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SUKHRU KOERI v. RAM LOTAN KOERI.

We think the proper order to make under the circumstances is that the plaintiff shall, at any rate as a condition of having his suit tried at all, put the defendant in the same position as if this miscarriage had never occurred, that is to say, he must pay in cash into the court of the Munsif a sum of Rs. 3,692-9-0, representing the costs due to the three defendants in the two courts as set out in the decree of the lower appellate court, unless of course any of these costs have already been paid, in which case credit for such payment must be given. He must also deposit, in cash or security sufficient in the opinion of the Munsif, a sum of Rs. 250 as security for the future costs of the suit in the trial court only, that is to say, whatever the costs in the trial court for the future hearing may be, the plaintiff will be entitled to any surplus between that amount and the sum of Rs. 250. Upon the payment of the first sum in cash into the Munsif's court and the deposit of the second sum either in cash or in some other form of security by way of security for the future costs within three months from this date, we allow the appeal, set aside the orders of both the courts below and remand the case under order XLI, rule 23, of the Code of Civil Procedure, to the court of first instance through the lower appellate court with directions to readmit the suit under its original number in the register of civil suits and proceed to determine it according to law. The costs of this appeal will abide the ultimate result of the suit. If at the expiration of three months those sums have not been either paid or deposited, the plaintiff's suit and this appeal will stand dismissed with costs.

Appeal decreed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

1919
June, 16.

KHUB SINGH (DEFENDANT) *v.* RAMJI LAL AND OTHERS (PLAINTIFFS).*

Construction of document—Will—Bequest to person described as the adopted son of the testator—Adoption not proved—Intention of testator.

One N, a separated Hindu, brought up in his house K, who was the son of his wife's brother. N provided for K's marriage, and later, by a deed of gift made over to K most of his zamindari property. Ultimately N made a will

* Second Appeal No. 702 of 1917, from a decree of Sitla Prasad Bajpai, Additional Judge of Meerut, dated the 30th of March, 1917, modifying a decree of Manmohan Sanyal, Additional Subordinate Judge of Meerut, dated the 10th of February, 1916.

bequeathing to K, whom he described as his adopted son, the residue of his property. After N's death his reversionary heirs sued K to recover the property left to him by N's will, alleging that no adoption had taken place, or, if it had, that it was invalid. The suit was at first contested upon the ground that there was a valid adoption, and a deed of adoption was produced, but at a later stage of the suit that defence was given up.

Held that K's right to take under N's will did not in the circumstances rest on the fact of his being the legally adopted son of N, but upon N's intention to leave his property to K, irrespective altogether of the validity of the adoption. *Lali* v. *Muridhar* (1) and *Fanindra Deb Raikat* v. *Rajeswar Das* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Kailas Nath Katju* for the appellant.

Mr. *N. C. Vaish*, for the respondents.

WALSH and RYVES, JJ.:—The property in dispute belonged to one Nihalo, who died on the 29th of December, 1914. The plaintiffs respondents were distant collaterals of Nihalo, who was a separated Hindu, and they claimed all the property left by Nihalo, as his heirs. Their claim was resisted in the mutation proceedings by the appellant on the ground that he was entitled to Nihalo's property. Mutation was granted in his favour, hence this suit. The plaintiffs claimed all the property left by Nihalo. The defendant asserted that on the 15th of December, 1891, Nihalo had executed a deed of gift of the bulk of his property in his favour and had put him in proprietary possession of it, and that subsequently on the 13th of January, 1912, he executed a registered will by which he left the remainder of his property to him. The defendant also stated that as a matter of fact he was the adopted son of Nihalo, and in proof produced a *tabniatnamah* or deed of adoption, executed on the 19th of January, 1913. The fact and legality of this adoption was denied. At the trial the defendant's pleader stated that he did not wish to give evidence on the issue of adoption, as he was prepared to stand or fall on the remaining issues. The court of first instance held, that the deed of gift was genuine and that it had been acted upon, and that under it the defendant had acquired full proprietary title and possession of the properties comprised in it. The plaintiffs'

(1) (1908) I. L. R., 28 All., 488. (2) (1885) I. L. R., 11 Calc., 463.

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plea with regard to the will was that it was "*farzi*," that is to say, mere "waste paper." In argument before us it was pleaded that inasmuch as throughout the will the defendant was described as Nihalo's adopted son, on failure of proof of the adoption, the will must fail because, it was argued, that the whole motive of making it was the fact of the defendant being believed to be the adopted son of Nihalo. The court of first instance overruled this plea and held that it was the intention of Nihalo under this will to pass the remainder of his property to the defendant. On appeal the lower appellate court found that the plaintiff's suit as regards all the property except that covered by the will was rightly dismissed. With regard to the will that court held that Nihalo made the will in the defendant's favour, only *qua* adopted son, and as the plea of adoption had been abandoned, it held, purporting to follow two decisions of the Privy Council, *Lali* v. *Murlidhar* (1) and *Fanindra Deb Raikat* v. *Rajeswar Das* (2), that it was necessary to find what was the intention of the testator in making the gift under the will. In both these cases in the Privy Council it was held, that under the circumstances of those cases the fact that the donee was an adopted son was a condition precedent to his receiving the gift. In both cases it was found that if the alleged adoption was not valid the gift must fail. The question in every such case is whether the donee's right to succeed depended on whether he had been sufficiently indicated, or whether he actually and legally was the "adopted son," and whether the gift was made to him personally or only because he was believed to be the adopted son. In *Fanindra Deb Raikat* v. *Rajeswar Das* (2), their Lordships of the Privy Council admitted that, "the distinction between what is description only and what is the reason or motive for a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language (of the document) and the surrounding circumstances." Now in this case the facts are these:—Nihalo had no children of his own. The defendant who was his nephew (or more accurately "wife's brother's son") lived with him apparently since his boyhood. Nihalo brought him up and got him married and, as has been mentioned above, on the 15th of

(1) (1906) I. L. R., 28 All., 488. (2) (1885) I. L. R., 11 Calc., 463.

December, 1891, made a gift in his favour of the bulk of his zamindari property. Since that time the nephew had been helping Nihalo in his business and living jointly with him. Then we come to the will executed twenty-one years afterwards, in which he bequeathed to him the rest of his property. At that time Nihalo's wife was dead, and he had no near relative. As said before he was a separated Hindu. It is contended that he did not mean to leave this property to the defendant merely because he was his nephew and because had lived with him for all these years and had been the recipient of his bounty, but because he had adopted him and for no other reason. It seems to us that it would be pressing the principle laid down in the Privy Council rulings very far to hold that simply because in this will the donee is described as an adopted son it must be taken that the testator meant that unless in fact and law he was an adopted son he never meant him to get any benefit under the will. Under these circumstances we think that the court of first instance was right. We allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs.

Appeal decreed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

1919
June, 17.

JAI CHAND BAHADUR (PLAINTIFF) *v.* GIRWAR SINGH (DEFENDANT).*

Suit to recover possession of land from an alleged licensee—Act No. IX of 1908, *(Indian Limitation Act), schedule I, article* 144*—Defence of title by adverse possession—Burden of proof,*

The plaintiff who was the zamindar, sued to eject the defendant from certain land within the ambit of the plaintiff's zamindari, alleging that the defendant was in possession merely as a licensee. The defendant denied that he was a licensee, and claimed that he had acquired a title to the land in suit by adverse possession. The defendant, however, failed to prove that he had been in adverse possession of the land for more than twelve years.

Held that the plaintiff was entitled to succeed simply on the strength of his *prima facie* title as zamindar. It was not necessary for him to go further and prove that he had been in actual possession at some period within twelve years previous to the commencement of the suit.

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* Second Appeal No. 321 of 1917, from a decree of Murari Lal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Cawnpore, dated the 18th of December, 1916, reversing a decree of Muhammad Junaid, Munsif of Fatehpur, dated the 2nd of September, 1916.