PRIVY COUNCIL

Singh

Vs.

Brij Raj Saran Singh

P.C.A Nos.12, 13, 14 and 15 of 1931
(Lords Blanesburgh, CJ. Thankerton Alness, J. Sir Lancelot Sanderson and Sir Shadi Lal JJ.)

17.05.1935

JUDGMENT

LORD THANKERTON . J.

1. These are consolidated appeals from four decrees of the High Court of Judicature at Allahabad, dated the 16th January 1929, which substantially reversed a decree of the Additional Subordinate Judge of Meerut, dated 2nd March 1925. The property in suit is the Sahanpur estate situated in the District of Meerut, and the last male holder was Kunwar Khushal Singh, a Hindu Jat, who died on 6th August 1879, leaving surviving him a Widow, Rani Raghubir Kunwar, who died on 24th November 1920. The present suit was instituted on 1st May , 1923. The right of succession to the estate lies between the plaintiff-appellants 1 to 5, who are now admitted to be the nearest reversioner's, and the original respondent in the leading appeal, Kunwar Brijraj Saran Singh, defendant 1 in the suit, who is now deceased, and whose representative is now respondent. Defendant 1 was in possession, and claimed as adopted son under an adoption made by the said Rani on 13th April 1903. The fact of the adoption is not disputed, but its validity is challenged by the appellants, and this forms the main issue in the appeal. The remaining plaintiffs and defendants claim under-rights derived from plaintiffs 1 to 5 and defendant 1 or Rani Raghubir Kunwar respectively, but no separate question arises as to their rights unless the appeal succeeds. The validity of the adoption of defendant 1 is challenged in respect of (1) the widow's authority to adopt, and (2), the fact that defendant 1 was an orphan at the time of his adoption. Khushal Singh was the adopted son of Raja Nahar Singh of Ballabgarh in the Delhi District, at that time in the North Western Provinces. Nahar Singh joined the mutineers during the Mutiny and was hanged ; his estate was confiscated in 1858 by the

Government, who granted allowances to his dependants on condition that they left their home. Khushal Singh migrated to Kuchesar, a large estate in the Bulandshahr and Meerut districts, and married Bhup Kunwar, the daughter of Gulab Singh, the last male owner of that estate. On the death of Bhup Kunwar about 1859, there was litigation amongst various claimants to the estate, including Khushal Singh, which ended in a compromise, which was recorded in a decree dated 29th May 1868, and under which a 5 annas share was carved out of the estate and allotted to Khushal Singh and was thereafter known as the Sahanpur estate, the succession to which is now in dispute. After the compromise Khushal Singh married Rani Raghubir Kunwar, who was the daughter of Umrao Singh, to whom a 6 annas share had been allotted under the compromise, which retained the name of the Kuchesar estate. The remaining 5 annas share went to one Partab Singh, and is known as the Muhiuddinpur estate. It is alleged that on 26th July 1879-eleven days before his death-Khushal Singh executed a will, under which, by para. 3, he gave authority to his widow to adopt a boy, in the event of his having no son or adopted son living at his death, in accordance with the custom prevailing among the Jats, in the first place from the family of the present rais of Kuchesar ; in the second place a descendant of Rao Maharaj Singh, resident of Muhiudinpur, and in the event of this being impossible, in the third place, any boy belonging to the brotherhood. She should bring up the boy, educate him and perform his marriage. From the time of adoption that son shall be like the begotten son of my wife and me. But when a boy of one family has been adopted, a boy of another family shall not have any right to urge his claim for being adopted.

2. That authority is in terms narrated in the deed of adoption of defendant 1 of 13th April 1903. The original will has not been produced, but a copy has been produced, which was made in 1897, under circumstances which will be referred to later. Khushal Singh and his family were Hindu Jats, and the appellants maintain that they were governed by the Mitakshara law, under which the adoption of an orphan is admittedly invalid. But the respondents maintain that, at the time of his migration in 1858, Khushal Singh was governed by the customary law of the Delhi district, that he carried it with him to the Meerut district, and retained it till his death. It is not disputed that if the customary law applied to Khushal Singh when he left the Delhi district in 1858, he retained it till his death. The appellants however maintain that the customary law did not apply to Khushal Singh in 1858, on two grounds, namely, that its application was limited to agricultural village communities among the Jats, and that, in any event, it did not apply to Nahar Singh, who was a ruling chief with sovereign powers, or his family. On the assumption that the customary law did apply to Khushal

Singh and his family, the respondents maintain that, under that law, (a) the adoption of an orphan is allowed, and (b) failing proof of the authority to adopt in the will, the widow was entitled to adopt without authority or consent as regards self-acquired property, which the estate in suit is admitted to have been. The appellants maintain that the adoption of defendant 1 was not valid under the customary law, in respect that admittedly he was not of the same gotra as Khushal Singh.

3. As regards the alleged will, the appellants challenge its genuineness, and, incidentally, an important question has arisen as to whether the respondents are entitled to use the copy will as secondary evidence, and, if so entitled, as to its evidential value. The respondents claim to use the copy as secondary evidence on the ground that the original is proved to have been lost in terms of Section 65(c), Evidence Act (1 of 1872). The appellants further maintained that, if the will were held proved, defendant 1, being the son of a sister of Rani Raghubir Kunwar, was not a member of the Kuchesar family (Khandan), and that therefore his adoption was not warranted by the authority given in the will.

4. It will be convenient to deal first with the questions as to the proof of the alleged will, and as to the loss of the original will. The evidence, both oral and documentary, on these matters has been fully discussed in the judgments in the Courts below, and it is unnecessary to refer to it in great detail. The learned Subordinate Judge held that neither the genuineness nor the loss of the original will had been proved; the High Court held that both facts had been sufficiently established. The most outstanding part of the evidence relating to the history of the will is the evidence with regard to the proceedings in the Court of the Settlement Officer of Meerut in 1897, 26 years before the date of the present suit. In an application by two priests of a temple for correction of the khewat regarding a 5 biswas share of mouza Pooth, which was founded on the will of Khushal Singh as confirming the gift of that property to charity, the petitioners asked that Rani Raghubir Kunwar should be summoned to produce the will; the Rani was visited by a Qanungo on behalf of the Settlement Officer, who took a statement from her and made a copy of the will. Later the will itself was produced in the Court of the Settlement Officer. It was not disputed that the copy, which is that which the respondents seek to use as secondary evidence, is to be taken as a correct copy of the original document, which purported to be the will of Khushal Singh, and the appellants are therefore driven to maintain that this original document was a forgery concocted by Rani Raghubir Kunwar about 1894 or 1895, it may be with the help of her father, Umrao Singh. They further maintain that the application of the priests was

prompted by the Rani or her father in order to give the seal of publicity to this false will.

5. Umrao Singh died on 3rd June 1898, and in 1901 the Rani filed a suit against her brothers for a very large claim in respect of Umrao Singh's malversation of her estate, the main defence to which was an allegation that she had adopted Inderjit Singh, the son of her brother Girraj Singh on 16th June 1898, immediately after her father's death. This suit was compromised by the Rani's acceptance of a portion of her claim on condition that the question of Inderjit's adoption should not be reopened, and a consent decree was made on 21st July 1902. On the adoption of defendant 1 by the Rani on 13th April 1903, Inderjit Singh reopened his claim as an adopted son by a suit for recovery of the estate, and the Rani, regarding this suit as a breach of the compromise of 1902, brought a fresh suit for recovery of the profits due to her. Inderjit's suit was dismissed in both Courts, the final decree being in 1909, and the Rani's suit was settled in 1912 by a second compromise. There can be little doubt that throughout these family disputes and litigations the will was treated as a valid will; its authority was recognised as authorising the adoption of defendant 1 and as the authority for the alleged adoption of Inderjit Singh. The original will was not produced in the litigations, but the recognition of the will rendered this unnecessary. A copy of it was used in connexion with the adoption of defendant 1.

6. With regard to the loss of the original will, it must be observed that the dispute is more as to the genuineness of the will than as to its contents, as also that there can be no doubt that a document existed which purported to be a will and from which the copy was taken, and the inquiry is as to the loss of this document. In the opinion of their Lordships there is sufficient evidence to establish its loss. The learned Subordinate Judge would appear to have allowed his grave suspicions as to the genuineness of the will to have affected his mind on this question of admission of evidence, and thus to credit defendant 1 with a desire to suppress the false document. But their Lordships are of opinion that it is sufficiently established by the evidence that the original document was not in the repositories of the Rani at her death, and had not been found since by defendant 1; his information from the Rani, supported by the evidence of Jeoni, a former maid of the Rani, is that it was given by the Rani to Girraj Singh prior to 1903, and that he had not returned it. Girraj Singh was summoned on behalf of the respondents to give evidence and to produce the original will of 1879; on 2nd September 1924, he presented an application to the Subordinate Judge submitting that, if his evidence should be thought necessary, he should be informed of the date of

his examination, but stating, " neither the original will requisitioned from me was ever with me nor is it now." Loss can never be proved absolutely, and although Girraj Singh was not called as a witness, their Lordships regard this evidence of loss of a document which has not been seen for so many years as sufficient to satisfy the provisions of Section 65 Evidence Act. Accordingly, they hold that the copy is admissible as secondary evidence of the original, and it may therefore, as already stated, be taken as a correct copy of the original document.

7. In the first place, the appellants maintain that inferences adverse to its genuineness may be derived from the terms of the will itself. They did not seek to support the view of the Subordinate Judge that it was improbable that Khushal Singh would have made a will on the date ascribed to it. According to the appellants the terms of the will should lead one to conclude that it was made when it was known that Khushal Singh had died without having adopted anyone and at a time when Umrao Singh was pressing the Rani to adopt one of his sons, and the Rani was not averse to doing so, if she was left in supreme control of the property during her life, despite the adoption. This contention is founded on the absence of any express provision for the widow, in the event of the testator, who was then 37 years old, dying leaving a son, natural or adopted by him during his life. Their Lordships are unable to see anything unusual in the terms of the will, nor is it unusual for a will not to be registered.

8. The appellants next contend that the actings of the Rani from the date of Khushal Singh's death in 1879 until the production of the will in 1897 were inconsistent with the existence of a genuine will. With the exception of the goshwara statements the papers relative to the Rani's application for mutation of names on her husband's death are not available; in the goshwara it is entered as an application for mutation ?by virtue of succession," but the witness from the Collectorate, who produced the goshwara, stated that, on examination, he found that mutations that have taken place in any way are ordinarily recorded as by succession. Accordingly no relevant inference can be made on that point. As regards the agreement by Mt. Lachmi, the mistress of Khushal Singh, and the deed of gift by the Rani, both dated 10th November 1879, no mention is made of the will and its provision for Lachmi, but the Rani is described as "the legal and absolute owner of and heir to his estate" which is not so suggestive of intestacy. While the gift would appear to be less in amount than that provided for Lachmi by the will, it may well be that it was more liberal than was necessary as on intestacy. A transmission of part of the property by Lachmi in 1902 shows that she was by then aware of the provision for her in the will, and there is no

evidence that she ever challenged the gift of 1879 as inadequate. The power of attorney by the Rani in favour of Umrao Singh dated 10th May 1890, and the Rani's plaint in a mortgage suit dated 20th December 1886, describe her as owner " by right of inheritance " and do not mention the will. While these four documents will fit in with the appellants' case, their Lordships regard them as just the type of evidence as to which adequate explanation might have been afforded, if the present challenge by the appellants had not been so long delayed.

9. Before considering the positive evidence as to the genuineness of the will, it is necessary to deal with the argument that the copy of the will having been admitted as secondary evidence under section 65, Evidence Act, the Court is entitled to presume the genuineness of the original-which purports to be over 30 years old-by virtue of Section 90 of the Act which provides as follows :

> 90. Where any document, purporting or proved to be 30 years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and. in the case of a document executed or attested, that it was only duly executed and attested by the persons by whom it purports to be executed and attested.

10. This argument is based on certain decisions to which it will be necessary to refer. The High Court stated that if they were to be guided by the wording of the section alone they might have some difficulty in holding that such a presumption might be made but that there was a preponderance of authority in favour of the proposition. The earliest of these cases was *Khetter Chunder Mookerjee v. Khetter Paul,* in which the will, more than 30 years old, had been lost, and a copy was tendered. After holding that loss had been proved so as to admit the copy as secondary evidence, Wilson, J., said, in reference to Section 90:

> Under the section the execution of a document produced from proper custody and more than 30 years old, need not be proved, if the document "is produced." I do not think the use of these words limits the operation of the section to cases in which the document is actually produced in Court. I think that as the document has been shown to have been lost in proper custody, and to have been lost, and is more than 30 years old, secondary evidence may be admitted without proof of the execution of the original.

11. This case was followed, but with doubt, in *Ishri Prasad Singh v. Lalli Jas Kunwar,*

it was also followed in *Dwarka Singh v. Ramanand Upadhia,* though Walsh, J., preferred to base his decision on exercise of the powers given to the Court by Section 114 by way of analogy to Section 90. In face of the clear language of Section 90 their Lordships are unable to accept these decisions as sound. The section clearly requires the production to the Court of the particular document, in regard to which the Court may make the statutory presumption. If the document produced is a copy admitted under Section 65 as secondary evidence, and it is produced from proper custody and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine, as was done in *Seethayya v. Subramanya Somayajulu,* in that case the dispute was as to the terms of a grant, which had admittedly been made. Their Lordships approve of the decision in *Shripuja v. Kanhayalal*in which the Judicial Commissioner held that production of a copy was not sufficient to justify the presumption of due execution of the original under section 90, and they are unable to agree with the subsequent overruling of that decision in *Shri Gopinath Maharaj Sansthan v. Moti,* Turning then to the positive evidence, including the copy will, their Lordships prefer the view taken of the oral evidence by the High Court to that taken by the Subordinate Judge, and their Lordships are of opinion that the principles laid down by this Board in *Rajendro Nath Holdar v. Jogendra Nath, Banerjee*were rightly applied by the High Court in the present case. While the principles so laid down are in general terms, the facts in that case may be noted. The testator died in September 1837, the will was produced in August 1838, the adoption was made in 1848, and the widow died in 1864, upon which the suit was filed, challenging the genuineness of the will, upon which the authority to adopt rested. The will had been accepted for 27 years, and the adoption had been made 16 years before the challenge.

12. The testator left a mother, a widow, and four sisters, and under the will the mother took the whole estate for her life; the mother died in 1855. Some provision appears to have been made for the widow, but she disputed the will in 1844, and then compromised the litigation on the basis of acceptance of the will. Prior to the birth of the plaintiff in the suit before the Board a more distant relative had been the presumptive heir of the testator. In that case, as in the present one, a successful challenge by the heir during the life time of the widow would not have obtained for him possession of the estate but, in addition, in that case the person, whose failure to challenge was founded on, had only a presumptive right, as contrasted with the certainty of the present appellant's right. It is true in that case when the will was produced in 1838 by the mother, who claimed, as executrix, to be substituted as decree-holder in a suit in which her son had recovered a decree in his lifetime, the

writer of the instrument was examined and one, if not two of the attesting witness were also examined, and the Judge appears to have been satisfied at all events for the purposes of the application, which was supported by the widow; the document was to be treated as a true document. In the present case, though there is no record of any examination of similar witnesses the will was filed before the Revenue Officer in 1897, and it is to be assumed that the Revenue Officer was satisfied that it was to be treated as a true document for the purposes of the application. In the present case the will was public produced 23 years before the death of the widow, and the adoption had been made 17 years before. The fact that the will in the present case was not so produced until 18 years after the death of the testator would not tend to decrease the incentive to challenge it. The following passage may be quoted from the judgment of the Board, which was delivered by Sir James Colville:

> We, therefore, find that for a period of 27 years this will was, with the exceptions I have mentioned, acted upon and recognised by the whole of the family of Kali Prosad Haldar, and that the legal status of the appellant was acquired under it with the knowledge of all the members of the family. If the document bad been a fabrication, and if there were persons who might have intervened and have contested the will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting respondent, might have come forward in one way or another and contested the will. Therefore, there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the will. No doubt these circumstances, as the law stands, are not conclusive against respondent 1. He has the right to call upon the appellant, the defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by death or otherwise-every allowance which can account for any imperfection in the evidence-ought to be made; and, on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the will and to the acts done by them under the will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the defendant, in order to defend his status, should be allowed to invoke against the

> claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of an Hindu claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights-he may lose them altogether-which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the status which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

13. In the present case the adoption took place with great publicity and formality, and both the Courts below have found that the appellant knew all about it at the time. Attached to the will are the names of two pleaders and ten witnesses of evident respectability, of whom the two pleaders and four witnesses are known to have been dead in 1897; and of the remaining six, five are known to have been alive at the time of the adoption in 1903; of these one died in 1904, and the remaining four died in the years 1908 to 1910. Their Lordships agree with the High Court that the evidence of Bhagwan Singh is of great value; he states that he went to the feast after Khushal Singh's death with his brother Sheo Baran Singh, and in the presence of his brother and the Rani took the will in his hand, and identified his brother's signature on it. The respondents are also entitled to rely on the evidence of Ganga Saran that he went with his uncle, Ganga Pratap, to Khushal Singh at Meerut, when the latter showed the will to his uncle and asked him to sign it, which he saw his uncle do. There is also the evidence of the witnesses Tilok Chand and Mt. Jeoni as to having seen the will about 1892 and just after Khushal Singh's death respectively, upon which the respondents are entitled to rely. In their Lordships' opinion the respondents are entitled to the benefit of the principles above referred to, and that, in that view, the genuineness of the will is sufficiently established. Accordingly, the Rani had authority to adopt, provided that the adoption is valid in other respects.

14. Their Lordships agree with the view of the High Court that the adoption of defendant 1 was warranted by the terms of the authority given in the will. The next question is whether Khushal Singh, when he left Ballabgarh in 1858, was governed by the customary law of the Delhi District. The respondents rely mainly on the riwajiam prepared for the Delhi District in 1880, certified extracts from which have been produced and the Manual of the Customary Law of the Delhi District published officially in 1911 from the riwajiam completed shortly before. It is clear that the Jats are included and also that the enquiries included Ballabgarh as part of the Delhi

District. The value of the riwajiam as evidence of customary law, is well established before this Board; the most recent decision is *Vaishno Ditta v. Rameshri,* in which the judgment of the Board was delivered by Sir John Wallis, who states (p.421):

> It has been held by this Board that the riwajiam is a public record prepared by a public officer in discharge of his duties and under Government rules: that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal; and that the statements therein may be accepted even if unsupported by instances: *Beg v. Allah Ditta, at 97*; *Ahmad Khan v Channi Bibi, at 383*. Further, manuals of customary law in accordance with riwajiam have been issued by authority for each district, and in their Lordships' opinion stand on much the same footing as the riwajiam itself as evidence of custom.

15. It has also been found by this Board that, though such customary law is to be found principally amongst the agricultural classes, it is also to be found amongst classes which are not agricultural : *Ramkishore v. Jainarayan,* Their Lordships agree with the High Court that such customary law, if found to exist in 1880 and 1910, must be taken to have the ordinary attribute of a custom that it is ancient, and that, unless the contrary is proved, it must be assumed to have existed prior to 1858, when Khushal Singh left the Delhi District. Accordingly, it is for the appellants to rebut the prima facie evidence of the riwajiam that the customary law of the Delhi District applied to Khushal Singh, as a Jat resident therein, at the relevant date. The appellants maintain, in rebuttal, that the customary law did not apply to Khushal Singh, as a member of the family of a ruling chief, who had sovereign powers. It is enough to say that the appellants have failed to satisfy that the Raja of Ballabgarh occupied such a position, or that he was not a "chief who held the position rather of jagirdar than of Native prince": Aitchi-son's Treaties, (Edn. 4), Vol. 8, p. 119. It is further important to note that this contention of the appellants is inconsistent with the will of Khushal Singh, which directs the adoption to be made in accordance with the custom prevailing amongst the Jats.

16. Accordingly, their Lordships are of opinion that the respondents have established that the customary law applied to Khushal Singh when he left the Delhi District in 1858. But the appellants maintain that the adoption of defendant 1 was invalid in that it did not comply with the customary law in two respects, viz., that defendant was an orphan, and that he was not of the same gotra as Khushal Singh, either of which would invalidate the adoption. The reason that under the Mitakshara law, an orphan cannot be adopted is because a boy can be given in adoption only by his father or his mother,

and such giving is an essential part of the ceremonies, but answer 87 in the 1911 manual does not prescribe such giving as a formality necessary to constitute a valid adoption; answer 83 shows that a brother can be given in adoption, and answer 86 shows that a sister's son or a daughter's son may be adopted; and further, answer 8 shows that a boy may be adopted even after tonsure or investiture with the sacred cord, and that there is no age limit, except that the age of the adoptive son should be less than that of the adoptive father. This makes it clear that the conditions of adoption under the Mitakshara law are completely superseded by the customary law, and there is no reason for excluding an orphan under the latter; but, if it were necessary, their Lordships agree with the High Court that the evidence in the present case is sufficient to place the validity of the adoption of an orphan beyond question.

17. It is admitted that defendant 1 does, not belong to the same gotra as Khushal Singh, and the appellants found on answer 174 in riwajiam of 1880. No such restriction is suggested in the manual of 1911. But answer 174 of 1880 appears to make clear, by the second example in the column of particulars, that it is only a recommendation that they should be of the same gotra, and that a person of a different gotra may be adopted; in other words, factum valet. Their Lordships are therefore of opinion, on the whole matter, that the adoption of defendant 1 was valid, and that the appellants' appeal fails. This renders it unnecessary to consider the validity of the transactions challenged by the appellants in the plaint. Their Lordships will humbly advise His Majesty that the consolidated appeals should be dismissed with costs to the legal representative of the respondent Kunwar Brij Raj Saran Singh deceased, and that the four decrees of the High Court dated 16th January 1929 should be affirmed. As regards the costs of respondent 1 in appeal No. 15 of 1931, the appellants should pay him such costs as are attributable to his appearing and putting in a case by reason of the issues raised which were special to him, together with such costs of perusing the record as were reasonably incurred in relation to such special issues.

Appeal dismissed.

Cases Referred.

(1880) 5 Cal 886=6 CLR 199,

(1900) 22 All 294=(1900) AWN 82;

1919 All 232=51 IC 275=41 All 592

AIR 1929 PC 115=117 IC 507=56 IA 146=52 Mad 453 (PC);

, 1918 Nag 114=53 IC 947=15 NLR 192

1934 Nag 67=148 IC 561=30 NLR 155.

, (1871) 14 MIA 67=15 WR 41=2 Suther 422=2 Sar 666 (PC)

AIR 1928 PC 294= 113 IC 1=55 IA 407 (PC)

AIR 1916 PC 129=38 IC 354 =44 IA 89=44 Cal 749=45 PR 1917 (PC)

AIR 1925 PC 267=91 IC 455=52 IA 379=6 Lah 502 (PC)

1942 PC 2=64 IC 782=48 IA 405=49 Cal 120=17 NLR 163 (PC) at 410.