

Mst. Kesarbai and another - - - - - Appellants
v.
Indarsingh alias Ishwarkumar - - - - - Respondent

FROM

THE HIGH COURT OF JUDICATURE AT NAGPUR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1944

Present at the Hearing :

LORD PORTER
LORD GODDARD
SIR MADHAVAN NAIR

[*Delivered by* LORD GODDARD]

The only question raised in this appeal is whether it has been proved that there is a custom in the Raghubansi caste, to which both parties belong, that a widow can adopt a son to her deceased husband, without his authority. The burden of proof was admittedly on the respondent, who was the defendant in the suit. The District Judge at Chhindwara held that the custom was not proved; his judgment was reversed by the High Court at Nagpur, who dismissed the plaintiffs' claim, and ordered the plaintiffs to place the defendant in possession of the property to which as an adopted son he was entitled.

The facts are that one Atalsingh, a member of the above mentioned caste who lived in the Chhindwara district of the Central Provinces died in 1918 leaving a widow but no issue. The widow remained in possession of his property till her death in June 1937. In August 1935 the widow adopted the defendant and an adoption deed was duly registered before the Sub-Registrar on 24th August of that year. In the deed the widow stated that her husband had empowered her to adopt any boy according to her own desire at any time, to continue his name. When the widow died the plaintiffs who are the sisters and reversioners of Atalsingh endeavoured to take forcible possession of the property; a riot ensued and the natural father of the defendant was murdered, a matter which might well discourage persons from coming forward to give evidence. When the riot took place the police intervened and placed a receiver in possession under sec. 145 of the Code of Criminal Procedure. Thereupon the plaintiffs brought this suit claiming a declaration that they were entitled to all the property left by the widow and that the defendant had no title or interest therein. As their Lordships are of opinion that the judgment of the High Court in favour of the defendant should be affirmed they do not think it necessary to discuss whether the form of action was technically correct and there was no argument on the point. In their written statement the material allegations made by the plaintiffs were that there had been no adoption in fact of the defendant by the widow and that the adoption, if any, was void because no authority had been given to the widow by her deceased husband to adopt a son. In his first written statement the defendant besides

asserting the fact of his adoption, relied only on the allegation that the widow had been authorised by her husband to adopt a son, but afterwards he obtained leave to amend and then set up that there is a custom of the caste that a widow can adopt a son to her deceased husband without his permission or authority. The issue of authority was decided against him in both Courts and no more need be said about it.

It appears from works of authority cited in the judgment of the High Court that the Raghubansis are a class of Rajputs of impure descent. They appear to have originally emigrated from Ayodhya in Oudh and to have found their way not only to the Central Provinces but the Gwalior territory, the Kandish district of Bombay, Bhopal and other places. Originally it is not disputed that they were governed by the law of the Burans (Mitakshara) School under which a widow could not adopt without authority. In some parts of India it is clear that they have departed from the strict orthodoxy of the Benares school; the High Court quote from the Nagpur Settlement Report of Sir Reginald Craddock in which he says that their religion is unorthodox and they have gurus or priests of their own caste, discarding Brahmans, and in the case of *Bishwa Nath Singh v. Jugal Kishore* L.R. 50 I.A. 179 which related to a family in the district of Sitapur in Oudh, and to which further reference will be made hereafter, a finding of the very custom that is in question in the present appeal was upheld by their Lordships' Board. Now the evidence of the custom which was rejected by the Trial Judge and accepted by the High Court was that, among others, of five malguzars residing in different villages and three different districts. Other witnesses came from other villages in two different districts. They were for the most part men of some standing and position, and their Lordships cannot but agree with the learned Judges of the High Court when they say "We see no reason why these persons, important and influential in their own ways and scattered over such wide areas should all combine to give false evidence against the plaintiffs." They were all quite firm in their evidence that this custom did exist in their caste. Between them they gave some 12 specific instances and a further one was referred to by a pleader who was called on behalf of the plaintiffs. It is true that in none of the 12 cases referred to by the defendant's witnesses could the witnesses say definitely that no authority had in fact been given by the deceased husband whose widow had adopted; but the striking fact is that in only one of the cases, even where the matter had been referred to the panchas, was it ever suggested that there might have been a lack of authority. This is certainly remarkable and points to the fact that the custom was so notorious that no one thought of challenging it. As the High Court said when dealing with the case No. 7, relating to one Bhoorasingh "knowing how keenly these cases are contested on every conceivable and inconceivable ground it is remarkable that we find case after case in which this plea was not taken." The one instance in which it is said to have been raised is No. 3, relating to Daryaosingh. Two witnesses were called, one of them deposed that the question of authority was raised before the panchas, while the other said that the only issue decided was that the widow could adopt anyone provided he was of the same community. Both witnesses agree that the latter was what the panchas actually decided. The second witness was not cross-examined as to whether it was the only issue raised, but in any case the adoption seems to have been strenuously contested and if anything could have been made of the adoption having taken place without authority it is most unlikely that it would not have been raised. It may be that the panchas thought that the custom was so well known that they did not trouble to refer to it when giving a decision. The plaintiffs' evidence with one exception was of a purely negative character; the witnesses simply said that they knew of no such custom as was alleged but they gave no instance where there had been a successful challenge of a widow's right to adopt without authority, nor as the High Court point out did they call any of the leaders of their community who could speak with authority to disprove the custom, in spite of the fact that the defendant had called persons of considerable influence and position to support it.

The exception was the evidence of a pleader, one Vijai Singh. He is a member of the caste and deposed that he had never heard of the custom. But he did not, as he said in examination in chief, live in his community. He would not therefore be likely to know of its particular customs, especially when it is remembered that adoption in this caste is in any case rare. But though he did not know of any custom of widows being able to adopt without the authority of their husbands he did know of two cases where it had been done. The highest he could put it was that in one of these cases the adoption was disputed on that ground and his father was asked to settle the matter. His father then asked how the parties (or more probably the objecting party) knew that there was no authority and advised them not to quarrel, and apparently the person about whom the dispute arose is still regarded as an adopted son. This evidence is quite negative and does not help one way or the other; it is quite consistent with the learned pleader's father having taken up the very sensible attitude of saying in effect, " Well even assuming that your objection is good how are you going to prove it? "

The principal attack which has been made on the High Court's judgment is that the learned judges misunderstood and paid far too much attention to the case before this Board of *Bishwa Nath Singh v. Jugal Kishore* which has been mentioned above. Sir Thomas Strangman's argument was that as it is firmly established that migrants carry with them the law applicable to them at the time of migration and as it is conceded that originally in Oudh the caste was governed by the Benares School *prima facie* they are still governed by it. Therefore the fact that one portion of the caste settled round Sitapur have deviated from that school is no evidence that those in the Central Provinces have also deviated. He further contends that the case in question related only to a particular family custom and not to that of a caste. In their Lordships' opinion it is clear that the evidence in that case related not to the custom of a particular family but to the custom of the caste in the locality where the family lived. The custom affected the family because it was the caste custom in that locality. This appears from the fact that the evidence mainly relied on was contained in the " *wajib-ul-arzes* " of eight villages, in four of which no member of the family in question resided or owned property. The High Court did not treat that case as binding them to find that this custom prevailed throughout the entire caste wherever they might be found. Had it been binding there would have been no more to be said. What they did was to regard the case as showing that the custom did prevail among certain members of the caste, that it prevailed in Oudh whence the caste originally came and that it was therefore reasonable and of long standing. To that extent it also afforded corroboration of the defendant's witnesses as showing that the custom to which they deposed was known and practised by other members of their community in a different part of India. The case of *Babu Motising v. Durgabai* I.L.R. 53 Bom. 242 is in no way in conflict with the Privy Council decision nor does it assist the plaintiffs. It decided no more than that it was not proved that this custom obtained among those members of the caste who were settled in Kandish in the Bombay Presidency, and Murphy, J. pointed out the difference in certain customs which prevailed among those of the caste settled in Oudh and the Central Provinces from those prevailing among them in Kandish. The learned Trial Judge evidently took an unfavourable view of the defendant's case from the outset as is shown from the note of his decision on the application of the defendant to have additional witnesses examined on commission and on his application for an amendment of pleadings made on 24th September, 1938. He obviously thought that the allegation as to custom was a mere after-thought and in their Lordships' opinion he did not give the weight to the evidence which it deserved. They consider that the fully reasoned judgment of the High Court is more satisfactory; no error of law can be attributed to it and their Lordships accordingly are not prepared to differ from the conclusion at which that Court arrived. They will humbly advise His Majesty that the appeal should be dismissed with costs.

MST. KESARBAI AND ANOTHER

v.

INDARSINGH ALIAS ISHWARKUMAR

DELIVERED BY LORD GODDARD

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