

APPELLATE CIVIL.

Before Mr. Justice Leslie-Jones and Mr. Justice Broadway.

Mussammat RAM RAKHI AND OTHERS
(PLAINTIFFS)—*Appellants,*

1921

April 1.

versus

MELA RAM, JUDGMENT-DEBTOR,
Mst. MALAN, DECREE-HOLDER and
DHANNA MAL, AUCTION-PURCHASER
(DEFENDANTS)—*Respondents.*

Civil Appeal No. 383 of 1917.

Punjab Courts Act, VI of 1918, section 41 (3)—Second appeal on question of onus probandi in custom cases—necessity for certificate—adoption of daughter's son among Brahmins of Amritsar.

Held, following *Mussammat Bhari v. Khanna* (1), that the question of *onus probandi* in a custom case is not a pure question of law, unconnected with custom, and that, on the other hand, it is not under all circumstances a question relating to the validity or the existence of a custom (except in so far as in proving or disproving the validity or existence of a custom, a party to a suit may be held to be entitled to an initial presumption in his favour on the strength of a generally accepted rule of custom.

Held also, that in the present case having regard to the decision in *Lachni Dhar v. Thokur Das* (2), the *onus probandi* must be regarded as one relating to the existence of a custom governing the question of adoption and therefore a certificate under section 41 (3) of the Punjab Courts Act was necessary.

Allah Din v. Salam Din (3), referred to.

Second Appeal from the decree of C. A. Barron, Esquire, Additional District Judge, Amritsar, at Lahore, dated the 4th December 1916, reversing that of Lala Maya Ram, Subordinate Judge, 1st Class, Amritsar, dated the 29th March 1915, and dismissing the claim.

BALWANT RAI, for Appellant.

T&K CHAND, for Respondents.

(1) 7 P. R. 1918.

(2) 149 P. R. 1288.

(3) 96 P. R. 1915.

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The judgment of the Court was delivered by—

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BROADWAY, J.—The facts of the suit giving rise to this second appeal are detailed in the judgments of the Courts below. Briefly stated they are these :—

On the 23rd April 1913 one *Mussammât Malan* obtained a decree for money against *Mela Ram* and in the execution of her decree a house was attached and brought to sale. It was purchased by *Dhanna Mal* on the 24th March 1914, the sale being confirmed on the 1st of May 1914. The house had originally belonged to one *Harbhagwan* and on the 1st April 1914 *Mussammât Ram Rakhi* and *Rukmani*, two of *Harbhagwan's* daughters, filed objections to the attachment of the said house. These objections were not proceeded with being dismissed in default on the 2nd April 1914.

On the 18th April 1914 the same two ladies in conjunction with *Mussammât Bishan Devi*, widow of *Harbhagwan*, instituted a suit asking for a declaration that the house in question was not liable to attachment and sale in execution of the decree against *Mela Ram* who, it was said, was the daughter's son of the original owner, *Harbhagwan*, and, therefore, not entitled to it. The suit was contested by *Mussammât Malan* and *Dhanna Mal*, the auction purchaser, on the ground that the house belonged to *Mela Ram*, he being the adopted son of *Harbhagwan*. The trial Court decreed the claim in favour of *Mussammât Bishan Devi*, holding that the adoption was not proved and that under Hindu Law *Harbhagwan* could not adopt his daughter's son.

On appeal the learned District Judge reversed the findings of the trial Court and held that the adoption had taken place. He also held that the rule in the Punjab amongst Hindu non-agriculturists was that a daughter's or sister's son could be adopted, and that the parties in this case being Brahmins of the Amritsar District were governed by this general rule and the adoption in the present case was, therefore, valid by custom. The *onus* of proving that a custom existed at Amritsar by which the adoption of a daughter's son was invalid lay on the plaintiffs which they did not discharge. He accordingly dismissed the plaintiffs' suit.

Against this order of dismissal the plaintiffs have come up to this Court in second appeal and on their behalf we have heard *Lala Balwant Rai*.

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On behalf of the respondents Mr. Tek Chand raised an objection to the effect that the question involved being one of custom a certificate under section 41 (3) of the Punjab Courts Act was necessary and as none had been obtained the appeal could not proceed. After hearing *Lala Balwant Rai* we are of opinion that the objection must prevail. In *Lachmi Dhar v. Thakur Das* (1) it was found that an adoption of a sister's son by Brahmins of Amritsar was not invalid. Mr. Balwant Rai contended that as under Hindu Law the adoption pleaded in this case was invalid the *onus* lay on the appellants to prove a custom validating the adoption of a daughter's son, and he further contended that the question of *onus probandi* was one which could be raised in second appeal without a certificate under section 41 (3) of the Punjab Courts Act. *Allah Din v. Salam Din* (2), is however, an authority against this contention. In *Mussammatt Bhari v. Khannu* (3) it was held by a Division Bench of the Chief Court that—

“ the question of *onus probandi* in a custom case is not a pure question of law, unconnected with custom, and that on the other hand, it is not under all circumstances, a question relating to the validity or the existence of a custom, except in so far as, in proving or disproving the validity or existence of a custom, a party to a suit may be held to be entitled to an initial presumption in his favour on the strength of a generally accepted rule of custom.”

In the present case there seems to be no doubt that having regard to the decision in *Lachmi Dhar v. Thakur Das* (1) the *onus probandi* must be regarded as one relating to the existence of a custom governing the question of adoption and therefore in our opinion a certificate under section 41 (3) of the Punjab Courts Act was necessary. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 149 P. R. 1933.

(2) 93 P. R. 1915.

(3) 7 P. R. 1918.