FULL BENCH.

Before Sir Shadi Lal, Chief Justice, Mr. Justice Scott-Smith, and Mr. Justice Harrison.

1922

June 1.

MELA SINGH AND OTHERS—(DEFENDANTS) *Appellants,*

versus

GURDAS—(PLAINTIFF)—*Respondent.*

Civil Appeal No. 582 of 1917.

Custom—Succession—whether son of an appointed heir, who pre-deceased the appointer, succeeds to latter's property—Customary adoption discussed.

Held, that the relationship established between the appointed heir and the appointer is purely a personal one and resembles the *Kritrima* form of adoption under Hindu Law.

Rattigan's Customary Law, article 49, *Tulsi* v. *Ram Rakha* (1), *Mehra* v. *Mangal Singh* (2), Trevelyan's Hindu Family page 205, *Collector of Tirhoot* v. *Huropershad Mohunt* (3), *Boolee Singh* v. *Mst. Busunt Koeree* (4), Mayne's Hindu Law, VIII Edition, page 268, and Mulla's Principles of Hindu Law, III Edition, page 415, referred to.

Waryaman v. *Kanshi Ram* (5), distinguished.

Held further, that (*a*) such an appointment only affects the parties thereto; (*b*) the appointed heir does not become the grandson of the appointer's father, and (*c*) his son does not become the grandson of the appointer.

Held consequently, that the son of an appointed heir, in the absence of proof of a special custom to the contrary, has no right of succession to the appointer.

Chhajju v. *Dalipa* (6), overruled.

Pala Singh v. Mst. *Lachhmi* (7), *Amin Chand* v. *Bujha* (8), and *Gulab Khan* v. Mst. *Chiragh Bibi* (9), referred to.

Second appeal from the decree of W. deM. Malan, Esquire, Additional District Judge, Hoshiarpur at Jullundur, dated the 26th January 1917, affirming that of

(1) 66 P. R. 1908.
(2) 99 P. R. 1914, p. 371.
(3) (1867) 7 W. R. 500.
(4) (1867) 8 W. R. 155.
(5) (1921) I. L. R. 3 Lah. 17.
(6) 51 P. R. 1906.
(7) 105 P. R. 1915.
(8) 107 P. R. 1915.
(9) 43 P. R. 1916.

Sheikh *Nasir-ud-din, Senior Subordinate Judge, Hoshiarpur, dated the* 22*nd August* 1916, *decreeing the plaintiff's claim.*

M. S. BHAGAT, for Appellants.

FAKIR CHAND and NANAK CHAND, for Respondent.

The order of Sir Shadi Lal, C. J. and Mr. Justice Harrison, referring the case to a Full Bench was as follows:—

The circumstances, which have led to the action out of which the present appeal arises, are briefly as follows :—One Jawahar, a *Jat* of the Hoshiarpur District, appointed his nephew, Basanta, his heir according to the custom prevailing in the tribe. Basanta died in 1911 in the life-time of the appointer, and the latter died in 1915. Basanta's son, Gurdas, now lays claim to the estate of Jawahar but his claim is resisted by Jawahar's collaterals.

The question for determination is whether the son of an appointed heir is entitled to succeed to the property of the appointer in the event of the appointed heir having pre-deceased the appointer. The judgment of a Division Bench of the Punjab Chief Court in *Chhajju* v. *Dalipa* (1) answers the question in the affirmative, but it appears that the learned judges decided the case in accordance with what they considered to be the general principles of customary law, and were influenced by the fact that "an element of absurdity is brought into the matter, if the ultimate effectiveness of the appointment is made to depend on the accident whether the appointer or appointed should die first."

Now it has been repeatedly pointed out that the customary appointment of an heir does not involve the transplanting of the heir from one family to another. The tie of kinship with the natural family is not dissolved, and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee is a purely personal one and does not extend beyond the contracting parties on either side. It is, therefore, doubtful whether the appointee's son is entitled to inherit the property of the appointer.

Further, we consider that Jawahar after the death of Basanta could appoint another heir if he desired to do so, and it seems to us that the second appointed heir would exclude the son of the first appointed heir from inheritance. We are not aware of any rule of law and none has been cited to us, which precludes a proprietor from making a second appointment in the event of the death of the first appointed heir.

As at present advised we doubt the correctness of the rule laid down in *Chhajju* v *Dalipa* (1) and we accordingly refer the question to a Full Bench for an authoritative decision.

(1) 51 P. R. 1906.

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The judgment of the Full Bench—

SCOTT-SMITH, J.—The question referred to the Full Bench is whether the rule laid down in *Chhajju* v. *Dalipa and others* (1) namely, that the son of an appointed heir, who pre-deceased the appointer, is entitled to succeed to the latter's property is correct. The judges, who decided that case, admitted that there was no authority on the point and decided it in accordance with what they considered to be the general principles of the customary law. In coming to their decision they were mainly influenced by two considerations: *firstly*, that an element of absurdity would be introduced into the matter if the ultimate effectiveness of the appointment were made to depend on the accident whether the appointer or the appointed should die first; *secondly*, that all through the discussions about adoption in the Punjab it appeared to be clearly recognised that there is no real distinction between adoption and gift. The Judges were of opinion that the intention of the alienor is the same in both and that it is more a matter of habit than anything else that he should proceed in one way rather than the other. They said that the gift, if valid, would benefit the donee's son whether the donee himself pre-deceased the donor or not.

As regards the first of these considerations, I do not, with all deference see much force in it, because there is no authority, that I know of, which prevents a person from appointing another heir if the one appointed by him dies. As regards the second consideration it appears to me that the appointment of an heir just as much resembles a bequest as a gift.

In the case of *Mehra* v. *Mangal Singh and others* (2) at page 371 of the report the following passage occurs:—

"It has been held in many cases that the appointment of an heir is tantamount to a gift which comes into operation on the death of the appointer and that the property received by the appointee should be regarded in the nature of a bequest."

(1) 51 P. R. 1906. (2) 99 P. R. 1914.

A passage from the judgment of Sir Meredyth Plowden at page 231 of *Ralla* v. *Budha* (1) is then quoted, and the Judges go on to say —

"The appointee is a legatee of the property and the son of a legatee has absolutely no right to control an alienation by the father of the property bequeathed to the latter."

Article 49 of Rattigan's Digest of Customary Law states that the relationship established between the appointed heir and the appointer is purely a personal one. There is ample authority for this in the rulings of the Chief Court and of the High Court. In *Tulsi and another* v. *Ram Rakha and others* (2) the Judges said:—

"It seems to us clear that in a case of customary appointment of an heir the appointment is personal to him and does not operate to make all his relatives, or even his existing sons, members of the agnatic family of the adopter."

In *Mehra* v. *Mangal Singh and others* (3) it was held that property which comes to the appointed heir as such is not ancestral *qua* the latter's son. The difference between a ceremonial adoption of the Hindu Law and the customary appointment of an heir was referred to (page 369, last paragraph of the report) and it was pointed out that it had been repeatedly held that such an appointment does not involve the transplanting of a person from one family to another. The tie of kinship with the natural family is not dissolved and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee was said to be a purely personal one and not to extend beyond the contracting parties on either side. The Judges went on to say that it followed that the appointer or his male lineal ascendant could not be called an ancestor of the appointee's son.

In the same case at page 372 of the report the following passages occur:—

"It is, however, significant that in the case of Kritrima adoption which, as has been pointed out in several judgments of this Court, resembles the customary appointment of an heir in the

(1) 50 P. R. 1893 (F. B.) (2) 66 P. R. 1908.
(3) 99 P. R. 1914.

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Punjab, the Calcutta High Court has held that the sons of a person adopted in the Kritrima form are not entitled to inherit the property of the adoptive father, (vide *inter alia, Baboo Juswant Singh* v. *Doolee Chand* (1)). At page 258 (2) of the report the learned Judges make the following observations :—

'Under the Hindu Law as laid down in Macnaghten, Volume I, page 76, and also in a decision of this Court in Volume VIII, the relation of Kritrima son extends to the contracting parties only, and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father.'

"These observations are, in our opinion equally applicable to the person appointed an heir under the Customary Law."

With regard to the position of a Kritrima son the following authorities may be referred to. In Hindu Family Law by Trevelyan, bottom of page 205, it is stated that —

"A Kritrima adoption does not transfer the subject of it from his natural family. It gives him, in addition to his rights in that family, rights of inheritance to the person (man or woman) actually adopting him, and to no one else. His sons acquire no rights of inheritance to his adoptive father."

In *The Collector of Tirhoot, on behalf of the Court of Wards* v. *Huropershad Mohunt* (2) it was held that a Kritrima son succeeds to the property of the person adopting him only. The same was held in *Boolee Singh and others* v. Mussammat *Busunt Koeree and others* (3). In Mayne's Hindu Law, 8th edition, page 268, paragraph 204, the following passage occurs :

"As regards succession, the Kritrima son loses no rights of inheritance in his natural family. He becomes the son of two fathers to this extent, that he takes the inheritance of his adoptive father, but not of that father's father or other collateral relations. . . . . Nor do his sons take any interest in the property of the adoptive father, the relationship between adopter and adoptee being limited to the contracting parties themselves and not extending further on either side."

In support of this the learned author quotes the case *Baboo Juswant Singh* v. *Doolee Chand* (1). Mulla in his Principles of Hindu Law, 3rd editions, at page 415, states the same rule as to the Kritrima son's rights of inheritance.

(1) (1876) 25 W. R. 255. (2) (1867) 7 W. R. 500.
(3) (1867) 8 W. R. 155.

For the respondent we were referred to a recent decision of a Division Bench of this Court in the case of *Waryaman and others* v. *Kanshi Ram and others* (1). That was a case of *Jats* of the Hoshiarpur District and it was held that the adoption of Kanshi Ram was intended to be a complete adoption with the effect of bringing about a complete change of family. It was held that he was a fully adopted son and could succeed collaterally. The Judges in that case laid down no general principle, but merely held on the facts of that particular case that the appointed heir could succeed collaterally. It does not appear to me to have any bearing upon the point referred to us.

Another argument urged was that if the son of an appointed heir is debarred from inheriting the property of his father's appointer, he may in certain instances be deprived of inheriting in either family. Suppose for instance that A appoints B to be his heir. B has a son C and has brothers D, E, etc., B.'s natural father dies first and his brothers exclude him from inheritance in his natural family in accordance with the rule enunciated in paragraph 48 of the Digest of Customary Law. B dies next and then A, his appointer. B has been excluded from inheriting in his natural family and if his son C be debarred from succeeding to A, he will succeed in neither family. The case supposed would certainly be a very hard one, but I do not see how we can let the possibility of such a case influence us in deciding the point referred Counsel for the appellant urges that though B would be excluded from inheriting in his natural family, it does not follow that his son C would be so excluded. The point is not before us at present and will be decided if and when it arises.

It was suggested to us that we should order a remand for enquiry into the custom. This, I think, would be a matter for the Division Bench to have considered and it does not appear that such a course was suggested to it. The Full Bench has only to consider whether the rule laid down in *Chhajju* v. *Dalipa and others* (2) is correct or not. In my opinion it follows

(1) (1921) I. L. R. 3 Lah. 17. (2) 51 P. R. 1906.

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from the authorities and considerations referred to above that:—

(1) The customary appointment of an heir in the Punjab is a purely personal relationship, resembling the Kritrima form of adoption of the Hindu Law;

(2) it affects the parties thereto only;

(3) the appointed heir does not become the grandson of the appointer's father;

(4) his son does not become the grandson of the appointer.

It, therefore, follows that the son of an appointed heir in the absence of proof of a special custom to the contrary has no right of succession to the appointer. I would accordingly answer the question referred to the Full Bench in the negative but would add that it is always open to a party to plead a special custom, which as laid down in *Pala Singh*, v. Mussammat *Lachmi* (1) and *Amin Chand* v. *Bujha* (2) and *Gulab Khan* v. Mussammat *Chiragh Bibi* (3), must be proved by instances and not deductively.

SIR SHADI LAL C. J.—I have read the judgment of Mr. Justice Scott-Smith and reached the conclusion that the son of an appointed heir, who predeceased the appointer, is not entitled to succeed to the latter's property as pointed out by me in *Mehra* v. *Mangal Singh and others* (4) the customary appointment of an heir does not involve the transplanting of the heir from one family to another. The tie of kinship with the natural family is not dissolved, and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee is a purely personal one and does not extend beyond the contracting parties on either side.

It follows, therefore, that the son of an appointed heir cannot be regarded as the grandson of the appointer; and there being no relationship between the two, neither of them can inherit the property of the other. If the appointed heir dies in the lifetime of the

(1) 105 P. R. 1915. (3) 48 P. R. 1916.
(2) 107 P. R. 1915 (4) 99 P. R. 1914.

appointer, the existence of the former's son would not debar the latter from appointing another heir, and it is clear that the second appointed heir would succeed to the estate of the appointer.

It is to be observed that the customary appointment of an heir resembles in many respects the Kritrima form of adoption of Hindu Law, and as regards the Kritrima son, it has been held that he does not succeed to the property of his adoptive father's father, nor do his sons take the inheritance of his adoptive father. I would therefore hold that, in the absence of a special custom to the contrary, the son of an appointed heir acquires no right of inheritance to the appointer.

HARRISON J.—I agree.

C. H. O. *Reference answered in the negative.*

LETTERS PATENT APPEAL

Before Sir Shadi Lal, Chief Justice and Mr. Justice Brasher

SHIV GIR (PLAINTIFF)—AND
BHAGWAN GIR (DEFENDANT)— } *Appellants*

versus

KHAZAN GIR AND OTHERS—DEFENDANTS—*Respondents.*

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Letters Patent Appeal No. 16 of 1922.

Provincial Small Cause Courts Act, IX of 1887, *Second Schedule, articles* 13 *and* 35 *(ii)—Jurisdiction—suit by manager of a temple for a share of the offerings and price of a mare presented to the temple—without any allegation of dishonesty.*

Held, that a suit by a person as manager of a temple for a share of the offerings and the produce of the temple land, and for the price of a mare presented to the temple, in the absence of any allegation in the plaint that the defendant acted dishonestly, is cognizable by a Court of Small Causes and does not fall under either article 13 or article 35 (*ii*) of the second schedule to the Provincial Small Cause Courts Act, 1887.

Held also, that article 13 of the Act only relates to claims made against the person who is primarily liable to pay the cesses or dues.