

*Privy Council Appeal No. 72 of 1921.*

*Patna Appeal No. 21 of 1920.*

Sahdeo Narain Deo and others - - - - - *Appellants*

*v.*

Kusum Kumari - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER, 1922.

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*Present at the Hearing :*

LORD BUCKMASTER.

LORD PHILLIMORE.

SIR JOHN EDGE.

LORD SALVESEN.

[*Delivered by* LORD PHILLIMORE.]

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The question to be decided in this case is whether the succession to an impartible estate, called the Lachmipur Raj, devolved upon the adopted son of the last owner, or upon his nearest collateral blood relation. The action was brought by two half-brothers, claiming in the alternative that one or other was entitled to succeed according to the rule of primogeniture established for this property (with a third plaintiff, the assignee, for value of part of their claims), to recover possession from the defendant, who alleged that he was the adopted son of the last holder. Various points were raised as to the fact and regularity of the adoption, but these were disposed of in the course of the case in favour of the defendant. The plaintiffs' main case, however, was that there was a "family or clan custom which forbids and bars inheritance by adoption," or, as counsel for the plaintiffs has invited their Lordships to look at the matter, that the succession to this estate is not regulated in any sense by Hindu law, but wholly by custom, which custom has no place in it for adoption, or, alternately, for the succession of an adopted son.

The Lachmipur Raj, is situated in N.W. Bengal in the district of Bhagalpur, part of it extending into the Santhal Parganas. A point was raised in the case that by reason of Regulation 3 of 1872, relating to these Parganas, the Court of the Subordinate Judge at Bhagalpur had no jurisdiction to try it, even though the plaintiffs abandoned that part of their claim which related to the portion in the Santhal Parganas.

This view was taken in the High Court, and, if it be correct, is at once fatal to the case of the plaintiffs. It seemed, however, to their Lordships not so plain, on first impression, that this decision was correct, and counsel for the respondent desiring to have the matter tried upon the merits, their Lordships have heard the argument upon the merits without further discussion of the preliminary question of jurisdiction, and as upon the merits they have come to a conclusion, in accordance with that of both Courts below, that the plaintiffs have failed to make out their case, they do not deem it necessary to enquire further into the question of jurisdiction.

The Lachmipur estate appears to be one of several which are comprised under the term, the 84 gadis called Chowrasi—apparently a form of the vernacular word for 84. The holders of these gadis all claim to be Surjabansi Rajputs, and, as such, high-caste Hindus. They differ, however, in some customs, social and otherwise, from ordinary high-caste Hindus, and it is now said of them by the plaintiffs that they are really descendants of an aboriginal tribe called Bhuiyas, who have assimilated the manners of Hindus for many generations, and, having had fictitious pedigrees made out for them by Brahmins, now claim to be Rajputs. Certainly the bulk of the inhabitants in the district are Bhuiyas, and, though it is possible that these particular gadi holders may be lineal descendants of Rajput invaders and conquerors, the High Court has proceeded on the footing that they are by descent Bhuiyas. Their Lordships, without pronouncing upon the anthropological question, will assume, as the assumption is favourable to the plaintiffs, that this clan or collection of families, and in particular the family in which this estate has been held, are aboriginal Bhuiyas. The question then will be whether in matters of succession they have retained their aboriginal customs, or have adopted Hindu law, in whole or in part, and specifically whether by law or custom the succession of an adopted son is admitted.

Upon this point the plaintiffs have the decision of both Courts in India against them, and if the point to be decided is to be regarded as a question of pure fact, this would in an ordinary case be enough to dispose of the appeal. But it is said that the Subordinate Judge disqualified himself from coming to a correct conclusion, because he omitted all consideration of the origin of the family, and that both he and the High Court erred in law in putting the burden upon the plaintiffs, whereas it ought to

have been put and put strongly upon the defendant. This latter argument depends upon a consideration of the decision of this Board in the case of *Fanindra Deb Raikat v. Rajeswar Dass* (12 I.A. 72, 1885), and as it is upon this case that the appeal is founded, it is desirable to deal with it *in limine*. It turned upon the question whether the custom of adoption and succession by adoption was admitted in a family of the Koch tribe, who had begun to designate themselves as Rajbansis, and for social purposes affected to be Hindus. This Board came to the conclusion that, though they affected to be Hindus, they were not generally governed by Hindu law, but had retained and were governed by family custom, which as regards some matters was at variance with the Hindu law; and this Board held that the High Court had been wrong in holding that the question was "whether the general Hindu law was modified by a family custom forbidding adoption," and that the real question was "whether with respect to inheritance the family is governed by Hindu law or by customs which did not allow an adopted son to inherit." Having thus stated the question, their Lordships came to a conclusion upon the evidence agreeing in this respect with the Judge of first instance, and disagreeing with the High Court, that without regarding the burden of proof the facts showed that no succession by way of adoption was admissible. They summed up their judgment by saying:—

"Whether, if the Baikunthpur family were shown to have become Hindus out and out saving only special customs, such evidence would be sufficient to prove a special custom need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that whatever Hindu customs may have been introduced into it, the custom of succession by adoption has not been introduced."

The effect of this decision is stated in *Muhammad Ibrahim Rowther v. Shaikh Ibrahim Rowther* (49 I.A., p. 123), where their Lordships express themselves as follows:—

"The question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been governed by Hindu law, and there would have been this power. But though they affected to be Hindu, that in fact was not their status; the utmost that could be said was that, though the family had introduced many Hindu customs, they in fact were governed by family customs. Of such a family it was manifestly appropriate to remark that 'the question is not whether the general law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit.'"

Upon the principle thus laid down, the proper enquiry is whether this family can be said to have become so far Hindu as to throw the burden of proof upon the plaintiffs, or whether the opposite conclusion should be come to, which would throw the burden upon the defendant.

A great mass of evidence was given in the case, mostly on the specific question of the custom of adoption, but, incidentally, with regard to the other customs of the family or clan of Chowrasi gadis. But before coming to this evidence their Lordships would wish to begin at the beginning, and see the account which the plaintiffs, other than the assignee, give of themselves. Their plaint, filed on the 18th September, 1907, said that either of the claimants was "a Hindu governed by the Benares school of Hindu law"; that the Lachmipur estate was an impartible Raj, the succession to which was governed by a family custom or Kula char; that it was one of 84 gadis "owned and possessed by Surjabansi Rajputs of the same clan" as the deceased, which went by the collective name of Chowrasi; and that among the holders of these gadis there was a "family or clannish custom which forbids and bars inheritance by adoption and the succession to these gadis by blood relations cannot be defeated by adoption." This allegation made in paragraph 5 is repeated in paragraph 11. It should be added that in paragraph 3, when dealing with the rights of a widow who came into the line of succession, she is said to have come into possession "with the limited rights of a Hindu widow succeeding to the property of her deceased husband under the Benares school of Hindu law."

In accordance with this contention, the issue framed in respect of this matter was stated as follows: "Is the Lakshmipur Estate one of the alleged 84 Gadis called Chowrasi, as stated in paragraph 5 of the plaint, and governed by a family or clannish custom by which adoption is forbidden and which bars inheritance by an adopted son? Is such a custom valid?" And upon that a large part of the evidence had been given when, on the 26th July, 1915, an application was made by a petition presented on behalf of the plaintiffs of which the following passages are important:—

"1. That the plaintiffs have within the last week come to know from a very authoritative source that the ancestors of the late Thakur Latit Narain Deo were originally non-Hindus, and in course of time adopted only certain rules of Hindu law and called themselves Hindus.

"2. That this fact was never known to the plaintiffs herebefore until one of them was shown an extract from the report of the Settlement operations, Sonthal Parganas, by H. McPherson, Esq., a true copy of which is annexed herewith.

"3. That on account of the fact mentioned in paragraph 1 of this petition it is essentially necessary that the plaint should be amended at certain places which are more fully stated below.

"4. That the plaintiffs, therefore, pray that the following amendments may be made in the plaint, namely, that (1) in paragraph 1 the words 'who was a Hindu governed by the Benares School of Hindu Law' after describing Thakur Lalit Narain Deo of Luchmipur be omitted and struck off.

"(a) In paragraph 3 the words 'under the Benares School of Hindu Law' at the end of the paragraph, be struck off.

“(b) That after paragraph 1 the following paragraph may be inserted and added as paragraph 1 (a) :—

“That the ancestors of the said Thakur Lalit Mohan Deo belonged to a tribe called the Bhuiyas and were originally non-Hindus who in course of time adopted certain customs and practices in vogue amongst Hindus after they settled down in that part of the country where the Estate Lachmipur is situate.”

Then followed certain consequential alterations which were also said to be important. This petition was supported by an affidavit, but it is remarkable that the affidavit was only made by the assignee, and it may well be doubted whether any inducement would have led the original claimants to commit themselves by oath to the statements in paragraph 1 of the petition. The application made in this petition was refused by the Subordinate Judge, and his action was approved by the High Court, and, in their Lordships' view, rightly; and this puts the plaintiffs into a great difficulty. But the Judges in the High Court thought that nevertheless it was possible for the plaintiffs to go into the question of the origin of their community, and, as already stated, they held that indications pointed to the holders of these gadis being as a group originally indigenous, and having, at some time not known, accepted Hinduism. The High Court Judges place this acceptance somewhere near the beginning of the nineteenth century. At any rate, there are many decisions which unquestionably proceed upon the footing that Hindu law, according to the school of Benares—that is, the Mitakshara—was of general application to these Chowrasi gadis. Their Lordships listened to an analysis of such of these cases as counsel for the appellants thought could be scrutinised usefully, and they see no reason to qualify the conclusions of the High Court.

To sum up this part of the case, the combination of the plaintiffs' own statement, the oral evidence and the judgments in former cases is, in their Lordships' opinion, sufficient to justify the conclusion of the High Court that this clan, even supposing its origin to be not Hindu, had adopted in general, not only Hindu religion and Hindu social usages, but also the Hindu law regulating the succession of landed property, and this though, as the Judges held, “there were still some relics of non-Hinduism.”

It was suggested for the appellants that this conclusion was not enough, that if it could be proved that there was a customary law of succession before these people became converted to Hinduism, that custom could not be abrogated by conversion.

Now this case does not deal with modern conversion, but with a conversion which is at least 100 years old, and the Indian Courts and this Board have with regard to these ancient conversions admitted the possibility that they might carry with them abrogation of former customs. Thus, in the case in 12 I.A. already cited, it was an accepted matter that the family was of non-Hindu origin, but their Lordships nevertheless embarked upon the enquiry whether they had become Hindus “out and

out"; and in the recent judgment of this Board in *Palaniappa Chettyar v. Alayan Chetti*, 48 I.A. 539, it was accepted as an explanation of the custom of Putrabhaga, according to which the sons of each wife formed a class, and the classes divided the inheritance, instead of the individual sons, that it was probably due to the Dravidian origin of the people in question, who had retained some of their non-Hindu customs, though they had become Hindus and were governed by general Hindu law. In that case authority was cited for considering a mass of tribes in Southern India as having become Hinduised and subject to the law of the Smritis in most respects, though still adhering to particular customs.

The High Court, therefore, was right in treating it as a thing possible in law that this clan on the assumption that it was originally non-Hindu, had become sufficiently Hindu to make succession by adoption, even if non-existent in non-Hindu times, come in with the rest of Hindu law, though the custom of non-adoption might be a survival, as in *Palaniappa Chettyar v. Alayan Chetti*.

The High Court, however, without applying any principle as to the burden of proof, leaving that question open, came to a decision unfavourable to the appellants, and, after giving due weight to the criticism of the judgment of the Subordinate Judge, which counsel for the appellants has administered, their Lordships see no reason why the two judgments should not be treated as concurrent findings of fact, or why they should not stand. But as the case is important, they will go with some detail into the reasons which lead them independently to the same conclusion.

It is said for the appellants that there were a great number of cases where, if adoption had been the custom, it would have taken place, and they support this argument by saying that weight was given to a similar argument in 12 I.A. There is force in this contention, though there are counter observations to be made. But in the case in 12 I.A. there was no single instance of adoption carrying succession whereas in the case now before the Board there were certainly some instances, though not very many, proved. And more remarkable still, the defendant was adopted with much publicity and solemnity as far back as 1885, and was installed on the gadi with considerable pomp in February, 1902, and no protest or objection appears to have been raised. Moreover, later on he was with almost equal solemnity outcasted, in February, 1907, because he consorted with another outcaste, and in the document recording his sentence he is described every time his name is mentioned as "the adopted son Pratap Narayan Deo." This document is signed by nearly all the great men of the clan. After this, it is not altogether surprising that the very eminent counsel who appeared for the appellants in the High Court felt himself, as it were, driven from his other arguments, and took up the position that adoption might indeed be permissible, but that

succession to the estate did not follow from the adoption. It was open to him to take this point without abandoning his other contentions, but the position would be so unusual, and so contrary to Hindu ideas, that if the appellants were driven to this their chance of success was small.

It was urged that there was here a plain departure from Hindu law inasmuch as the estate, instead of descending to all the sons of a previous holder, was impartible. It is true that an estate only becomes impartible by custom, and that the custom has in each case to be proved. But it is a custom which is usually found to exist where the estate belongs to a King or independent Chief, or even a semi-dependent Chief of sufficient importance.

The Prince, to use a neutral term, regards the whole estate which his predecessor had as necessary for the support of his dignity or gadi, and he takes it of his princely power and keeps it, giving appanages or maintenance to the junior members of the family. The custom of impartibility in such a case affords no indicia whereby to determine that a family does not follow Hindu law as a whole. Regulation 10, of 1800, points to the frequency of this custom among Hindus in parts of Bengal.

It was further argued that where estates are impartible they usually descend to the nearest of kin and not in lineal primogeniture, and that here again was a departure from Hindu usage. This was disputed, and their Lordships were not invited to make any profound search into the question. Again, however, the case originally made by the plaintiffs appears to get in the way of and trip up their later arguments, for in the plaint (paragraph 2) it is stated that the family custom is "governed by the ordinary rule of lineal primogeniture," the only departure suggested being that a junior son by a senior wife is preferred; and this latter assertion was held not to be proved.

Upon the whole, their Lordships, after giving full attention to the very interesting argument of counsel for the appellants, have come to the conclusion that there is no reason to interfere with the decision arrived at in the Courts below, and they will humbly recommend His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

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SAHDEO NARAIN DEO AND OTHERS

v.

KUSUM KUMARI.

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DELIVERED BY LORD PHILLIMORE.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C.  
1922.