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BENGAL AND NORTH-WESTERN RAILWAY v. MATHU RAM.

Failing protection of section 55, the company ought to have kept custody of the goods for six months under rule 12 of the rules framed under section 47(*f*) of the Act. This was not done and the sale in contravention of that rule amounted to illegal conversion.

It was argued on behalf of the appellant that the plaintiff had not set up a case of unlawful conversion. This is inaccurate. In paragraph 6 of the plaint the complaint is made that the goods were sold at auction contrary to law. It is true that the trial court did not frame a specific issue on the subject, but the omission has not prejudiced the appellant. It was not denied that the goods were sold within six months of arrival and even of booking.

The amount of damage has been rightly assessed and we would not interfere with a matter which, under the circumstances of the present case, does not arise in second appeal.

It was argued half-heartedly that salt was a perishable article and so the company was authorized to sell it at once. In fact, the company did not sell it at once but about three months after the arrival of the consignment. It is clear that the company had no intention of treating salt as a perishable article.

We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

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SUKHBIR SINGH (PLAINTIFF) *v.* MANGEISAR RAO AND OTHERS (DEFENDANTS).*

Hindu law—Mitakshara—Mayukha—Adoption of orphan—Custom.

The Hindu law being a personal law, the presumption is that a Hindu who migrates to another part of India where the law differs from that of his domicile of origin carries with

* First Appeal No. 405 of 1923, from a decree of Gobind Sarup Mathur, Subordinate Judge of Saharanpur, dated the 27th of August, 1923.

him the law of his domicile of origin, unless there is evidence of an intention to adopt the law of his new domicile.

According to the law of the Mitakshara an orphan cannot be validly adopted.

In the present case, a custom to the contrary having been set up as prevailing in the Gwalior State, it was *held* that the custom, if it could be called so, applied only to *jagirs*, and in their case the principal validating factor with reference to adoptions was the recognition of the adopted son by the *Darbar*, in accordance with certain rules framed by the authorities of the State.

Dhanraj Johramal v. *Soni Bai* (1) and *Ramkishore* v. *Jainarayan* (2), referred to.

THIS was a suit for recovery of possession of a house situated at Hardwar which was acquired by the plaintiff under a sale-deed, dated the 27th of October, 1914, from one Madho Rao. The plaintiff's case was that this house, along with certain *jagirs* situated in the Gwalior State belonged to one Nil Kanth Rao, who died some time before 1913. His widow, Musammat Anandi Bai, with the permission of the Gwalior *Darbar*, adopted Madho Rao as a son. It was admitted that at the time of the adoption, namely, in 1913, Madho Rao was a married man with several children, and that both his parents were dead. He, therefore, either gave himself in adoption or he was given in adoption by the *purohit* who performed the ceremonies.

The court of first instance found on the evidence that it had not been established that there was a valid custom under which an orphan like Madho Rao could have been validly adopted. It, therefore, dismissed the suit. The plaintiff appealed and the existence of the custom alleged was again pressed.

Dr. *Kailas Nath Katju*, Munshi *Girdhari Lal Agarwala* and Munshi *Sheo Dihal Sinha*, for the appellant.

(1) (1925) 23 A.L.J., 273. (2) (1921) I.L.R., 49 Calc., 120.

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Babu *Piari Lal Banerji* and Munshi *Sarkar Bahadur Johri*, for the respondents.

The judgement of the High Court (LINDSAY and SULAIMAN, JJ.), after stating the facts as above, thus continued :—

It may be mentioned at the outset that prior to the institution of the suit, the plaintiff had first instituted another suit on the basis of the aforesaid sale-deed for possession of this very house. In the plaint of that suit there was no clear mention as to the way in which Madho Rao had succeeded to the estate of Nil Kanth Rao. It was, therefore, felt that the plaint was defective. On the 1st of June, 1916, an application was made for permission to withdraw that suit on account of the flaw, with liberty to bring a fresh suit. This permission was granted and the suit withdrawn. It might, therefore, have been expected that the present plaintiff, before filing his new plaint, would take care to formulate the alleged custom which is the basis of his claim. The only paragraph in the present plaint which mentions this custom is paragraph 2 which states that defendant No. 5, namely Musammat Anandi Bai, " according to the practice in the Gwalior State and with the permission of the said State " adopted Madho Rao, and by virtue of which he became the owner of and entitled to the estate of Nil Kanth Rao. This statement amounts to an assertion that there is a territorial custom prevailing in the Gwalior State, not necessarily confined to any particular family, and that in addition thereto the permission of the *Darbar* has some efficacy. The issue which was framed by the trial court on this question was issue No. 2 which ran as follows :—

" What is the custom or law of adoption obtainable in Gwalior State?"

It is, therefore, obvious that no special family custom governing the particular family of Nil Kanth Rao was put forward but a general custom prevailing in the Gwalior State was asserted. Nil Kanth Rao was an old resident of Vengrula in Ratnagiri district in the Bombay Presidency. His ancestors had migrated to Gwalior about 100 years ago and were granted some *jagirs* by the *Darbar*. They also acquired some property in British India.

On the death of Nil Kanth Rao, his widow undoubtedly applied to the *Darbar* for permission to adopt Madho Rao. In her application she clearly stated that Shankar Rao (which was the former name of Madho Rao) was 40 years old and was literate, and he had little boys. There was, however, no express mention that Shankar Rao was an orphan and his parents were dead, and that this adoption would take place in the old *Svayamdatt* form. The permission was duly granted to her and there can be no doubt that she did in fact adopt Shankar Rao, who was given the name of Madho Rao after his adoption in 1913. The *jagir* of Nil Kanth Rao devolved on Madho Rao and he was recognized by the Gwalior *Darbar* as his rightful successor at a subsequent stage. Musammat Anandi Bai subsequently appears to have changed her mind and repudiated this adoption as stated above. She adopted another son in his stead. In spite of the objection raised by Musammat Anandi Bai for herself and as guardian of this second adopted boy, Madho Rao was able to obtain a succession certificate from the High Court in Gwalior in the year 1915. It is, therefore, quite clear that, so far as the Gwalior State is concerned, his adoption was duly recognized and acted upon by the *Darbar*. It is also an undoubted fact that Madho Rao got the *jagir* in the Gwalior State. In 1917 Madho Rao brought a suit against Musammat Anandi Bai in the High Court of Bombay on the

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allegation that he was the adopted son of Nil Kanth Rao and was entitled to all his assets, and that his widow, Musammat Anandi Bai, had removed a box containing valuable ornaments from Gwalior. This suit was tried in the Bombay High Court. We are not at present concerned with the reasoning adopted in the judgement. It is sufficient to state that the learned Judge of the High Court came to the conclusion that the custom alleged by Madho Rao should not be accepted. This judgement was affirmed in appeal.

There can be no doubt that the family of Nil Kanth Rao, when it resided in the Bombay Presidency, was governed by the Mitakshara law as modified by the Mayukha law. Under the law there can be no question that an orphan, i.e., one whose parents are not alive to give him away in adoption, cannot be validly adopted. That this is the well recognized Mitakshara law admits of no doubt. We may refer to a case recently decided by the Privy Council, *Dhanraj Johramal* v. *Soni Bai* (1). At the same time it cannot also be doubted that if a custom is proved under which such adoptions do take place, they would have to be held to be valid. A case in point is the case of *Ramkishore* v. *Jainarayan* (2) where the adoption of an orphan was held valid under a custom by their Lordships of the Privy Council. Every case, therefore, must depend on its own circumstances and evidence. The burden lies on the plaintiff heavily to prove a special and unusual custom set up by him. We have, therefore, examined the evidence which is relied upon in support of that custom. A number of witnesses have been produced who have stated generally that married persons and orphans can be adopted in Gwalior, but when pressed further in cross-examination they had to admit that the only instance that they could state of an orphan having been adopted was that of Lakshmi Maharaj.

(1) (1925) 23 A.L.J., 273. (2) (1921) I.L.R., 49 Calc., 120.

the father of witness Wasdeo Maharaj. A number of cases of married men having been adopted have, however, been mentioned. We shall discuss this evidence later on. The circumstance on which the strongest reliance has been placed on behalf of the appellant is that under the rules which are in force in the Gwalior State, there is no prohibition against the adoption of an orphan. A book called *Tawarikh Jagirdaran* (History of the Jagirdars) with the rules has been produced before us, and a translation of an extract from it is printed at pages 81 to 83 of the paper-book. It appears that the *Majlis Khas* of Gwalior has power to modify the rules which are in force and the rules so modified in 1917 are quoted at length on the pages mentioned above. They provide a strict order of relations who can be taken in adoption. In each case the sanction of the *Darbar* is necessary. They do mention that if the person who stands first in order of preference refuses to be adopted or his father himself shows his unwillingness to give him in adoption, then he shall not be adopted. The learned advocate for the appellant contends that this indicates that a grown-up person may be adopted or he may refuse to give himself in adoption. Certainly there is nothing in these rules which expressly prohibits the adoption of a grown-up married man whose parents are dead. The one instance which has been quoted by many witnesses and has been particularly referred to by the witness Wasdeo Maharaj, is the adoption of his father. This instance has been accepted by the court below as correct. When the father of Wasdeo Maharaj was adopted, his parents were dead and his paternal aunt was taken to be in the position of a parent. His adoption also has remained unquestioned, and he has duly succeeded to the *jagir*. On behalf of the plaintiff this instance is strongly relied upon. On the other hand, the learned advocate for the respondents urges

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that this adoption took place in accordance with the rules in force in the *Darbar* which regulate the succession to *jagirs* and is not a true instance of the enforcement of the alleged custom. Undoubtedly not a single witness has been able to cite any instance where a person who was an orphan was adopted and succeeded to the property other than *jagirs*. As regards the *jagirs*, it appears that the main thing is the permission of the *Darbar*. Apaji Rao Sitole, who was the Revenue Member of Gwalior, stated that at the time when sanction is asked for, permission is generally granted in accordance with the Hindu law, but permission is also granted in a special way. Wasdeo Maharaj also admitted that among the *jagirdars* no adoption can take place without the permission of the *Darbar*. Similarly, Khan Bahadur Munshi Aulad Muhammad, senior member of the Court of Wards, stated that a person whom the *Darbar* wants is adopted and that if in the application for permission to adopt, any *jagirdar* mentions the name of any particular boy whom he wants to adopt, it depends upon the choice of the *Darbar* either to see him or not before granting such permission. Ordinarily if the rules laid down by the *Majlis Khas* are complied with, permission is granted, though perhaps on payment of some nazrana; but in special cases permission may even be granted though the adoption is not in strict accordance with those rules. Furthermore, it is quite clear that those rules can be modified by the decision of the *Majlis Khas*. Under these circumstances we are of opinion that the rules which are contained in the *Tawarikh Jagirdaran* are the rules laid down by the *Darbar* for regulating the succession to *jagirs*. They in no way embody the record of any particular custom which prevails in Gwalior generally. Those rules are restricted to the *jagirs* and *jagirdars* and are not applicable to the people in Gwalior in general. When these rules were

in force, it is not surprising that the father of Wasdeo Maharaj was accepted as the adopted son, although his parents were dead at the time of his adoption. He was a *jagirdar* and succeeded to the *jagir* in the Gwalior State. That instance, therefore, is by no means conclusive as to the existence of a general custom prevailing in Gwalior. Every instance of a married man having been adopted is not really an instance of the alleged general custom, for we have not only to see whether the fact that Madho Rao was a married man was an impediment in the way of his valid adoption, but we have also to see whether in the absence of any proper person to give him in adoption he could have been adopted. Many of the witnesses who stated generally that a custom of adoption of orphans prevailed had to admit in cross-examination that whatever they stated about the adoption of an orphan and married persons was concerned with the *jagirs* only. We may refer to the evidence of Baji Rao Kante, Sardar Nana Sahib and Munshi Aulad Muhammad Khan.

In our opinion there is no inconsistency in the succession of Madho Rao to the *jagir* being recognized by the Gwalior *Darbar* and his not being a validly adopted son regarding other properties the devolution of which does not depend on the State's sanction. One might quote the analogy of the Oudh Estates Act under which *taluqdari* estates would devolve according to the rule of succession and adoption laid down by that Act, whereas succession to the non-*taluqdari* estates may be governed by the personal law of the deceased.

We, therefore, agree with the view of the court below that there is no satisfactory evidence before us to show that a custom by which an orphan can be

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adopted exists among the common residents of Gwalior as was alleged in paragraph 2 of the plaint. No special custom of the family has been set up or proved. It is undoubtedly the law that when a person migrates from one country to another, there is a presumption that he carries with him his personal law, and, unless there is something to show that he has adopted the law of his new domicile, he must be deemed to be still governed by the old law. No previous act in the history of the family is forthcoming to show that it gave up the Mitakshara law under which it was governed in Ratnagiri and adopted any special law prevailing in Gwalior. The mere fact that the family accepted the *jagir* from the *Darbar* would not of itself be sufficient to show that the personal law was necessarily changed. Having regard to all these circumstances we are of opinion that it is impossible to interfere with the finding or decree of the court below.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

1926 *November*, 24.

ALI BAHADUR BEG AND ANOTHER (PETITIONERS) *v.* RAFI-ULLAH AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, order XXII, rules 4 and 10—Mortgage —Death of judgement-debtor after passing of preliminary decree—No application for substitution within prescribed time.

A preliminary decree in a mortgage suit was passed on the 13th of May, 1920. The judgement-debtor died in July, 1920. No application for substitution was made, but the decree-holder applied for a final decree on the 12th of May, 1923.

* Second Appeal No. 2267 of 1925, from a decree of Tufail Ahmad, Additional Subordinate Judge of Shahjahanpur, dated the 31st of August, 1925, confirming a decree of Banarsi Das Kankan, Munsif of Tilhar, dated the 16th of September, 1924.