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AMBA SAHAI v. NATHU.

Filling up gaps among trees of an old grove is analogous to filling up gaps in an old embankment. In each case the work is of the nature of repairs, for the purpose of maintaining the grove or embankment in its original state, and is not an "improvement".

Our conclusions on this point are fortified by the general principle that the legislature cannot be deemed to have intended to take away a very important right incidental to grove-holding without enacting express provisions to this effect. In our opinion the right which a grove-holder had before the commencement of the present Tenancy Act, to maintain his grove by replacing fallen trees, has not been taken away by anything in that Act.

We hold, therefore, that the appellants' contention cannot be accepted and the courts below have come to a right decision. We accordingly dismiss the appeal with costs.

PRIVY COUNCIL

*J. C.** 1933 *January*, 12

KALAWATI DEVI (PLAINTIFF) *v.* DHARAM PRAKASH (DEFENDANT)

[On appeal from the High Court at Allahabad]

Hindu law—Adoption—Authority to adopt—Construction—Khandani rishtadaran—*Estoppel.*

A Hindu by his will authorised one of his two widows to adopt, but forbade her to adopt any son of the relations of her family (*khandani rishtadaran*), or of that of her co-widow, or of his mother; if his brother should give his son in adoption, he should be adopted:—

Held that the will precluded the widow from adopting the son of a daughter of her brother. The word "*khandani*" was used in a general sense as referring to blood relations; the principle that a Hindu female on marriage passes into her husband's family could not be invoked, as it would exclude authority to adopt the son of the testator's brother or any agnatic relation of his.

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Held, further, that it had been rightly conceded on appeal that the widow was not estopped from denying that the adoption was invalid under the terms of the will.

Judgment of the High Court, I. L. R., 50 All., 885, reversed.

APPEAL (No. 126 of 1929) from a decree of the High Court (May 25, 1928) reversing a decree of the Subordinate Judge of Meerut (May 21, 1925).

The appellant instituted a suit against the respondent, a minor represented by his natural mother, contending that an adoption of the respondent by the appellant was invalid, and that it should be declared that a deed of adoption of her, dated August 8, 1918, was void and that the respondent was not the adopted son of her husband.

The facts appear from the judgment of the Judicial Committee.

The trial Judge held that the adoption was invalid as the defendant was within the class of persons who by the terms of the authority were not to be adopted; he further held that the plaintiff was not estopped from questioning the validity of the adoption.

On appeal to the High Court (SEN and NIAMAT-ULLAH, JJ.) the decision was reversed upon both points. The appeal is reported at I. L. R., 50 All., 885.

1932. December, 16. Sir *Leslie Scott*, *K. C.*, and *J. Nissim*, for the appellant.

Subba Row, for the respondent.

Reference was made to Bhattacharyya's Hindu Law, pp. 112—116; Mayne's Hindu Law, para. 701; *Sher Bahadur* v. *Ganga Bakhsh Singh* (1).

1933. January, 12. The judgment of their Lordships was delivered by Lord THANKERTON :—

The appellant is a widow of Ram Saran Das, a Hindu, who died in December, 1896, without issue, but leaving two widows, namely, (1) the appellant, Musammat Kalawati, and (2) Musammat Basanti, and his mother, Musammat Bhawan Kunwar. He left considerable property, movable and immovable, and shortly before his death he had executed a will on the 6th of December, 1896, under which he made the appellant the absolute

(1) (1913) I.L.R., 36 All., 101(122); L.R. 41 I.A., 1(21).

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owner of his property and gave her full powers of disposal and alienation in any way she liked. He also fixed certain allowances for Musammat Basanti and Musammat Bhawan Kunwar and made provision for a residence for them. As regards adoption, he made the following provision, viz. :—

"I authorise Musammat Kalawati to adopt when she wishes, after my death, anybody whom she likes. After making an adoption, Musammat Kalawati or the (adopted) son shall have no power to make a transfer of my property till the life-time of Musammat Kalawati. Musammat Kalawati shall act as guardian of the adopted son so long as he does not come of age, and, during his minority, she shall have power to carry on the management of the property. After the attainment of majority by the adopted son, he and Musammat Kalawati will have power to carry on the management and to enjoy the income of the property, either jointly or in equal shares."

On the 10th of December, 1896, the testator amended his will by the addition of the following provision :—

"Further it is stipulated that if Musammat Kalawati should like to adopt a son, she shall not adopt any son of the relations of her family or of that of Musammat Basanti or Bhawan Kunwar. If my brother, Jiwan, should give his son into adoption she should adopt him, otherwise she should adopt some other boy, and she shall not have a power to make a gift. In case of necessity Musammat Kalawati shall have power to sell or mortgage a portion of the property."

The testator's brother having declined to give his son in adoption, the appellant, on the 8th of August, 1918, adopted the minor respondent according to the usual forms as a son to herself and her deceased husband, and on the same date she executed a deed of adoption in his favour, which purported to proceed in accordance with the provisions of the will. The factum of adoption is not disputed. The minor respondent is a son of Musammat Chandrawati, a daughter of the appellant's brother, Brij Ballabh Saran.

On the 28th of May, 1924, the appellant instituted the present suit against the respondent, asking for a declaration "that the deed of adoption, dated the 8th of August,

1918, executed by the plaintiff in favour of the defendant is null and void as against the plaintiff according to law, and that the defendant is not the adopted son of the plaintiff or her husband; nor can he acquire any right under the document aforesaid, in respect of the property left by Lala Ram Saran Das, deceased."

Of the various grounds on which the appellant maintained the invalidity of the adoption, the only one to be now considered rests upon the prohibition contained in the addition to the will against adoption of "any son of the relations of her family or of that of Musammat Basanti or Bhawan Kunwar," within which the appellant contends that the respondent is included. The respondent, in addition to traversing this contention, maintained that the claim for cancellation of the deed of adoption was time-barred and that the whole claim was barred by estoppel.

The Subordinate Judge, by decree dated the 21st of May, 1925, decided in favour of the appellant and ordered and decreed "that it is declared that Dharam Prakash, the defendant, is not the adopted son of the plaintiff and that his adoption was invalid." By an obvious error the words "or of her husband" are omitted after "plaintiff". The learned Judge held that the respondent was within the prohibited class and rejected the pleas of limitation and estoppel. On appeal this judgment was reversed by the High Court of Judicature at Allahabad and the suit was dismissed by decree dated the 25th of May, 1928. The learned Judges agreed with the Subordinate Judge as to the plea of limitation, but they held, on construction of the prohibition, that the respondent was not affected by it; they also held that the appellant's claim was barred by estoppel. The appellant now appeals from that judgment.

The only question for their Lordships' decision is as to the proper construction of the clause of prohibition, as the respondent conceded that he was unable to support the judgment appealed against on the ground of estoppel.

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This ground was opened upon by the appellant's counsel, and their Lordships are of opinion that the respondent's counsel rightly conceded that there was not evidence to show that any representation of fact had been made by the appellant, as was found by the High Court.

The question for decision turns on the sense in which the testator used the words "relations of her family", which is the translation given of "*khandani rishtadaran*". There can be no doubt that the substantive "*rishtadaran*" will include relations by blood or marriage, but in what sense did the testator use the adjective "*khandani*" (of the family)?

The learned Judges of the High Court have held that, in the case of a Hindu, his "*khandan*" consists of his lineal ascendants and descendants and his collaterals in the male line, and that sisters and daughters after marriage are transplanted from the family and acquire the lineage or *gotra* of their husbands. They point out that the respondent's mother, on her marriage, ceased to belong to her father's family or *khandan*, and that the respondent is therefore not a "*khandani rishtadar*" of the appellant and they hold that the testator must have used these words in the above sense. But, in the opinion of their Lordships, this construction defeats itself, for the three ladies named—on that view—had all changed their family, on marriage, to the family of the testator and his father, and the effect of the learned Judges' construction of the clause would be to prohibit the adoption of agnates of his own family. Common sense is against any such intention on the part of the testator, and any such intention is inconsistent with his express direction to give a preference, in adoption, to his own brother's son. It is clear, in their Lordships' opinion, that the testator was using the word "*khandan*", which is a word in general use, in a general sense as applying to blood relations of the ladies named, and that, accordingly, the respondent falls within the prohibited class and his adoption was invalid.

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Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court, dated the 25th of May, 1928, should be set aside, that the decree of the Subordinate Judge, dated the 21st of May, 1925, should be varied by inserting the words "or of her husband" after the words "adopted son of the plaintiff" and should otherwise be affirmed, and that the appellant should have the costs of this appeal and her costs in the High Court.

Solicitors for appellant: *Douglas Grant* and *Dold*.

Solicitor for respondent: *R. S. Nehra*.

SAHU HAR PRASAD AND OTHERS (DEFENDANTS) *v.* FAZAL AHMAD (PLAINTIFF) AND OTHERS

*J. C.** 1933 *January*, 13

[On appeal from the High Court at Allahabad]

Muhammadan law—Wakf—Construction of wakfnama—Whether interest in property dedicated—Intention—Transfer of Property Act (IV of 1882), section 8.

On August 29, 1912, a Sunni Muhammadan, who died a few days later, executed a deed by which he purported to sell two villages to his mother for Rs.2 lakhs; the deed stated that she had paid Rs.10,000 and that she was to apply the balance of the price to charitable purposes. By a wakfnama, executed by the vendee on June 23, 1913, she stated the terms of the sale and declared that she therefore made a wakf of the villages, subject to a charge in her favour for Rs.25,000, being the Rs.10,000 paid and Rs.15,000 already spent, and she appointed as mutwallis herself and, after her death, the respondents. A decree made in 1917 declared that the sale was invalid, and that the villages were divisible among the heirs of the vendor, his mother being entitled to a one-third share. She sold that share to the appellants. After her death one of the mutwallis claimed that the one-third share was wakf property and the sale invalid.

Held, that the claim failed because looking at the transaction as a whole the intention of the wakif was to dedicate

**Present*: Lord THANKERTON, Lord WRIGHT, Sir GEORGE LOWNDES, and Sir DINSHAH MULLA.