

APPELLATE CIVIL.

1920
February, 24.

Before Mr. Justice Piggott and Mr. Justice Walsh.

PREM DEVI AND OTHERS (DEFENDANTS) v. SHAMBHU NATH
AND OTHERS (PLAINTIFFS).*

Hindu law—Adoption—Authority of widow to adopt—Adoption called in question after the lapse of many years—Presumption as to widow's authority.

The question being whether B had been validly adopted as the son of R by R's widow after his death, it was found that for a large number of years B had, as a matter of fact, been treated, and had behaved himself, as the adopted son of R, and that the adoption had been recognized by persons who would have been interested in denying it. On the other hand, as the adoption must have taken place at some date between the years 1823 and 1847 there was no direct evidence as to the circumstances under which it took place or as to the authority of the widow to adopt.

Held that in the above circumstances it might be presumed that the widow was properly authorized to adopt

THE facts of this case were as follows :—

The plaintiffs alleged themselves to be the nearest reversioners to one Badri Das, who was their father's elder brother and the object of the suit was to set aside an alienation of property which had belonged to Badri Das made by his surviving daughter Prem Devi. The defence to the suit was that Badri Das had been adopted many years ago by one Ramanand and therefore the plaintiffs were not his reversioners. On the question of the adoption of Badri Nath by Ramanand, the court of first instance found the adoption proved and dismissed the suit. On appeal the lower appellate court (Additional District Judge of Saharanpur) came to the conclusion that, although Badri Das had in fact been treated as a son by the widow of Ramanand, there was no satisfactory evidence of an actual adoption, in the way of which there was this further difficulty that Badri Das was by natural relationship the daughter's son of Ramanand, and therefore, in the absence of some special custom, could not have been adopted by him. The court accordingly set aside the decree under appeal and remanded the case to the court of first instance for trial on the remaining issues. Against this order the defendants appealed to the High Court.

*—First Appeal No. 96 of 1919, from an order of Puri Lal Katara, Additional Judge of Saharanpur, dated the 20th of April, 1919.

Mr. B. E. O'Connor and Mr. Nihal Chand, for the appellants.

The Hon'ble Pandit Moti Lal Nehru, The Hon'ble Dr. Tej Bahadur Sapru and Dr. Surendra Nath Sen, for the respondents.

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PIGGOTT and WALSH, JJ. :—The main question in issue in this case was whether one Badri Das had or had not been validly adopted as his son by one Ramanand, who died about the year 1822. One of the principal documents on the record does prove that the adoption, assuming it to have been made, was not made by Ramanand personally but by that gentleman's widow. Even then it must have been made prior to the execution of this document, which is a deed of gift of the 12th of February, 1847. It is not surprising in dealing with a transaction so ancient that there was a complete want of direct evidence as to the *factum* of the adoption, as to the performance of ceremonies, or as to formal authorization by Ramanand of his widow to adopt a son to him. What the defendants who set up the adoption relied upon was a mass of documentary evidence, supported by some oral evidence, to the effect that Badri Das had as a matter of fact been treated, and had behaved himself, over a long course of years as the adopted son of Ramanand and that in certain transactions he had been recognized as such by ancestors of the plaintiffs themselves. One difficulty, however, stood in their way. It was admitted that by natural relationship Badri Das was the daughter's son of Ramanand and, in argument at any rate, the question was raised whether such an adoption, assuming it to have been made or attempted, could operate as a valid adoption under the Hindu law. The first court, in a carefully reasoned judgment, found in favour of the adoption and dismissed the suit on that ground, leaving untried a number of other issues which required to be determined before the plaintiff's suit could be decreed. In appeal the learned District Judge purports to reverse the finding of the first court and has remanded the case for trial of the remaining issues. The appeal before us is against the order of remand. One of our difficulties has been to determine with certainty what the lower appellate court has found. We do not think that the learned District Judge can be taken to have found positively that no adoption of Badri Das

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by the widow of Ramanand ever in fact took place. What he does say is that there is "no proof", by which he apparently means no direct evidence, that Ramanand had authorized his widow to adopt a son to him after his death. Further, he has held that there is no adequate evidence on the record to prove a contention set up by the defendants to the effect that there is a clan or family custom binding upon the parties by which the adoption of daughters' sons is authorized and validated. With regard to the question of the authority of Ramanand's widow to adopt a son to him, we only wish to say this much at present, that we do not think the absence of direct evidence on the point ought, in a case like the present, to be regarded as conclusive. The authorization, if ever given, was given almost, or possibly quite, a hundred years ago and direct evidence on the point could not be expected. The question is whether it could not be presumed, as a fair matter of inference from established facts, that the lady must have had authority to make the adoption, that her authority to do so was known and recognized in the family and that it could safely be inferred from the conduct of members of the said family, including the ancestors of the present plaintiffs. The question of the alleged family custom is a more difficult one. In so far as the decision of the lower appellate court is limited to this that, on the evidence on the record, no such custom is satisfactorily established, that finding has not been challenged in argument before us. What we have been asked to hold is that, in view of the pleadings in the court of first instance, the defendants should not be regarded as having been properly put to proof of the existence and binding force of the alleged custom, and that the order of remand should either have been preceded, or at least accompanied, by the framing of an express issue on this point, with opportunity offered to the parties to produce such evidence as they might think proper regarding it. The point is a fairly arguable one; but on consideration of the record as a whole, we have come to the conclusion that the defendants are entitled to a clear issue on the point and opportunity of producing evidence regarding it. While, therefore, we affirm the order of remand now under appeal we make the following addition to it, which in our opinion could

have been made, and ought to have been made, by the lower appellate court. We frame the following issue:—

“ Is there a family or tribal custom, binding on the parties to this suit, by which the adoption of a daughter's son is validated in spite of the ordinary rule of Hindu law prohibiting the same.”

The burden of proof will be on the defendants, but both parties should be allowed to produce evidence. We think the trial court should comply with the order of remand by trying out, not only this issue, but also the remaining issues framed by it and should pass a decree after recording findings upon all the issues. The costs of this appeal will be costs in the cause.

Order modified.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR V. MAHADEO *

Act No. III of 1867 (Public Gambling Act), sections 3, 4, 5, 10 and 11—Search warrant—Endorsement of warrant by officer to whom it was issued—Procedure—Examination under section 10 of persons sent up as accused under section 4—Effect of order passed under section 11.

When a search warrant has been issued by a Magistrate under the provisions of section 5 of the Public Gambling Act, 1867, the police officer to whom it is addressed may endorse it over to another police officer, provided that the latter is an officer to whom such a warrant might have been issued in the first instance. *Emperor v. Kashi Nath* (1) followed.

Effect of an order under section 11 of the Public Gambling Act, 1867, and procedure necessary to terminate the legal liability of persons in whose favour such an order is passed whilst proceedings under section 4 of the Act are still pending against them discussed.

THIS was an application in revision against an order of the Sessions Judge of Allahabad, refusing to interfere with the conviction and sentence of the applicant under section 3 of the Public Gambling Act, 1867. The facts of the case sufficiently appear from the judgment of the Court.

Mr. C. Ross Alston and Munshi Ram Nama Prasad, for the applicant.

The Assistant Government Advocate (Mr. R. Malcolmson), for the Crown

* Criminal Revision No. 97 of 1920, from an order of B. J. Dalal, Sessions Judge of Allahabad, dated the 24th of January, 1920.

(1) (1907) I. L. R., 30 All., 60.

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