APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Shadi Lal and Mr. Justice Bevan-Petman.

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July 10.

KALU RAM AND MURLI DHAR (DEFENDANTS)—*Appellants,*

versus

PIARI LAL (PLAINTIFF)—*Respondent.*

Civil Appeal No. 2412 of 1915.

Declaratory suit in respect of property partly in possession of the Court and partly of tenants—Custom—adoption—Mahesris *of Delhi—power of widow to adopt without husband's authority or collaterals' consent—Hindu Law.*

One *Musst.* D., the widow of J. K., a *Mahesri* of Delhi adopted her minor brother M. D. After her death the present plaintiff-respondent, a cousin of J. K., brought the present suit for a declaration against the minor and his father that he is the owner of a certain house and for an injunction. It appeared that 3 rooms in the house were in the possession of the Court and the remaining portions were occupied by tenants who had not attorned to either party.

Held, that under the circumstances the suit for a declaration without consequential relief was maintainable.

Chinnammal *v.* Varadarajulu (1) and *Musst.* Lachhmi Bai *v. Musstt.* Mondi Bai (2), referred to.

Held also, that in the matter of adoption *Mahesris* follow custom and not strict *Mitakshara* Law and that defendants-appellants on whom the *onus* rested had proved that among them a widow can adopt to her deceased husband in cases, as in the present one, where her husband had separate property and was not a member of a joint family and that neither the authority of her husband nor the consent of collaterals was necessary to validate the adoption.

Mathura Das Karnani *v.* Sri Kissen Karnani (3), referred to.

Case No. 1524 of 1913 (unpublished), distinguished.

First appeal from the decree of C. L. Dundas, Esquire, District Judge, Delhi, dated the 2nd August 1915, decreeing the claim.

(1) (1891) I. L. R. 15 Mad. 307. (2) 100 P. R. 1913.
(3) (1917) 44 Indian Cases 5.

MOTI SAGAR, for appellants.

TEK CHAND and MEHR CHAND, *Mahajan*, for Respondent.

The judgment of the Court was delivered by—

BEVAN-PETMAN, J.—One Jugal Kishore, a Mahesri residing at Delhi, died childless leaving a widow, *Mussammat* Dakho, who, during her life-time, adopted her minor brother Murli Dhar. After the death of *Mussammat* Dakho, Piari Lal, plaintiff-respondent, a cousin of Jugal Kishore, instituted a suit in the Court of the District Judge at Delhi against Kalu Ram, the father of *Mussammat* Dakho and Murli Dhar, minor, under the guardianship of Kalu Ram, defendants-appellants, praying for a declaration that he was the owner of a certain house and its contents and for an injunction restraining the defendants from interfering with the said property. The suit was opposed on behalf of Murli Dhar who claimed to be the adopted son of Jugal Kishore, having been adopted to him by his widow *Mussammat* Dakho.

The following two issues, amongst others not material, were framed :—

(1) Is the plaintiff not entitled to bring a suit for a declaration as regards the house and property therein ?

(4) Has *Mussammat* Dakho made a valid adoption of Murli Dhar to her husband ?

With regard to the first issue, the contention of the defendants was, that the plaintiff not being in possession, a suit for a mere declaration without consequential relief would not lie. The locks of the Court of the District Judge were on three of the rooms whilst others were occupied by tenants and, therefore, on the authorities of *Chinnammal* v. *Varadarajulu* (1) and *Lachhmi Bai* v. *Hondi Bai* (2) the Lower Court held that the declaratory suit was maintainable. On the fourth issue the Lower Court, whilst holding that the factum of adoption has been proved, found that the defendants had failed to prove that Murli Dhar had been validly adopted and, therefore, granted a decree as

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prayed for except with regard to jewellery. The defendants appeal to this Court.

For the appellants it is again contended that under the circumstances of the case a declaratory suit is not maintainable. Lengthy arguments on both sides on this point have been addressed to us and for the plaintiff-respondent it is prayed that if we are of opinion that the appellants' contention is correct, he should be allowed to amend the plaint so as to include a prayer for possession on payment of the proper Court fee. We do not propose to discuss the large number of judicial decisions which have been cited before us. In the Lower Court it was admitted on behalf of the defendants as follows:—"Three rooms inside the house are in the possession of the Court, that is, the Court's lock is on them." It may be that originally the locks were placed on the premises to safeguard the contents and to enable lists to be prepared, but the locks continued to remain on the three rooms and it must be held that the Court was in possession of those rooms. The parties were not. The remaining portions were occupied by tenants who had apparently not attorned to either party. In their application of the 7th August 1914 the defendants admitted that they were no longer in possession of the premises under locks and asked for possession. There is no evidence that the tenants have attorned to the defendants and in this respect the case can be distinguished from some of the rulings cited and relied upon. Under the particular circumstances of this case we agree with the Lower Court and hold that the suit as instituted is maintainable.

The main contention in this case relates to the validity of the adoption. The Lower Court has held that the defendants have failed to prove that the adoption was authorised by Jugal Kishore prior to his death and with this finding we entirely agree. The parties are Mahesris by caste. The home or place of origin of Mahesris is in the Bikaneer State. Both parties were agreed in the Lower Court that, in the matter of adoption, Mahesris do not follow the strict Mitakshara Law. They were both agreed that the previous authority of her deceased husband is not legally necessary to enable a widow to make a valid adoption. But whilst the de-

fendants contended that Mahesri widows have an unrestricted power to adopt to their deceased husbands, the plaintiff contended that such an adoption could be made validly only with the consent of the deceased husband's collaterals. In this Court an attempt was made on behalf of the plaintiff-respondent to take up the position that even the consent of the collaterals was not sufficient, but this attempt is futile in the face of the plaintiff's own evidence. In the present case the consent of the plaintiff was not obtained and the matter for decision is narrowed down to the question whether, or not, amongst Mahesris, the consent of the husband's collaterals is necessary to a valid adoption by the widow.

We agree that the burden of proof is on the defendants-appellants, but that burden is not so heavy as it would have been, had the plaintiff been relying on the strict Hindu Law and the defendants been left to establish a custom contrary to that law. Here, the evidence of both parties is that Mahesris, with regard to adoption, are governed by custom and not the law, but they differ as to what that custom is In this respect the present case is very different from cases in which it is sought to establish a custom contrary to the ordinary personal law of the parties.

In discharging this burden of proof the defendants are greatly handicapped by the fact that they are called upon to prove two negatives, (*a*) no authority to adopt from the deceased husband and (*b*) no consent of the collaterals. It is admitted by the parties that if the deceased husband gave authority to adopt, no question of the necessity of the consent of the collaterals would arise. That is to say, the question of custom arises only in cases where the husband did not give authority. Consequently, in all instances of adoption by widows, tendered as evidence to prove the custom relied on by the defendants, they have to prove that neither the authority nor the consent was given. It is most difficult to do so The only persons who could prove both these facts satisfactorily are the adopting widows. Other persons could state only that so far as they knew, the husband gave no authority, or did not do so in their presence. Again,

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the implied consent of the collaterals from the fact of their presence at the adoption is consistent with the position taken up by either party. If, as a matter of fact, the widow has an unrestricted right, recognised by the collaterals, there is nothing surprising in their being present at the adoption, and this fact does not necessarily prove that their consent was necessary to the validity of the adoption.

The defendants have given 16 instances of adoption by widows on which they rely. It is not necessary for us to discuss the details of each. Of the se we in timated at the time that two were of no use to the defendants. The objections of the plaintiff-respondent to these instances have been summarised as follows :—

One was admittedly made with the authority of the husband.

In 2, no collaterals were alive.

In another there is no proof that collaterals were alive.

In 2, there was no property.

One is consistent with the consent of collateral s who were childless and were present at the adoption.

In another the collaterals consented.

In the two remaining instances the witnesses did not have sufficient information to be able to state whether or not authority or consent had been given.

Apparently, the contention that in two instances there was no property is not correct. There was no immoveable property.

The witnesses of the defendants have also been attacked as partizans, but it is not shown that the instances they quote did not occur, and, in one instance, the witness speaks to his own adoption and some others are obviously within the knowledge of the witnesses.

The defendants also rely on the evidence of a number of witnesses, two of whom gave evidence in a case of 1888, one of these latter being a *chaudhri* of Mahesris, to the effect that, amongst Mahesris, widows

had an unrestricted power of adoption and could adopt in spite of there being no authority, or consent. The defendants, on closing their oral evidence, desired to have a commission issued for the examination of certain Maheśris of position with regard to the alleged custom. In view of the fact that a commission had still to issue on behalf of the plaintiff, that the case had not long been pending, and of the importance of the case, the request might well have been granted.

In giving the lists of witnesses of either side who depose to custom apart from instances, the Lower Court has omitted the two witnesses of 1888 and has come to the conclusion that the weight of evidence appeared to favour the plaintiff. But it is to be noted that the majority of the defendants' witnesses are from Delhi whilst those of the plaintiff, with the exception of three, are from various other places. Of the three Delhi witnesses two are relations of the plaintiff. Had the District Judge's attention been called to *Mathra Das Karnani* v. *Śri Kissen Karnani* (1) it is possible he might have taken a different view of the value to be placed on the evidence and, though the remark of the Lower Court as to the partizan character of some of the defendants' witnesses is true, the Court has described Lala Mina Mal of Delhi, defendants' witness, as a well known and highly respectable member of the Maheśri community. This witness fully supports the defendants' case and gives the largest number of instances of adoption. He is also Vice-President of the *Maheśri Mahasabha* of Aligarh and produced a copy of the resolutions arrived at by that body at Mathra the preceding year, one of which is as follows :—

"*Hamare yahan riwaj hai ke chahe mard khare god le ya Mussammat istri god khare lewe wo manzur hai nikal nahin sakta.*"

The Lower Court was of opinion that this assertion ignores the controversial point whether the consent of collaterals is necessary to validate an adoption by a widow and it leaves the matter there. This, however, is not our opinion. The assertion of the right of the

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widow is made without qualification and means that she has an unrestricted right. We place considerable value on this resolution as a statement of the right to adopt amongst Maheśris by, apparently, a representative body of that community possibly because the matter wanted clearing up. The resolution is in accord with decisions to which we will presently refer.

The plaintiff's witnesses also gave instances of adoption in which it is alleged that consent of collaterals was given. There is no evidence of the nature or formality of the consent. The deed of adoption and *Mussammat* Dakho's will have also been referred to, on behalf of the plaintiff, and an inference is sought to be drawn from a false recital in the deed that the consent of the collaterals had been obtained, that it was known such consent was necessary and that no will was necessary if the adoption was valid. We do not, however, attach any importance to these documents in the face of weightier considerations.

In *Mathra Das Karnani* v. *Srikissen Karnani* (1) the Calcutta High Court held that, amongst Maheśris, the widow had an unrestricted right to adopt to her deceased husband in cases, as in the present one, where her husband had separate property and was not a member of a joint family and that neither the authority of the husband nor the consent of the collaterals was necessary to validate the adoption. In this same judgment reference is made to a judgment of the Chief Court of the Bikaneer State to the same effect. We regret that we have not a copy of the latter judgment. It is obvious that a judgment of the Highest Court in Bikaneer State, the home of the Maheśris, is of the greatest value. The custom itself is not of an extraordinary nature and is followed in Western India as part of the personal law applicable to Hindus, whilst here in the Punjab it has been judicially held that Jains and Kashmiri Pandits follow the same custom. It is by no means a great innovation as the Lower Court appeared to think.

The defendants have been able to produce a considerable number of instances of adoption by widows

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considering the small number of the community in Delhi and, although some of the instances are not strong, it is worthy of comment that the plaintiff has not been able to produce a single instance in which an adoption by a widow has been attacked.

In *Gopi Kishen* v. *Gopi Kishen and others*, case No. 1524 of 1912, decided by the Chief Court of the Punjab, the plea of custom had not been taken, or put in issue.

We are of opinion that the defendants-appellants have discharged the burden placed on them of proving that, amongst Maheśris, a widow has the power to adopt to her deceased husband without his authority, or the consent of his collaterals. No objection was taken in the present case to the power of a widow to adopt her own brother to her husband and it is, therefore, not necessary for us to go into this point. For the above reasons we accept the appeal and dismiss the suit. In view of the novelty of the point of custom on which there was no precedent of this Court, we direct the parties to bear their own costs in both the Courts.

Appeal accepted.