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April 1.

HEM SINGH AND ANOTHER

v.

HARNAM SINGH AND ANOTHER.

[B. K. MUKHERJEA, VIVIAN BOSE, GHULAM HASAN and VENKATARAMA AYYAR JJ.]

Custom—Adoption—Gill Jats of village Gillanwali District Gurdaspur (Punjab)—Adoption of a collateral of 8th degree—Validity of.

Held, that under the Customary Law of Gurdaspur District (Punjab) applicable to the Gill Jats of village Gillanwali, the adoption of a collateral of the 8th decree is not invalid.

The answer to question 9 in Customary Law of the Gurdaspur District that "the adoption of near collateral only" should be recognised is not mandatory but directory.

Under the Customary Law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selection have to be held to be directory and adoptions made in disregard of them are not invalid.

Jiwan Singh and Another v. *Pal Singh and Another* (22 P.R. 1913 at p. 84); *Sant Singh* v. *Mula and Others* (44 P.R. 1913 at p. 173); *Charan Singh* v. *Buta Singh and Others* (A.I.R. 1935 Lah. 83); *Jowala* v. *Dewan Singh* (166 I.C. 237); and *Basant Singh and Others* v. *Brij Raj Saran Singh* (I.L.R. 57 All. 494) referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 124 of 1951.

Appeal by Special Leave granted by His Majesty in Council, dated the 30th October, 1945, from the Judgment and Decree, dated the 12th July, 1944, of the High Court of Judicature at Lahore in Civil Regular Second Appeal No. 450 of 1942, against the Judgment and Decree, dated the 14th January, 1942, of the Court of the District Judge, Gurdaspur, in Appeal No. 91 of 1941, arising from the Judgment and Decree, dated 31st July, 1941, of the Court of Senior Subordinate Judge, Gurdaspur, in Suit No. 80 of 1940.

G. S. Vohra and *Harbans Singh* for the appellants.

Achhru Ram (*J. B. Dadachanji* and *R. N. Sachthey,* with him) for respondents.

1954. April 1. The Judgment of the Court was delivered by

GHULAM HASAN J.—This is an appeal by special leave granted by the Privy Council against the judgment and decree dated July 12, 1944, of a Division Bench of the High Court at Lahore passed in second appeal confirming the dismissal of the appellants' suit concurrently by the trial Court and the Court of the District Judge, Gurdaspur.

The two appellants are admittedly the first cousins of the respondent, Harnam Singh, and belong to village Gillanwali, Tahsil Batala, District Gurdaspur. Gurmej Singh, respondent No. 2, is a collateral of Harnam Singh in the 8th degree. The appellants sued for a declaration that the deed of adoption executed by Harnam Singh on July, 30, 1940, adopting Gurmej Singh was invalid and could not affect the reversionary rights of the appellants after the death of Harnam Singh. The appellant's case was that under the Customary Law of Gurdaspur District applicable to the Gill Jats of village Gillanwali, Harnam Singh could only adopt a "near collateral" and Gurmej Singh being a distant collateral his adoption was invalid. The defence was a denial of the plaintiffs' claim. Both the trial Judge and the District Judge on appeal held that the factum and the validity of the adoption were fully established. In second appeal Trevor Harries C. J. and Mahajan J. (as he then was) held that there was sufficient evidence of the factum of adoption as furnished by the deed and the subsequent conduct of Harnam Singh. They held that all that was necessary under the custom to constitute an adoption was the expression of a clear intention on the part of the adoptive father to adopt the boy concerned as his son and this intention was clearly manifested here by the execution and registration of the deed of adoption coupled with the public declarations and treatments as adopted son. Upon the legal validity of the adoption the High Court found that the answer to Question 9 of the *Riwaj-i-am* of Gurdaspur District of the year 1913 laying down that the adoption of "near collaterals only" was recognised was not mandatory. The High Court relied in support of their

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conclusion on a decision of Tek Chand J. in *Jowala* v. *Diwan Singh*(1) and the Privy Council decision in *Basant Singh* v. *Brij Raj Saran Singh* (2).

The first question regarding the factum of adoption need not detain us long. The deed of adoption, Exhibit D. 1, recites that Harnam Singh had no male issue who could perform his *kiry a karam* ceremony after his death, that Gurmej Singh had been brought up while he was an infant by his wife and that he had adopted him according to the prevailing custom. The recital continues that since the adoption he had been treating and calling Gurmej Singh as his adopted son. This fact was well-known in the village and the adoptee was enjoying all rights of a son. He had executed a formal document in his favour in order to put an end to any dispute which might be raised about his adoption. As adopted son he made him the owner of all of his property. We are satisfied that there is ample evidence to sustain the finding on the factum of adoption.

The main question which falls to be considered is whether under the terms of the *Riwaj-i-am* applicable to the parties, Gurmej Singh being a collateral of Harnam Singh in the 8th degree could be validly adopted. The custom in question is founded on Question 9 and its answer in the Customary Law of the Gurdaspur District. They are as follows :—

"Question 9. Is there any rule by which it is required that the person adopted should be related to the person adopting ? If so, what relatives may be adopted ? Is any preference required to be shown to particular relatives ? If so, enumerate them in order of preference. Is it necessary that the adopted son and his adoptive father should be (1) of the same caste or tribe ; (2) of the same *got* ?

Answer : The only tribes that recognised the adoption of a daughter's son are the Sayyads of the Shakargarh and the Arains of the Gurdaspur Tahsil. The Brahmans of the Batala Tahsil state that only such of them as are not agriculturists by occupation recognize such adoption. The Muhammadan Jats of the

(1) 166 I.C. 237. (2) I.L.R. 57 All. 494.

Gurdaspur Tahsil could not come to an agreement on this point. *The remaining tribes recognise the adoption of near collaterals only. The right of selection rests with the person adopting.* The Khatris, Brahmans and Bedis and Sodis of the Gurdaspur Tehsil, however, state that the nearest collaterals cannot be superseded and selection should always be made from among them."

It is contended for the appellants that the expression "near collaterals only" must be construed to mean a collateral up to the third degree and does not cover the case of a remote collateral in the 8th degree. The restriction as regards the degree of relationship of the adoptee, it is urged, is mandatory and cannot be ignored. The expression "near collaterals" is not defined by the custom. The relevant answer which we have underlined above gives no indication as to the precise import of the words "near collaterals." The custom recorded in the *Riwaj-i-am* is in derogation of the general custom and those who set up such a custom must prove it by clear and unequivocal language. The language is on the face of it ambiguous and we can see no warrant for limiting the expression to signify collateral relationship only up to a certain degree and no further. We are also of opinion that the language used amounts to no more than an expression of a wish on the part of the narrators of the custom and is not mandatory. If the intention was to give it a mandatory force, the *Riwaj-i-am* would have avoided the use of ambiguous words which are susceptible of a conflicting interpretation. The provision that the right of selection rests with the person adopting also detracts from the mandatory nature of the limitation imposed upon the degree of relationship. Though the adoption of what the custom describes as "near collaterals only" was recognized by the community of Jats, the right of selection was left to the discretion of the adopter. There is no meaning in conferring a discretion upon the adopter if he is not allowed to exercise the right of selection as between collaterals *inter se*. We are unable to read into the answer a restriction upon the choice of the adopter of any particular collateral however near in degree he may be.

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In his valuable work entitled "Digest of Customary Law in the Punjab" Sir W. H. Rattigan states in paragraph 35 that "a sonless proprietor of land in the central and eastern parts of the Punjab may appoint one of his kinsmen to succeed him as his heir" and in paragraph 36 that "there is no restrictions as regards the age or the degree of relationship of the person to be appointed". It appears to us that the basic idea underlying a customary adoption prevalent in the Punjab is the appointment of an heir to the adopter with a view to associate him in his agricultural pursuits and family affairs. The object is to confer a personal benefit upon a kinsman from the secular point of view unlike the adoption under the Hindu Law where the primary consideration in the mind of the adopter if a male is to derive spiritual benefit and if a female, to confer such benefit upon her husband. That is why no emphasis is laid on any ceremonies and great latitude is allowed to the adopter in the matter of selection.

Mulla in his well-known work on Hindu Law says :

"It has similarly been held that the texts which prohibit the adoption of an only son, and those which enjoin the adoption of a relation in preference to a stranger, are only directory ; therefore, the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid. In cases such as the above, were the texts are merely directory, the principle of *factum valet* applies, and the act done is valid and binding." (Page 541).

We see no reason why a declaration in a *Riwaj-i-am* should be treated differently and the text of the answer should not be taken to be directory. However peremptory may be the language used in the answers given by the narrators of the custom, the dominant intention underlying their declarations which is to confer a temporal benefit upon one's kinsmen should not be lost sight of.

A number of cases have been cited before us to show that in recording the custom the language used was of a peremptory nature and yet the Courts have held that

the declarations were merely directory and non-compliance with those declarations did not invalidate the custom.

In *Jiwan Singh and Another* v. *Pal Singh and Another*(1) Shah Din and Beadon JJ. held "that by custom among Randhawa Jats of Mauza Bhangali, Tahsil Amritsar, the adoption, by a registered deed, of a collateral in the 9th degree who is of 16 years of age is valid in the presence of nearer collaterals." The adoption was objected to on the ground that the adoptee was a remote collateral and that he was not under the age of twelve at the time of the adoption as required by the *Riwaj-i-am*. The learned Judges held that the provision as regards the age was recommendatory and not of a mandatory character.

In *Sant Singh* v. *Mula and Others*(2) Robertson and Beadon JJ. held "that among Jats and kindred tribes in the Punjab, the general, though not the universal, custom is that a man may appoint an heir from amongst the descendants of his ancestor and that he need not necessarily appoint the nearest collateral." This was a case where distant collateral was preferred to a nearer collateral. The learned Judges expressed the opinion that the clause which points to the advisability of adopting from amongst near collaterals was nothing more than advisory.

In *Chanan Singh* v. *Buta Singh and Others*(3), a case from Jullundur District, the question and answer were as follows :—

"Q. No. 71 : Are any formalities necessary to constitute a valid adoption, if so, describe them. State expressly whether the omission of any customary ceremonies will vitiate the adoption ?

A.....The essence of adoption is that the fact of adoption be declared before the brotherhood or other residents of the village. The usual practice is that the Baradari gathers together and the adopter declares in their presence the fact of the adoption. Sweets are distributed and a deed of adoption is also drawn up. If

(1) 22 P.R. 1913. p. 84.
(2) 44 P.R. 1913 p. 173.
(3) A.I.R. 1935 Lah. 83.

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these formalities are not observed the adoption is not considered valid."

The adoption was challenged on the ground that there was no gathering of the brotherhood. The learned Judges (Addison and Beckett JJ.) held that it was immaterial whether there was or was not a gathering of the brotherhood at the time. It appears that the adopter had made a statement in Court acknowledging the appointment or adoption in question. The next day he celebrated the marriage of the boy as his son, and thereafter he looked after his education and allowed him to describe himself as his adopted son or appointed heir, and the boy lived with him as his son. The learned Judges held that the details given in the answers to questions in various Customary Laws were not necessarily mandatory but might be merely indicatory.

In *Jowala* v. *Dewan Singh*(1) Tek Chand J. held "that an adoption of a collateral in the fourth degree, among Jats of Mauza Hussanpur, Tahsil Nakodar, District Jullundur, is valid although nearer collaterals are alive." He also held "that an entry in the *Riwaj-i-am* as to the persons who can be adopted is merely indicatory".

In a case from Delhi reported in *Basant Singh and Others* v. *Brij Raj Saran Singh*(2) the Privy Council held "that the restriction in the *Riwaj-i-am* of adoption to persons of the same *gotra* is recommendatory and a person of a different *gotra* may be adopted."

Council for the appellants frankly conceded that he could cite no case where the declarations governing customary adoptions were held to be mandatory.

Whether a particular rule recorded in the *Riwaj-i-am* is mandatory or directory must depend on what is the essential characteristic of the custom. Under the Hindu Law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules have, therefore, been held to be mandatory and compliance with them regarded as a condition of the validity of the adoption. On the other hand, under the

(1) 166 I.C. 237. (2) 57 All. 494.

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Customary Law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selection have to be held to be directory and adoptions made in disregard of them are not invalid.

There is no substance in the appeal and we dismiss it with costs.

Appeal dismissed.

NATHOO LAL

v.

DURGA PRASAD

1954

April 9.

[MEHR CHAND MAHAJAN C.J., VIVIAN BOSE and GHULAM HASAN JJ.]

Hindu Law—Female—Alienation in her favour—Whether any presumption of law that she does not get absolute or alienable interest in the property—Whether the case of a male and that of a female different.

It may be taken as well settled that there is no warrant for the proposition of law that when a grant of immoveable property is made to a Hindu female she does not get an absolute or alienable interest in such property unless such power is expressly conferred upon her.

The law is that there is no presumption one way or the other and there is no difference between the case of a male and the case of a female and the fact that the donee is a woman does not make the gift any the less absolute where the words would be sufficient to convey an absolute estate to a male.

Mohamed Shumsool v. *Shewukram* (2 I.A. 7), *Nagammal* v. *Subbalakshmi* [(1947) I.M.L.J. 64] and *Ram Gopal* v. *Nand Lal* (A.I.R. 1951 S. C. 139) referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 59 of 1953.

Appeal from the Judgment and Order dated the 5th April, 1950, of the High Court of Rajasthan at Jaipur in Case No. 24 of Samvat 2005 (Review modifying the Decree dated the 3rd March, 1949, of the High Court of the former Jaipur State in Civil Second Appeal No. 187 of Samvat 2004 against the Decree