CALCUTTA HIGH COURT

Manik Chand Golecha

Vs

Jagat Settani Pran Kumari Bibi

(Mitter and Beverley, JJ.)

19.12.1889

JUDGMENT

Mitter and Beverley, JJ.

1. The respondents filed cross-objections as regards the findings on the third and fourth issues, but Mr. Evans candidly admitted before us that he could not contest the accuracy of the lower Court's conclusion as to the written authority set up. Mr. Woodroffi, on behalf of the appellant, contended that the allegation made in the written statement to the effect that the adoption was made in pursuance of an authority derived from Gobind Chand not having been made out, he defendants should not have been allowed to set up a new case which is not to be found in their written statement, namely, that by a special custom of the tribe and family, the widow was entitled to adopt without permission. We are of opinion that the written statement is sufficiently broad in its terms to include the plea referred to. The existence of the custom in question is not inconsistent with an express permission or authority to adopt in particular cases; and we think that the fifth issue in general terms raised the question as to the validity of the adoption according to the custom prevalent among the Oswal caste and in the family of Jagat Sett. Several objections were taken in the lower Court, and although no specific issues were framed in respect of them, they appear to have been fully tried and discussed, and we are unable to say that the appellant has in any way been prejudiced. The questions, therefore, that have been laid before us for our consideration in this appeal are the following:

1. Is the plaintiff a reversionary heir and entitled to bring the present action?

2. Is the suit brought within time as provided by Article 118* of the Limitation Act?

3. Is it proved that by any special custom, prevalent among the tribe and family to which the parties belong, a widow can adopt a son without having obtained permission to do so from her late husband?

4. Supposing that the adoption was good and valid according to Jain usage, how is the matter affected by the fact that this particular family has embraced Vaishnavism?

5. Is the adoption in this case invalid by reason of the adopted son being the only surviving son of his natural parents?

6. Is the adoption invalid by reason of the estate having vested in Gopal Chand, and after him in his son Gopi Chand?

1. On the first point it has been contended before us that the plaintiff has no status as a reversionary heir, inasmuch as the sapinda relationship does not exist between him and the late owner Gopi Chand. The argument that-has been addressed to us is opposed to the decision of the Full Bench in the case *of Uma Sunker Moitra v. Kali Kamal Mozumdar*[1] *affirmed on appeal by P.C*[3]. as well as to that of the Privy Council in the case of *Padmakmnari Debi Chowdhwani v. Court of Wards*[2] Upon the authority of these cases, therefore, we think the lower Court was right in overruling this objection to the suit.

2. As regards the question of limitation, the first point we have to decide is, when did the alleged adoption take place? If, as the plaintiff contends, the adoption did not take place till Magh 1938 Sumbut or the beginning of 1882 A. D., the question of limitation will not arise, as in that case the adoption itself took place within six years before suit. If, on the other hand, it took place in Bysakh 1936 (April 1879), then we have to consider whether the plaintiff knew of it more than six years before suit, or whether Sett Kissen Chand knew of it, and whether plaintiff is bound by his knowledge. Now it has been pressed upon us in argument, (and we think there is a good deal of evidence in support of the theory), that there were in fact two adoptions-that in 1879 the boy Golab Chand was adopted in accordance with the practice of the Oswal community, and that some 2 1/2 years later there was a second ceremony of adoption when the deed of gift (Ex. I) was executed and the Hindu religious rites were observed. Several of the plaintiff's witnesses, who speak to this later adoption, admit that there was a transaction of some nature or other having reference to an adoption some three years earlier. Prem Chand Pipara (p. 30) says that he and all the Oswals attended on that occasion, that they gave salami, and that coconuts were distributed. Mukund Lall Pundit (p. 37) speaks of a feast that took place some two years before the Jag ceremony. Sourid Mull Lorha (p. 39) says he sent his son to the adoption about the year 1936 (Sumbut). Sookul Chund Doogar (p. 43) speaks to the same effect. Harek Chand Goleecha (p. 48) speaks of Golab Chand being driven out for two or three years, and then taken in again. So also Hulas Chand Singhi (pp. 53, 56): and compare the evidence in cross-examination of Rai Boo dhoo Singh Dodhuria at pp. 160-61. From this evidence we think it clear that even on the plaintiff's own showing the boy Golab Chand was adopted in accordance with the practice of the Oswal community so far back as 1B79. This evidence is corroborated by the petition (Ex. F. 1) at

p. 178. Gopi Chand it seems, died on 27th Aghran 1285, corresponding with the 12th December 1878, and on the 28th Falgoon following, corresponding with the 11th March 1879, the defendant No. 1 intimated to the authorities her intention of taking a second son in adoption. It has been contended before us, that the transaction which took place in 1879 was merely a consultation as to the person who should be taken in adoption. In the lower Court the difficulty appears to have been attempted to be met by the supposition that after his adoption in 1879 Golab Chand was turned out and retaken in adoption in 1882. We think that upon the evidence we must hold that there was an adoption according to the Oswal practice in 1879; and that this was followed nearly three years later by another ceremony performed in accordance with Hindu rites'. Was the plaintiff then aware of this adoption more than six years before suit? He has sworn that he was not aware of it till a few days before instituting this suit. He deposes that he was living in Calcutta and elsewhere, and only on one occasion visited Mohimapur where Pran Kumari resides. He has adduced some evidence in support of this statement. The defendants on the other band have adduced evidence to show that the plaintiff' was constantly at Mohimapur. We are not prepared to accept that evidence. The statements of Surbesaur Mazumdar (p. 98) contradict those of the other witnesses. But although we are unable to agree with the lower Court in the view it takes of the defendants' evidence on this point, we cannot accept the plaintiff's statement that he only became aware of the adoption on 2nd May 1887. The family of Jagat Sett is an important one among the Oswals of Moorshedabad, and the plaintiff is related to the family through his mother. He admittedly came from time to time between 1883 and 1887 to Azimgunge, which is only four miles from Mohimapur; and on one occasion (November 1881) he says he saw the defendant No. 2 in the Jagat Sett's house at Mohimapur. We think it is impossible to believe that at a time when the boy was being recognized by the entire Oswal community of that neighbourhood as Pran Kumari's adopted son, the plaintiff was the only person who was not aware of the fact. It seems to us, therefore, that he has failed to show that he only became aware of the adoption on 2nd May 1887, or within six years before suit. The suit is therefore barred by limitation. In connection with this matter it has been contended that even if the plaintiff' himself did not know of the adoption, the evidence shows that his maternal grandfather, Sett Kissen Chand, knew of it; and that by the definition of the word "plaintiff'" in the Limitation Act, Kissen Ghand's knowledge would have the effect of barring the suit. We are unable to agree with the lower Court's conclusions on this point. There is no satisfactory evidence of Kissen Chand's knowledge of the adoption of defendant No. 2. It is curious to notice the manner in which this story grew, as the witnesses who deposed to it were successively examined. The first witness who deposed to this matter, Dino-bundho Sen (p. 86), stated that at the time Sett Kissen Chand was consulted, it was not settled who was to be adopted. The next witness (p. 88) makes Kissmi Chand refer to the deed of permission. Har Proshad Dabar (p. 95) states that the deed was got out and shown to Kissen Chand; while the next witness, Surbessur

Mazumdar. (p. 97) goes still further and deposes that Kissen Chand approved of the defendant No. 2 and paid him a salami. Most of these witnesses have been discredited in the matter of the written authority, and we think they cannot be believed on this point either.

3. The next question is whether by any custom or usage, prevalent among the Oswal Jains, a widow can adopt a son to her husband without an authority express or implied from him to do so. On this question we are of opinion that due weight must be given to the decisions of the Courts in analogous cases; and we therefore proceed first to examine these cases. In the case of Gobind Notk Roy v. Gulal Chand 5 Select Rep. 276, (which was a suit between Tains of this very district of Moorshedabad), the facts were these: One Uttam Chand by a will authorized his widow to adopt a son who was to be selected by his executor, Moti Chand. Moti Chand died without making a selection, and the widow subsequently adopted Gulal Chand. The suit was instituted by Gulal Chand to recover possession of the estate as the adopted son: and it was held by the late Sudder Court that the adoption of Gulal Chand was a good and valid adoption, although it had not taken place in accordance with the authority given by the husband. In that case several pundits appear to have been consulted, and although there was a difference of opinion as to whether the widow could depose a son after being once adopted, they seem to have been unanimous in the opinion that according to the Jain Shasters "a sonless widow may adopt a son, just as may her husband, for the performance of rites. The sanction of her husband or the direction of the yatis or priests is not essential." It is not stated in the report to what caste Uttam Chand Nahar belonged, but it appears from the evidence of plaintiff's witness Hulas Chand Singhi at page 59 of the paper book that Gulal Chand was an Oswal. This case then is in our opinion an important piece of evidence, being as it is a judicial decision so far back as 1883, that among the Oswal Jains of Moorshedabad a widow can validly adopt a son without the permission of her husband. The case of Bhagvandas Tejmal v. Rajmal 10 Bom. H.C. 241 was one between Jains of Marwari origin residing in the district of Ahmednagar. In that case the widow had died without making an adoption; and the question before the Court was whether under Jain law or custom a son could he adopted to the deceased widow and her husband by other members of the caste. The Court held that the alleged custom was not proved; but it seems to be assumed throughout the judgment that, if the adoption had been made by the widow before her death, it would have been valid. This assumption is based, however, not upon any custom peculiar to the Jains, hut upon the general principles of Hindu law according to the Maratha school. At page 257, Westropp, C.J., says: "The Maratha school of Hindu law permits the widow to adopt a son on behalf of her husband without any express authority from him to that effect, provided he has neither said nor done anything which can be regarded as a prohibition to her or a refusal by himself when in articles mortis to adopt. It has even been held here that the consent of the kinsmen of the husband is not essential to adoption by a widow, if the act be done in the bona

fide performance of a religious duty, and neither capriciously nor from a corrupt motive." In *Sheo Singh Rai v. Dakho*[4] it was held that among the Saraogi (or Jain Agarwalas of the Meerut district, according to the custom of the sect, a sonless widow could adopt a son without any permission from her husband or the consent of his heirs, and this decision was affirmed by the Privy Council. It is contended by Mr. Woodroffe that this decision is not in point, inasmuch as the parties were Saraogi Agarwalas and not as in this case Jain Oswals. But the term Saraogi appears to be synonymous with Jain (*Sheo Singh Rai v. Dakho*[5] and Bhagvandas Tejmal v. Rajmal 10 Bom. H.C. 241 page 251, and the decision in this case, as in. that in Govind Nath Roy v. Gulal Chand 5 Select Rep. 276, appears to be based on a custom prevalent among the Jains and not as being peculiar to any tribe or caste. This appears clear from the analysis, which is given in the judgment of the High Court, of the evidence upon which they found the custom proved. The parties in the present case admittedly came from the North-Western Provinces, and we think, therefore, that this case, like Govind Nath Roy v. Gulal Chand 5 Select Rep. 276, constitutes strong evidence in favour of the custom pleaded by the respondents. Turning to the oral evidence taken in this case, we are unable to say that the lower Court was wrong in holding that it sufficiently establishes the custom alleged. A large number of witnesses (including several called by the plaintiff himself) have deposed that among the Jain Oswals the husband's permission is not a necessary condition to the validity of an adoption by the widow. It is no answer to this evidence to say that in some cases, as the witnesses admit, the husband does authorize or enjoin the widow to adopt. The question is not whether the widow may adopt with the husband's permission- that is the ordinary Hindu law in this part of India; and the special deviation from that law, which has to be proved in this case, is that even when no permission has been granted the widow as the representative of her husband is entitled to adopt. A large number of instances have been cited by the witnesses in which this power is said Co have been exercised by the widow. Some of these instances no doubt may be open to criticism; and as regards others the evidence is possibly not the strongest that might have been adduced. But some of the instances cited do certainly go to bear out the statements of the witnesses as to the alleged custom, and the plaintiff has not attempted to show that in any of the instances given there was an authority granted by the husband. We think, then, that the oral evidence taken in this case, coupled with the judicial decisions in *Govind Nath Roy v. Gulal Chand*[6] *and Sheo Singh Rat v. Dzkho 6 N.-W.P*[7]. establishes the existence of a custom among the Jain Oswals, under which a widow may adopt a son to her husband even in cases where he has not conferred upon her an express authority to adopt.

4. Then it is contended that, even supposing it proved that according to Jain usage a widow can adopt a son to her husband without any authority derived from him, the family in this case had adopted Vaishnavism, and would not, therefore, be governed by Jain usage. We think it is

satisfactorily proved upon the evidence that the family of Jagat Sett Gobind Chand originally belonged to the Jain sect of Hindus, and that they embraced Vaishnavism in the time of Harek Chand about the beginning of the present century. But we are clearly of opinion that the adoption of the tenets of another sect of Hinduism would not affect the laws and customs by which the personal rights and status of the members of the family were governed. The custom in question is not shown to have been in its origin in any way connected with the peculiar tenets of the Jain religion, and in our opinion it would not be affected by the particular creed or religion which a family or an individual governed by it may profess to follow. Moreover, in the present case the oral evidence clearly shows that the custom in question prevails among members of the Oswal caste, whether they are Jains or Vaisnabs. We are of opinion, therefore, that the fact that the family have turned Vaisnabs in recent times will not affect the question whether they would still be governed by the customary law, which, in our opinion, is well established on the evidence.

5. The next question we have to determine is whether the adoption is invalid by reason of defendant No. 2 being at the time the only son of his natural father. It appears from the deposition of Amrita Kumari Bibi, the mother of defendant No. 2, that although both her living sons (Manik Chand Kuthari and defendant No. 2) have been given in adoption, the widow of one of her deceased sons has adopted a son. The reason for the rule forbidding the adoption of an only son does not therefore exist in this case; and even if we thought that rule imperative, it would not apply in the present case. We are of opinion that the adoption is not valid on this ground.

6. The next objection urged is that the adoption is invalid because Jagat Sett Gobind Chand left a son Gopal Chand, who again left a son Gopi Chand, in whom the estate vested on his father's death. In support of this objection Mr. Woodroffe relies on the decision of the Privy Council in the case of *Padmakumari Debt Chowdhrani v. Court of Wards L.R. 8 I.A. 229 : I.L.R. 8. Cal. 302(Supra)*. In that case one Gour Kishore executed a deed of permission to adopt in favour of his wife Chandrabali. Gour Kishore died leaving, besides his widow, a natural son Bhowani Kishore, who succeeded to his property, and on Bhowani's death the estate vested in his widow Bhoobun Moyi. Chandrabali then adopted a son to her husband Gour Kishore; but the Privy Council held that the adoption was invalid on the ground that "upon the vesting of the estate in the widow of Bhowani, the power of adoption was at an end and incapable of execution." We think, however, that that decision will not apply to the facts of the present case. In the case referred to the authority to adopt was sought to be exercised at a time when the estate had vested in Bhowani's widow; and the Privy Council held that it could not then be exercised so as to divest the widow of the estate which had devolved upon her. In the present case the adoption was made at a time when the estate had vested in Pran Kumari as heir to Gopi Chand; and the real question is whether it was not competent to her to divest herself of the estate by the adoption of a son. In the case of Bhoobun Moyi Dehea v. Ram Kishore Acharj Chowdhry 10 Moore's I.A. 279 their

Lordships of the Privy Council say (p. 31l) with reference to the case under consideration: - "If Bhowani Kishore had died unmarried, his mother Chandrabali Debia would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the rule." And in the judgment of this Court in the case of Paddo Kumaree Debt v. Juggut Kishore Acharjee I.L.R. 5 Cal. 615(Supra) occurs the following passage in which a similar opinion is expressed (p. 642): -"If, therefore, Chandrabali immediately on the death of Bhoobun Moyi had made an adoption and so divested her own estate, there would have been nothing in the judgment of the Privy Council, and nothing that we are aware of in the law, to prevent her doing that which her husband had authorised her to do, and which would certainly be for his spiritual benefit and for that of his ancestors and even of Bhowani Kishore. "It is true that in their later judgment in that case the Privy Council decided that "upon the vesting of the estate in the widow of Bhowani, the power of adoption was at an end and incapable of execution." But the power in that case was a power given by the husband, and the decision referred to lays down the limit of time within which such a power should be exercised. But in this case, as we have found, no power from the husband was necessary to the validity of the adoption, and it seems to us, therefore, that the decision in Paddo Kumaree's case does not apply; and that the estate having vested in Pran Kumari she was at liberty to divest herself of it if she chose to do so, and that the adoption is not invalid on that ground. For these reasons we are of opinion that the plaintiff's suit was properly dismissed in the lower Court, and we accordingly dismiss this appeal with costs.

__ *[Article 118:

Description of suit.	Period of limitation.	Time from which period begins to run.
To obtain a declaration that an alleged adoption is invalid, or never in fact took place.	Six years	When the alleged adoption becomes known to the plaintiff.]

Cases Referred.

1I.L.R. 6 Cal. 256 : 7 C.L.R. 145

2L.R. 8 I.A. 229 : I.L.R. 8 Cal. 302
3I.L.R. 10 Cal. 232 : 13 C.L.R. 379; and L.R. 10 I.A. 138
46 N.-W.P. Rep. 382 : on appeal I.L.R. 1 All. 688 : L.R. 5 I.A. 87
56 N.-W.P. Rep. 382 : on appeal I.L.R. 1 All. 688 : L.R. 5 I.A. 87 page 395
65 Select Rep. 276
7Rep. 382; on appeal I.L.R. 1 All. 688; L.R. 5 I.A. 87