adoption. In that case the adopted son would, had there been no natural son, or on the death of the natural son, have taken the whole. But that would not be so in any case except where the father of the natural son and the adopted son is the same. The rule on which the respondent's contention rested was the text of Vasistha, section 15, verse 9, "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," suggests no extension of it to collateral succession; and the addition to it in the Dattaka Mimansa, section 10, verse 1, "on the death of the natural son, the adopted son is entitled to the whole," shows that the rule was not intended to apply where the partition was between a natural born son, and an adopted son, who were sons of different fathers. Such an extension was inconsistent with the Mitakshara, Chapter I, section 5, in dealing with the shares of grandsons, where the primary division per stirpes is made irrespective of the number or quality of the members of the stirpe; and Chapter I, section 11, dealing with the rights of sons according to their respective quality. The word "son" there did not include "grandson" for the purpose of extending the rule to succession among collaterals. From the Mayukha, a commentary of great authority in Bombay, the respondent's contention derived no support: see Mayukha, Chapter IV, section 5, verses 21, 24, 25, and Dayabhaga, Chapter XI, section 13, verse 10. That contention rested upon the Dattaka Chandrika, section 5, paragraphs 24, 25, and on the construction put upon those texts in the case of *Raghubanund Doss* v. *Sadhu Churn Doss*[1], which was, it was submitted, wrongly decided.

(1) (1878) 4 Cal. 425.

Even with the addition of the words which it was insisted in that case should be inserted in Mr. Sutherland's translation, paragraph 24, and the first part of paragraph 25 appear rather to support the view contended for by the appellant. Reference was made to Mayne's Hindu Law, 8th Edn., page 230, paras. 168, 169, 170. This view is also consistent with the translation[1] which the parties agreed to in the lower Courts. Of the decided cases that of *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*[2] is in favour of the appellant's contention, and it has been followed in *Dinonath Mukerji* v. *Gopal Churn Mukerji*[3] where *Raghubanund Doss* v. *Sadhu Churn Doss*[4] was distinguished. In *Raja* v. *Subbaraya*,[5] and *Baramanund Mahanti* v. *Chowdhry Krishna Charan Patnaik*[6], the decision in *Raghubanund Doss* v. *Sadhu Churn Doss*[4] was doubted. The respondent's contention was properly rejected by Macleod J. as being in conflict with the Mitakshara: reference was made to *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[7]; *Bhagwan Singh* v. *Bhagwan Singh*[8]; and *Puttu Lal* v. *Parbati Kunwar*[9]. It was decided in *Kali Komul Mozumdar* v. *Uma Sunker Moitra*[10], that an adopted son occupies the same position and has the same rights as a natural son; and no reason has been shown for giving him, under the circumstances of this case, a reduced share on partition. Mayne's Hindu Law, 8th Edn., page 230, paras. 164, 166, and page 731, para. 504 was also referred to.

(1) This is set out in the judgment of the Judicial Committee.
(2) (1868) 9 W. R. 423 at p. 425.
(3) (1881) 8 Cal. L. R. 57.
(4) (1878) 4 Cal. 425.
(5) (1883) 7 Mad. 253.
(6) (1884) 14 C. L. J. 183 at p. 187.
(7) (1899) 22 Mad. 398 : L. R. 26 I. A. 113.
(8) (1899) 21 All. 412 : L. R. 26 I. A. 153.
(9) (1915) 37 All. 359 : L. R. 42. I. A. 155.
(10) (1883) 10 Cal. 232 : L. R. 10 I. A. 138.

1915.

NAGINDAS BHAGWANDAS v. BACHOO HURKISSONDAS.

J. A. Clyde, *K. C.* and *E. B. Raikes* for the respondent contended that the proper partition in this case was that prescribed in section 5, paras. 24 and 25 of the Dattaka Chandrika which, it was submitted, was in accordance with the doctrine of the Mitakshara and the Mayukha. An adopted son is not in the same position as a natural son in the joint family, except so far as he is put in the same position by special texts; the texts referred to do not put him in the same position. Members of a joint family have not all equal rights: Mayne's Hindu Law, 8th Edn., page 664, para. 447; Mitakshara, Chap. I, section 11, page 410 of Stokes' Hindu Law Books. An adopted member of a joint family always takes, on partition with a natural born member, a quarter share. That, it was contended, was the meaning of the passage cited according to the translation admitted by the parties, and according to Sarkar's Law of Adoption, page 399, note; it was the meaning of Sutherland's translation when the omissions were supplied and the glosses admitted. The first seven sections of Chapter I of the Mitakshara are confined to the rights of the natural born sons (aurasa), of the same caste (savarna), and the rule in section 5, verses 1 and 2, on which the appellant relies, is not only merely a restrictive rule, which does not confer any right, but it is expressly confined to the natural born son, the word "utpadana" (procreation) being used regarding him in those verses. Section 7 deals with natural sons not "savarna," and to them a reduced share is assigned, and this whether they share as sons, grandsons, or great-grandsons. In section 11 the secondary sons are enumerated, and the rule of Yajnavalkya is stated according to which each class only shares if the higher classes are absent. In mitigation of this rule the author introduces the texts of Vasistha and Katyayana, and gives his interpretation of them, and it is not the texts but Vijnaneswara's

interpretation of them which is the Mitakshara law: see *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[1]. Paragraph 26 says that all the secondary sons of the same caste, and particularly the "son of the wife," take a quarter share, but that son can only share with his uncles or cousins, for the circumstances of his case he cannot have a brother. It was submitted, therefore, (*a*) that Vasistha's and Katyayana's exceptions, at any rate as introduced into the Mitakshara, were enabling exceptions giving the adopted son, and other secondary sons a right to share where they co-exist with natural sons; and (*b*) that those exceptions whether enabling or disabling were continued by Vijnaneswara as applying to every partition in a joint family. The reason for reducing the share was, it was submitted, the inferiority of the adopted member whether on the test of consanguinity (of which he has of course none) or sacrificial efficacy in which he is inferior to the natural born member: see Mitakshara, Chap. I, section 11, verse 21; the table of Nirnaya Sindhu, the great Mahratta authority at page 123 of Sarvadhikari's Hindu Law of Inheritance; and the Dattaka Chandrika, section 3, verses 1—3. The natural born member offers oblations to three generations of ancestors, and the adopted member only to one, if there are any born members in the family.

The construction of the passages in the Dattaka Chandrika which the respondent contends for was allowed in *Raghubanund Doss* v. *Sadhu Churn Doss*[2]; and to get rid of that case the appellant suggests that the last part of paragraph 24 and the whole of paragraph 25 are directed to proving only that the adopted son of an adopted son cannot take more than his father would have taken, a proposition which no one could

(1) (1868) 12 Moo. I. A. 397 at p. 435.

(2) (1878) 4 Cal. 425.

1915.

NAGINDAS BHAGWANDAS v. BACHOO HURKISSONDAS.

dispute. Mr. Mayne after labouring this construction postulates, of course, rightly but without any authority that neither can the natural son of an adopted son take more than his father would have done which is a much bolder proposition. The respondent's interpretation, on the contrary, makes the author refute the following plausible but fallacious argument, that, as the grandson succeeds to the share appropriate to his father, and as the share appropriate to the father of an adopted grandson (if natural born) is a full share, therefore the adopted son of a natural son takes a full share. The fallacy is that the first proposition of the suggested argument is, as the Dattaka Chandrika points out, a restrictive (and not an enabling) rule, and after indicating the impropriety which would result if it were enabling, the author explains that it is only true if the words "the share appropriate for his father" are qualified by the addition of the words, "if he had been of the same description" (that is adopted or natural) "as himself." The author then links this up with the first statement of the proposition in passage in para. 24 (omitted by Sutherland) and finishes the subject by stating that the same rule applies to the great grandson, that is, the exact limit of the coparcenary system. The last sentence in para. 25 is an answer to the appellant's contention that the rule is not intended to apply to a partition in a Mitakshara family; and so is para. 30 which in terms refers to a partition during the father's life.

All the criticisms of the decision in *Raghubanund Doss* v. *Sadhu Churn Doss*[1] have been *obiter dicta* in cases where the point now in question did not arise for consideration. *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*[2] was decided on the translation of Sutherland with the material passage omitted, and

(1) (1878) 4 Cal. 425.

(2) (1868) 9 W. R. 423.

relates only to collateral succession. *Dinonath Mukerji* v. *Gopal Churn Mukerji*[1], though it followed *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*[2] as to collateral succession, contains a dictum at page 62 of the report directly in favour of the respondent. The decision of this Board in *Pudma Coomari Debi* v. *Court of Wards*[3] and *Kali Komul Mozumdar* v. *Uma Sunker Moitra*[4], adopt the reasoning and conclusion of Mitter J. in the High Court in former case[5]: but he mentions as one of the exceptions the very text of Yajnavalkya on which the respondent relies (Mitakshara, Chap. I, section 11, verse 21) citing it with the addition (not found in the Mitakshara) "otherwise", that is, except that he does not share or present funeral oblations with the natural born or other superior sons, "the adopted son in every respect resembles the legitmate son." Reference was also made to West and Buhler, pages 10, 23; Mayne's Hindu Law, 8th Edn., page 227, para. 170, as to paragraphs 24 and 25 of Dattaka Chandrika; 2 Macnaghten's Hindu Law, 89; Mayne's Hindu Law, 8th Edn., pages 339, 340, as to the vested interest a member of a joint Hindu family (Mitakshara law) takes in the joint property; Mayne's Hindu Law, 8th Edn., page 342, para. 271; West and Buhler, page 598; and *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova*[6].

Sir R. Finlay K. C. replied:—In this case the adopted son was not adopted until after the birth of the natural son; whilst the whole argument for the respondent has been with regard to a case where the natural son has been born after the adopted son had been adopted. Reference was made to *Suraj Bunsi Koer* v.

(1) (1881) 8 Cal. L. R. 57. (2) (1868) 9 W. R. 423.
(3) (1881) 8 Cal. 302: L. R. 8 I. A. 229.
(4) (1883) 10 Cal. 232: L. R. 10 I. A. 138.
(5) (1879) 5 Cal. 615 at p. 623. (6) (1889) 14 Bom. 249 at p. 259.

1915.

NAGINDAS BHAGWANDAS *v.* BACHOO HURKISSONDAS.

Sheo Persad Singh[1] per Sir J. Colvile; Dattaka Mimansa, Chap. II, para. 64; Mitakshara, Chap. I, section 11, verses 12, 30, 31; *Sumboo Chunder Chowdry* v. *Naraini Dibeh*[2]; *Pudma Coomari Debi* v. *Court of Wards*[3]; and the same case in the High Court *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*[4]; *Kali Komul Mozumdar* v. *Uma Sunker Moitra*[5]; and the same case in the High Court *Uma Sunker Moitro* v. *Kali Komul Mozumdar*[6]; and *Ramchandra Martand Waikar* v. *Vinayek Venkatesh Kothekar*.[7]

1915, November 26th:—The judgment of their Lordships was delivered by

SIR JOHN EDGE:—The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujerathi Hindus, of which the plaintiff by adoption and the defendant by birth are the male members. The question in this appeal is one as to the share in the joint family property to which the plaintiff is on partition entitled.

The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissondas Nagardas died on the 14th September 1900, leaving his wife surviving; she was then pregnant, and the defendant, who was the posthumous child was born on the 18th December 1900. Bhugwandas Nagardas died childless on the 17th

(1) (1879) 5 Cal. 148 at pp. 164, 165 : L. R. 6 I. A. 88 at pp. 99, 100.
(2) (1835) 3 Knapp 55.
(3) (1881) 8 Cal. 302 : L. R. 8 I. A. 229.
(4) (1879) 5 Cal. 615.
(5) (1883) 10 Cal. 232 : L. R. 10 I. A. 138.
(6) (1880) 6 Cal. 256.
(7) (1914) 42 Cal. 384 : L. R. 41 I. A. 290.

December 1900, leaving his widow surviving him; he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the plaintiff as a son to her deceased husband. The parties are governed by the Mitakshara, as altered or interpreted by the Vyavahara Mayukha. The plaintiff claimed that he was entitled on partition to a moiety of the family property. On the other hand the defendant contended that the plaintiff, as an adopted son, was entitled to a reduced share only of the family property; in support of that contention the defendant relied upon paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss*.[1]

This suit was tried in the High Court at Bombay by Macleod J., who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural born son of the same father (which is not the case here), and he gave the plaintiff a decree for an equal share. From that decree the defendant appealed.

On appeal Sir Basil Scott C. J. and Batchelor J. holding, as their Lordships understand their judgment, that there is nothing in the Mitakshara which is inconsistent with paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as these paragraphs were construed by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss*[1], adopted the construction of Markby and Prinsep JJ. of those paragraphs, and decided that the plaintiff as an adopted son was on partition entitled only to a reduced share in the family

[1] (1878) 4 Cal. 425.

1915.

NAGINDAS BHAGWAN-DAS v. BACHOO HURKISSON-DAS.

property. From their decree this appeal has been brought.

The learned Judges of the High Court on the appeal from Macleod J. in this suit had before them Sutherland's translation of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika, the translation of those paragraphs which was relied upon by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss*,[1] and a translation made by Sir Ramkrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit. Sutherland's translation was not a complete translation of the Sanskrit text. The translation which was relied upon by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss*[1] and is apparently accepted as a correct translation by Mr. Mayne in paragraph 169 of his Hindu Law and Usage, is as follows :—

Paragraph 24.—"Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son. Where such son may not exist, the adopted son takes the whole estate even."

Paragragh 25.—"Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grandfather, is entitled to an equal share even with a paternal uncle, who is also such description of son ; therefore a grandson who is an adopted son may (in all cases) inherit an equal share even with an uncle. This must not be alleged (as a general rule). For there would be this discrepancy : where the father of the grandson were an adopted son, he would receive a fourth share ; but the grandson, if he were such son (of him) would receive an equal share (with an uncle in the heritage of the grandfather). And accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question (*viz.*, the adopted son of one adopted) succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also."

[1] (1878) 4 Cal. 425.

The translation which was made by Sir Ramkrishna Bhandarkar is as follows :—

"It should be understood by this that an adopted son acquires the ownership wherever possible of his proper share by a relation similar to the relation, brotherhood, &c., by which a natural-born son acquires a right to the property of his brothers, &c. Similarly, an adoptive grandson whose adopting father is dead acquires the ownership of the share proper for an adopted (son) when the owner of the property has got another son or other sons and of the whole when he has got no son or sons. It should not be argued that because a grandson is necessarily the owner of the share proper for his father, the taker (in adoption) of the adoptive son being a natural-born son of the grandfather and entitled to a share equal to that of the uncle similarly born, the adoptive grandson should take a share equal to that of the uncle ; for it involves impropriety, inasmuch as the adopted son gets one-fourth and the adoptive grandson an equal share. Therefore that share is proper for a son's father which he would get by law if he were of the same description (adopted or natural born) as the son. This way should be followed in the case of great grandsons also."

Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the Dattaka Chandrika other than that at which their Lordships have arrived.

The author of the Dattaka Chandrika was in paragraphs 24 and 25 of section 5 of his commentary, relying upon the text of Vasistha according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." The text of Vasistha is quoted by Nanda Pandita in paragraph 1 of section 10 of the Dattaka Mimansa, who added, "on the death of him (the naturally-born son) he (the adopted son) is entitled to the whole." It is obvious that Vasistha and Nanda Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to

1915.

NAGINDAS BHAGWAN-DAS v. BACHOO HURKISSON-DAS.

cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally-born son of a brother or a nephew of the adoptive father.

The author of the Dattaka Chandrika expressed his views somewhat obscurely and confusedly in paragraphs 24 and 25 of section 5 of his commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was. For the purposes of his commentary he paraphrased the text of Vasistha that "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," and in paragraphs 24 and 25 of section 5 he illustrated the text of Vasistha, as he understood that text, by examples of its application.

His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son. The author of the Dattaka Chandrika, applying the well-established rule of Hindu law that a son takes no greater share than his father if a qualified person would have been entitled to, illustrated the application of the principle of the text of Vasistha by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive father's adoptive father, in other words his uncle

through the adoption of his adoptive father. In the first case, as the author of the Dattaka Chandrika pointed out, the adopted son would take a share equal to that of his uncle by adoption; in the latter case, as a son cannot take a greater share than his father would have been entitled to, the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally-born member of the family, and who would have taken a greater share than his brother by adoption.

As their Lordships construe paragraphs 24 and 25 of section 5 of the Dattaka Chandrika those paragraphs are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasistha in paragraph 1 of section 10 of the Dattaka Mimansa. To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* [1], would bring them into conflict with what are now well established principles of Hindu law. The attention of Markby and Prinsep JJ. in *Raghubanund Doss* v. *Sadhu Churn Doss* [1], which was decided by them in 1878, does not appear to have been drawn to the case of *Tara Mohun Buttacharjee* v. *Kripa Moyee Debia* [2] which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse JJ. held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral relative of his adoptive father. In *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* [2] the plaintiff by birth and the defendant by adoption were in equal relationship to the deceased collateral; their respective grand-fathers were the first cousins of

[1] (1878) 4 Cal. 425. [2] (1868) 9 W. R. 423.

1915.

NAGINDAS BHAGWANDAS v. BACHOO HURKISSONDAS.

the collateral and their respective fathers were his *first cousins once removed*. Loch and Hobhouse JJ. were pressed in argument to put a construction upon paragraph 25 of section 5 of the Dattaka Chandrika adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of the body legitimately begotten, where there is no such son subsequently born; and that there was no reason why the plaintiff and the defendant in the suit before them should not each take the share to which their respective fathers were entitled. The parties to the suit which was in appeal before Loch and Hobhouse JJ. were governed by the law of the Dayabhaga, but that fact does not distinguish that case in principle from the case which is now before this Board. The decision in *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* [1] was followed in 1881 by McDonell and Field JJ. in *Dinonath Mukerji* v. *Gopal Churn Mukerji*[2]. In *Raja* v. *Subbaraya*[3] which was, however, a case relating to Sudras, Sir Charles Turner C. J. and Muttusami Ayyar J. in 1883 doubted that paragraph 25 of section 5 of the Dattaka Chandrika had been correctly construed in *Raghubanund Doss* v. *Sadhu Churn Doss*.[4] Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep JJ. of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika has been adopted.

In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the defendant that the position of a member by adoption in a joint Hindu family, and his interest in the joint family property,

(1) (1868) 9 W. R. 423.
(2) (1881) 8 Cal. L. R. 57.
(3) (1883) 7 Mad. 253.
(4) (1878) 4 Cal. 425.

are inferior to the position and interest of a member by birth of the family, and it was suggested that an adopted son does not on his adoption become a coparcener in the joint family property. It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point and could throw no light on the construction of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika or upon the position and rights of an adopted son. Hindu law and customs have not stood still, and what we are now concerned with is the position at the present time of an adopted son in a Hindu family. As early as 1835 this Board in *Sumboo Chunder Chowdry* v. *Naraini Dibeh* [1] considered that according to Hindu law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881 in *Pudma Coomari Debi* v. *Court of Wards* [2] approved of the decision of this Board in *Sumboo Chunder Chowdry* v. *Naraini Dibeh* [1] and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa.

[1] (1835) 3 Knapp 55.

[2] (1881) 8 Cal. 302 : L. R. 8 I. A. 229.

1915.

NAGINDAS BHAGWANDAS v. BACHOO HURKISSONDAS.

Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. To the same effect is the decision of this Board in *Kali Komul Mozumdar* v. *Uma Sunker Moitra*.[1] In the last-mentioned case when it was before the Full Bench of the High Court at Calcutta,[2] Romesh Chunder Mitter, J., held that—

"According to Hindu law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it."

With that statement as to the Hindu law of adoption their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside and the decree of Mr. Justice Macleod should be restored.

The respondent must pay the costs of this appeal and of the appeal in the High Court.

Solicitors for the appellant:—Messrs. *Hughes & Sons.*

Solicitors for the respondent:—Messrs. *Latteys & Hart.*

Appeal allowed.

J. V. W.

(1) (1883) 10 Cal. 232; L. R. 10 I. A. 138.
(2) (1880) 6 Cal. 256 at pp. 259, 260.