PRIVY COUNCIL

Seth Biradh Mal

Vs.

Sethani Prabhabhati Kunwar

P.C.A.No.44 of 1937
(Lord Romer, Sir Lancelot Sanderson and Sir George Rankin JJ.)

27.03.1939

JUDGMENT

SIR GEORGE RANKINJ.

1. This pedigree table has reference to a family of the sub-caste "Lodha" at Ajmer. It is possessed of a trading and banking business carried on under the name of Kanwalnain Hamir Singh. The headquarters of the business are in Ajmer but it is carried on in some 16 different places throughout India under various names and in the case of three of the branch businesses it is said that a stranger to the family has an interest. A considerable amount of immovable property is owned by the family : it is not used in the business but the rents and profits are received by the business and are dealt with as income thereof. The business is said to have been established for over a hundred years. There is some dispute about the correct description of the family : they are said to be Oswal Jains but the appellants are concerned to maintain that though they are Oswals by caste they are not Jains and that they are governed by the Mitakshara. On 26th March 1923, Jeet Mal had died childless leaving a widow - now respondent 1 Sethani Prabhabhati Kunwar. She was about 18 years of age. On 30th June 1924, she entered into a deed of adoption whereby she purported to have adopted as a son to her deceased husband a boy of 11 years named Man Mohan Lal whose father, Bhanwarmal, purported by the same deed to have given him in adoption. On the next day (1st July 1924), the appellants and respondent 4 (or their predecessors), filed in the Court of the District Judge of Ajmer-Merwara the suit out of which this appeal arises. They sued the widow, the boy and Bhanwarmal seeking a declaration that the adoption was invalid and an injunction restraining the defendants from giving effect to it : they also sought to restrain the defendants from interfering with the affairs, property and business of the family, alleging that the family was joint, that the

widow was entitled only to maintenance and residence, and that she was not entitled as heir of her husband to any share in the family business or property.

2. No steps were taken by the plaintiffs to have a *guardian-ad-item* appointed for the boy but his father and the widow filed similar written statements (30th July) admitting the joint status of the family and defending the adoption as valid. In December they sought to amend by pleading that Jeet Mal had died separate in food, worship and estate, but leave to amend was refused (14th March 1925). On 6th November 1925 the widow again applied to amend her defence alleging that her husband had died separate, and repudiating the adoption as having been due to fraud and misrepresentation practised upon her. The District Judge (31st August 1926) allowed her to amend her defence as to the separate status of her husband but refused to permit her to repudiate the adoption. The boy's father, Bhanwarmal, was not allowed to amend his written statement so as to withdraw his admission of Jeet Mal's joint status. In August 1926, it was discovered that no *guardian-ad-item* had been appointed for the boy and Bhanwarmal was appointed. On 22nd November 1929 the learned Additional District Judge gave judgment in the suit. He held that the factum of adoption had not been established as no giving and taking of the boy had been proved to have taken place on 30th June 1924 : accordingly he declared the adoption to be "null and void and cancelled." He dismissed the claim for an injunction to restrain the widow from interfering with the business, reciting in his decree that it is held that as the widow of a separated Jain governed by Hindu law she has the right as such widow to a half of a third share in the tisira or unpartitioned property and assets of the firm of Kanwalnain Hamir Singh to which her deceased husband Jeet Mal was entitled.

3. From this decree the widow did not appeal : indeed she had no quarrel with it. But the plaintiffs appealed to the Court of the Judicial Commissioner (Appeal No. 68 of 1930) : likewise the boy and his father Bhanwarmal (Appeal No. 50 of 1930). The appeals were heard together but had a different fate. On 4th May 1931, the learned Judicial Commissioner dismissed the appeal which the plaintiffs had brought against the trial Judge's refusal of an injunction restraining the widow from interfering with the business; but he upheld the adoption and dismissed the suit in toto with costs throughout. Upon this appeal it is admitted by the respondents that the adoption cannot be upheld without proof of a giving and taking of the boy. On the other hand it is conceded for the appellants that on the evidence as to this family no objection can successfully be taken to the adoption on the score of want of authority from the widow's husband, want of consent by his relatives, or because the boy was not a close

relation. The sole issue discussed before their Lordships was the question of fact whether on 30th June 1924, at about 6 P. M. when the adoption deed was being registered the boy was present and was given by Bhanwarmal and taken by the widow. On this question the Courts in India have differed but the evidence before the Judicial Commissioner was not the same as before the trial Judge. An important witness to the proceedings at the time of registration of the adoption deed was a barrister Mr. Kishen Saroop: he had been tendered as a witness at the trial but refused by the trial Judge on the ground, as their Lordships are informed, that he was engaged as counsel in the case. The Judicial Commissioner recorded his evidence at the appellate stage under Order 41, Rule 27, though he does not seem to have recorded his reasons as required by the Rule. Their Lordships are of opinion that this evidence was rightly received. There may have been good reason why Mr. Kishen Saroop should return his brief and cease to act as counsel in the case but to deprive a party of the evidence of a witness is a very different matter.

4. The evidence of Mr. Kishen Saroop is therefore part of the evidence upon which the Board has to consider the sole question of fact which arises upon the validity of the adoption. Telegrams of 28th and 29th June show that on the 28th the boy was at Nagore and that a servant was being sent to fetch him to Ajmer but that on the 29th he and his escort had missed the connexion at Merta Road and wanted a motor to be sent there to bring them to Ajmer. The servant Bhaghji, P. W. 6, was called by the plaintiffs to prove that the boy did not reach Ajmer till 8 P. M. on the 30th, but his evidence breaks down in view of the telegrams and their Lordships see no reason to doubt that the boy had arrived in Ajmer in the early afternoon of the 30th. Putting on one side the evidence of certain other servants as unreliable, their Lordships think that the evidence that the boy was present at the time when the sub-registrar put to his father and to the widow the questions whether they had executed the deed is sufficient to prove a giving and taking. The witnesses who speak to the matter are Bhanwarmal, Bhabutmal, Lakshmimal and Kishen Saroop. The evidence of the last is that Bhabutmal was present, a fact of which the trial Judge was not apparently convinced. The evidence of the sub-registrar is neutral. What is said by the scribe Rajnarayan, D. W. 17, and the record keeper P. W. 4 to disprove the presence of the boy is not, in their Lordships' view, to be accepted. It is plain from the telegrams that it was intended that there should be a ceremony and that the boy was being brought to Ajmer for that purpose. Even if the suggestion be accepted that the auspicious day ended at noon on the 30th and that the deed was executed before noon and before the boy arrived at Ajmer, it seems quite probable that the registration proceedings which were arranged for 6 P. M.

would be regarded as a suitable occasion for carrying out the very simple ceremony that was necessary. Their Lordships see no reason to think that after the boy's arrival at Ajmer nothing was done, or to disturb the finding of the learned Judicial Commissioner on this point.

5. There remains the claim for an injunction to restrain the widow from interfering in the affairs, property and business of the family. The sole issue raised by this branch of the case is whether or not Jeet Mal at the time of his death was separate in estate or was a coparcener in a joint family. The trial Judge held that he had died "a separated Jain governed by Hindu law" and on this question which is one of fact the Judicial Commissioner arrived at the same conclusion. He held that certain facts proved were entirely inconsistent with the contention that Jeet Mal was at the time of his death a coparcener whose interest passed by survivorship to the remaining male members of the family. On the contrary these circumstances clearly indicate the recognition of a separate and defined interest which passed on Jeet Mal's death to his widow.

6. These are concurrent findings of fact. They have been challenged in a sustained and able argument by Mr. Page who appears for the representatives of Kan Mal, deceased, and their Lordships' first duty is to consider whether there is any sufficient reason to depart from their rule of practice that concurrent findings of fact should not be disturbed. The history of the family and of the business presents certain difficulties to either side. In 1898, there had been a partition by metes and bounds of the buildings in which the family lived : this had been effected by one Thanmal, as an arbitrator; but it is clear that the business and its assets (including moveables and immovables) were not within the arbitrator's scope and were not touched by his award of 26th April 1898. The residential buildings and some little property adjoining thereto were divided into three equal shares by casting lots and a third share was given to (a) Umed Mal, (b) Raj Mal and Chand Mal (sons of Sujan Mal), (c) Sirah Mal, Abhey Mal, Biradh Mal and Gadh Mal (sons of Sameer Mal). By a separate award soon afterwards (15th May 1898) the property so allotted to the sons of Sujan Mal was divided by the same arbitrator into two equal shares which were allotted in severalty to Raj Mal and Chand Mal. In these awards there were references to the business as "tisira" and to the joint firm and as to the other property of the family remaining joint. These the Courts in India have rightly treated as ambiguous upon the question whether there had been any division of title so as to result in a tenancy-in-common as distinct from a coparcenary, it being clear enough that the arbitrator Thanmal had no authority to bring about such a division of title and did not purport to affect any other property than the buildings

which he was partitioning by metes and bounds.

7. At or about the same time there was a partition of the horses and carriages, and a partition of some jewellery took place at some date not precisely ascertained. The different branches of the family had separate messes. Raj Mal and Chand Mal's sub-branches had separate accounts (khatas) in the books of the business. The evidence as to joint worship is equivocal. The expenses of marriages and deaths were in most cases borne by the branch or sub-branch concerned. Each of the three branches received a fixed monthly allowance out of the common funds : Raj Mal and Chand Mal dividing one allowance equally between them. The allowance was at one time Rs. 1500: then it was raised to Rs. 4000: then it was lowered to Rs. 2500. The branches were allowed in addition to the allowance to draw on the common funds, and these drawings were debited to the branch concerned: every three years these drawings were equalized as between the branches. In the case of Sujan Mal's descendants the drawings were made by the two sub-branches and were debited to the sub-branches. This course of dealing is traceable to a date soon after 1898. When Jeet Mal died in 1923 the allowance which would have gone to him was paid to his widow; though had Jeet Mal been joint with Kan Mal or any of the others, the widow was entitled only to maintenance and in this respect was on the same footing as Jeet Mal's mother, Manohar Kunwar, who received nothing. Moreover, there belonged to the business 316 shares in a company called the Edward Mills Co. Ltd., at Beawar, and after her husband's death the widow was given one-sixth (52) of these valuable shares as her own property. The explanation offered is that after Jeet Mal's death in March 1923, the monthly allowance of Rs. 4000 was decreased to Rs. 2500 as from October 1922, and that each branch was allotted shares so that the dividends might make up the deficiency in its income. It is difficult however to see that this explanation in any way detracts from the strength of this evidence in support of the case that Jeet Mal died divided. There is evidence on the other side of a number of plaints and execution applications brought by the family as a joint family but the trial Judge thought that the intention to avoid the payment of duty on a succession certificate accounted for this practice which was not consistent throughout. In a document dated 12th April 1915, having reference to the Edward Mills Co., the family is described as joint and undivided but this again is contradicted by the action of the widow and of the directors in July 1923, when the shares which stood in Jeet Mal's name were transferred to his widow as his heir.

8. It was contended by Mr. Page that if account be taken of the adoptions disclosed in

the pedigree table, then on the assumption that the members of Sameer Mal's branch were not joint inter se and that there were no special bargains at the time of adoption, the division of the profits of the business into thirds and sixths would not on any view of the matter accord with the rights of the parties. But this argument does not seem to have been advanced at any previous stage of the case and the facts upon which it depends have not been sufficiently ascertained. It is not shown to their Lordships' satisfaction that the concurrent findings of fact upon the issue as to Jeet Mal's status as a divided or undivided member of the family have been arrived at by reason of any error of method or mistake or through neglect of any aspect of the evidence. The Courts in India had to draw a conclusion from evidence of conduct which was not always consistent and of statements which were conflicting. They have rightly thought that the treatment of the profits of the business and properties is very far from being in accordance with what was to be expected if they belonged to a joint family of which the sons and grandsons of Sameer Mal were members whose rights so long as they were joint were equal to the rights of Jeet Mal. The suggestion that the profits of the business and properties were divided according to houses as a reasonable method of meeting the needs of all the members of the family cannot be accepted. A division according to houses would have been a division into fourths: Jeet Mal and Khan Mal divided a third between them. The Courts in India have proceeded upon very cogent evidence in attributing weight to the payments made to Jeet Mal's widow and the allocation to her of 52 valuable shares. In these circumstances, their Lordships find no reason to depart from the important though not inflexible rule of practice that concurrent findings of fact should not be disturbed.

9. The result is that the appeal fails and their Lordships will humbly advise His Majesty that it should be dismissed. Respondent 1 has not appealed from the decree of the Judicial Commissioner and the Board can take no action upon Mr. Dunne's complaint that she was not allowed to dispute the adoption or to cross-examine witnesses upon that part of the case. Their Lordships are not called upon to decide what the effect of the dismissal of this appeal will be upon respondent 1's rights in any other proceedings to dispute the adoption.

10. It appears that the Judicial Commissioner was in error in thinking that only one decree was passed by him and he ought to have given a formal certificate covering the decree in Appeal No. 50 as well as that in Appeal No. 68. As the result of their Lordships' decision is to affirm the decree in Appeal No. 50 it seems unnecessary to give special leave to appeal in order to dismiss such appeal. It will be sufficient to

make clear that their Lordships have treated the formal certificate of 16th April 1932, as covering all the issues in the suit as explained in the order of the learned Judicial Commissioner dated 3rd October 1931. The appellants must pay one set of costs to respondent 1 and another set of costs to respondents 2 and 3. Respondent 4, who was previously a plaintiff and an appellant, but was allowed to change his position by an Order in Council dated 28th July 1938, will pay to the appellants one-fifth of one set of their costs incurred up to that date and will likewise be answerable together with the appellants both to respondent 1 and also to respondents 2 and 3 for costs incurred by them prior to that date. Costs are to be taxed under this direction upon the footing that the appeal to His Majesty has covered the whole case so as to include the question of the validity of the adoption of respondent 2, Man Mohan Mal. The costs awarded against respondent 4 by the Order in Council of 28th July 1938 and against respondents 2 and 3 by the Board's order of 14th February 1939, in favor of the other parties will be taxed. Costs so far as is possible will be set off.

Appeal dismissed.