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April 30

APPELLATE CIVIL.

Before Mr. Justice Broadway.

MOMAN (DEFENDANT)—*Appellant*,

versus

MUSSAMMAT DHANNI (PLAINTIFF) and UDA (DEFENDANT) } *Respondents.*

Civil Appeal No. 130 of 1919.

Custom—adoption—of a stranger—Jats of Tahsil *Fatehabad, District Hissar—onus* probandi*—estoppel—where adoption was the result of a compromise to which the challenger's grandfather was a party.*

Held, that the *onus* of proving that the adoption of a stranger (*viz.*, the illegitimate child of the widow of a brother) is valid by custom among Jats of Bangroon, *Tahsil* Fatehabad, District Hissar, rests on the adopted child and that this *onus* had not been discharged in the present case.

Rattigan's Digest of Customary Law, page 54 and paragraph 37 (*b*), referred to.

Malagir v. *Jagir* (1), distinguished.

Held, however, that as the defendant who challenged the adoption was the grandson of a party to the compromise under which the adoption was made and under which he received a material benefit and who was present and consenting when the ceremonies were performed, the defendant was estopped from disputing the adoption and was bound by his grandfather's action.

Labhu v. *Mussammat Nihali* (2), *Devi Dial* v. *Utam Devi* (3), *Habib Khan* v. *Muhammad* (4), *Bhagat Ram* v. *Gokal Chand* (5), and *Chuhar* v. *Mussammat Jas Kaur* (6), referred to.

Second appeal from the decree of Rai Sahib Lala *Sri Ram, Poplai, District Judge, Hissar, dated the 12th August 1918.*

NANAK CHAND, *Pandit*, for Appellant,

JAGAN NATH, for Respondents.

(1) 93 P. R. 1893.
(2) 7 P. R. 1905.
(3) 37 P. R. 1907.
(4) 68 P. R. 1912.
(5) 150 P. R. 1908
(6) 60 P. R. 1917.

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The judgment of the learned Judge was as follows :—

BROADWAY, J.—The facts of the case giving rise to this appeal are briefly as follows :—Ram Rikh, Uda and Toda were three brothers. Ram Rikh died leaving two widows, *Mussammat* Surjan and *Mussammat* Singari, but no issue. In 1909 Uda and Toda instituted a suit against *Mussammat* Surjan and *Mussammat* Singari, claiming possession of Ram Rikh's property on the ground that the two widows had become unchaste. *Mussammat* Surjan had given birth to a posthumous child named Bega alleged to have been born some 21 months after the death of Ram Rikh. This suit was compromised in 1909, and according to this compromise it was agreed that *Mussammat* Singari was to retain possession of one-fourth of Ram Rikh's property, the boy Bega was to take another one-fourth and the two plaintiffs Toda and Uda were to receive the remaining one-half. Further, Uda who had no issue was to adopt Bega as his son, and in accordance with this compromise the property was divided and Bega was adopted with all necessary ceremonies in the presence and with the consent of the brotherhood. In 1913 Uda executed a deed of adoption adopting Kusla, son of Toda, whereupon Bega instituted this suit asking for a declaration that the adoption of Kusla by Uda was invalid and would not affect his rights in his adoptive father's property. The litigation has been a protracted one, with the result that at this date the parties before me are *Mussammat* Dhanni, a minor girl widow of Bega, as representing Bega, and Moman son of Kusla, Uda, Kusla and Bega all having died. It is obvious that, assuming that Bega was validly adopted by Uda, Moman, the present appellant, is bound ultimately to succeed to the property as a reversioner when *Mussammat* Dhanni's estate comes to an end either by her death or re-marriage. It should be stated here that Bega was married to *Mussammat* Dhanni by Uda and, as stated by Harsukh, *Mussammat* Dhanni's father, he gave his daughter in marriage to Bega, having been distinctly given to understand that Bega was the adopted son of Uda.

The Courts below have found (1) that Bega was the

illegitimate son of *Mussammat* Surjan ; (2) that Bega was adopted by Uda in accordance with the compromise ; and (3) that this adoption took place with all necessary ceremonies and in the presence and with the consent of the entire brotherhood. These are questions of fact which cannot be re-opened in second appeal. The Courts below have also held that by custom Bega, treated as a stranger, was validly adopted by Uda. The successor of the learned District Judge, who decided the appeal below, granted the appellant a certificate under section 41 (3) of Act III of 1914, certifying that there was sufficient ground for an inquiry regarding the existence of a custom, *viz.* whether an illegitimate nephew could be adopted by his uncle. No authority has been cited before me by Mr. Nanak Chand *Pandit* for the appellant relating to any custom precluding the adoption of an illegitimate child, and *Malagir* v. *Jagir*(1), is an authority for holding that a foundling may be adopted with the consent of the brotherhood.

The question still remains, however, whether a custom has been established by which Jats of Bangraon, *Tahsil* Fatehabad in the District of Hissar, may adopt strangers. As pointed out at page 54 of Rattigan's Digest of Customary Law, the appointment of a person of a different *gôt* is generally opposed to custom and in paragraph 37 (*b*) the same learned author points out that amongst agriculturists, especially in the eastern districts of the Punjab, such appointments are not now favoured and are to be presumed to be invalid. There seems, therefore, no doubt at all that the general custom is against the validity of the adoption of Bega by Uda and that therefore the onus rests on him to prove that there is a custom existing amongst Jats in his village validating his adoption. The evidence on the record through which Mr. Nanak Chand took me is not very convincing. Three instances alone have been referred to, and the evidence regarding these is by no means clear and it is impossible for me to say that in these three instances the person adopted was as a matter of fact of another *gôt* to the adoptive father. Mr. Jagan Nath however contended that the defendant in this case was estopped from attacking the validity of his adoption, inasmuch as Toda was a party to the compromise

(1) 98 P.R.

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under which the adoption was made and was also present and consenting when the ceremonies were performed. He pointed out that by that compromise the attack against the chastity of *Mussammat* Surjan came to an end and that Toda obtained a material benefit, inasmuch as he and Uda were, under the terms of the agreement arrived at, given possession of one-half of Ram Rikh's property. My attention was drawn to *Bhagat Ram* v. *Gokal Chand*, 150 P. R. 1908, at page 692 (1) where it was pointed out that when a person had himself acquiesced in an adoption, he was estopped from disputing it at a subsequent stage. Similarly in *Chuhar* v. *Mussammat Jas Kaur* (2), a similar decision was arrived at and it was held that where an adopted son had been brought up as a member of the village community to which his adoptive father belonged and had been regarded as an adopted son in consequence of the attitude taken up by the collateral heirs of the adoptive father it would be grossly inequitable to allow the validity of the adoption to be challenged as being opposed to custom. It seems to me that this case is very similar to the rulings cited. There can be no doubt that the adoption of Bega was brought about owing to this compromise—a compromise which gave Toda a substantial benefit—a benefit which Kusla undoubtedly in his turn enjoyed and which Moman is now enjoying. I have no doubt whatever that the adoption in question was made with the active assistance of Toda and that the present appellant is bound by his grandfather's action (see *Lobhu* v. *Mussammat Nihali* (3), *Devi Dial* v. *Utam Devi* (4), and *Habib Khan* v. *Muhammad* (5)) Mr. Nanak Chand contended that the question of estoppel was never directly put in issue. That is no doubt correct to some extent. The issue, however, was whether Bega could be validly adopted by Uda and the question of Toda's consent to the adoption has been considered by the Courts below and a finding arrived at thereon. It seems to me therefore that the appellant had sufficient notice of this question of estoppel and that a further remand on this point is not necessary. I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) 150 P. R. 1908 page 692.
(2) 69 P. R. 1917.
(3) 7 P. R. 1905.
(4) 87 P. R. 1907.
(5) 68 P. R. 1912.