APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Moti Sagar.

1923

April 25.

BASHU RAM AND BALAK RAM (PLAINTIFFS) Appellants,

versus

PIARA CHAND (DEFENDANT) Respondent.

Civil Appeal No. 1292 of 1921.

Custom—Rai Brahmans *or* Bhats *of villages Mohra Bhattan and Mangot,* Tahsil *Rawalpindi*—Hindu Law—Onus probandi.

Held, that as the *Rai Brahmans* of villages Mohra Bhattan and Mangot formed a fairly compact village community and as their basic occupation was agriculture the *onus,* which originally rested on the plaintiffs, was shifted to the defendant to prove that they were governed by Hindu Law.

Held also, that the defendant had succeeded in discharging this *onus.*

Lachhman Das v. *Pahla Mal* (1), referred to.

Devi Ditta Singh v. *Dropti* (2), and *Daswandi* v. Mahant *Krishen Dev* (3), distinguished.

Second appeal from the decree of J. Addison, Esq., District Judge, Rawalpindi, dated the 1st April 1921, affirming that of Lala *Narinjan Das, Senior Subordinate Judge, Rawalpindi, dated the 30th July 1920, dismissing the plaintiffs' suit.*

M. S. BHAGAT, for Appellants.

TEK CHAND, for Respondent.

The judgment of the Court was delivered by—

MARTINEAU J.—The plaintiffs sue for a declaration that they are the owners of the lands and houses left by their brother Sant Ram, who died in 1917. The defendant, who is Sant Ram's uncle's daughter's son and also Sant Ram's wife's brother's son, claims title to the property on the ground that Sant Ram adopted him

(1) 59 P. R. 1908. (2) 56 P. R. 1909.
(3) 34 P. R. 1911.

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and made a will in his favour. The suit has been dismissed, the Courts below having concurred in finding that the parties are governed by Hindu Law and that the adoption and the will have been proved and are valid. The plaintiffs have preferred a second appeal, in which the main contention is that the parties are governed by custom.

A preliminary objection is taken on behalf of the respondent that there is no proper certificate from the District Judge as required by section 41 (3) of the Punjab Courts Act. It is true that there is no certificate apart from the order of the District Judge granting one, but the appellants have filed a copy of that order, which is in the following terms :—

"I have held that parties are bound by Hindu Law. Petitioner's contention is that they are bound by custom. The evidence is conflicting and difficult. The question affects a whole village and is thus important. I accordingly grant a certificate under section 41 of the Punjab Courts Act."

We think that this order itself amounts to a certificate, and as, when read with the application on which it was passed, it is found to contain all the particulars required by section 41 of the Act we hold that the requirements of the section have been satisfied and we overrule the objection.

The property in suit is situate in the villages of Mohra Bhattan and Mangot in the Rawalpindi *Tahsil* of the Rawalpindi District. Sant Ram was a *Rai Brahman* or *Bhat* of Mohra Bhattan, and the village was named after the *Bhats* who inhabited it. The material facts are given in the following passage from the judgment of the learned District Judge :—

"Both the villages in question, Mohra Bhattan and Mangot, are populated in the main by *Rai Brahmans*. There are about 140 houses in both the villages and there are less than six houses belonging to other persons. There are two *dhoks*, however, in the village *Dhok Sayadan* seems to contain two houses of *Sayads* and *Dhok* Hashu contains four houses of occupancy tenants. There *Sayads* are owners by purchase in the village. There are a few barbers, a *Jhiwar*, and a *Sunar*, whose presence there may only be temporary. Of both the villages the *lambardars* are *Brahmans*. There is also evidence to show that there are only 40-50 ploughs in those villages though the families

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number 140. In spite of this it would seem that numerous *Brahmans* do plough the land themselves, though there are some who use tenants. Further there are 88 people out of the villages, who are in service in the police, army, etc. Then there are others who are shop-keepers, *granthis*, tonga drivers, and pony hirers, etc. It is also in evidence that some of the poorer members still take *birt* and perform priestly functions, though this has become less common than formerly. Even plaintiffs' own witness (P. W. 5) further admits that some still wear the sacred thread."

It is, as the learned District Judge observes, difficult to say whether the principal means of livelihood of the *Rai Brahmans* is agriculture or service, since so many are in outside employ and engaged in other occupations. The proprietary body is also no longer homogeneous as persons of different tribes such as *Sayads*, *Ghokhars*, *Khatris*, *Mohyals*, etc., have become owners by purchase. Still the majority of the proprietors are *Rai Brahmans*, and the learned District Judge seems to be right in saying that they form a fairly compact village community and that their basic occupation is agricultural, and that thus the *onus* which originally rested on the plaintiffs, is shifted to the defendant to prove that they are governed by Hindu Law. He has, however, held that the *onus* has been discharged by proof of the fact that there have been numerous uncontested alienations in the village as well as many adoptions, and by proof of certain instances in which daughters have succeeded to property in the presence of collaterals.

There have been 44 sales in the village, of which 21 were in favour of a *Khatri* and many others in favour of persons of various castes besides *Brahmans* and 15 gifts. None of these alienations have been contested. The learned District Judge has mentioned a case in which Mr. Stephen decided in 1903 that the parties followed custom, but that case is not in point as it related to another village and the parties to it were *Mahal Brahmans* and not *Rai Brahmans*. There have also been many adoptions of sons or grandsons of daughters or sisters. One of these was contested by the plaintiffs' family and the suit failed.

Besides the alienations, there are two instances mentioned by D. Ws. 7 and 18 in which daughters have

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succeeded in preference to collaterals. Only two instances to the contrary have been cited and both are capable of explanation. One Chet Ram was succeeded by his collaterals, but the land was very small in area and it was in mortgage with Gurdit Singh (D. W. 11), at the time of Chet Ram's death, so that the daughters may not have thought it worth while to claim it. Moreover the mutation took place only in 1917, so that the succession may yet be contested. The other instance is that of the succession to the property left by one Bharo, and the explanation of her daughter not succeeding is given by the latter's husband D. W. 11, who says that there was only a small quantity of land and that the collaterals were his sister's sons.

None of the authorities cited before us appear to be on all fours with the present case. *Devi Ditta Singh* v. *Dropti* (1), on which counsel for the appellants relies, does not help him, as no evidence was given in that case to rebut the presumption which it was held arose in favour of the parties following custom. In *Daswandi* v. Mahant *Krishen Dev* (2) although many alienations were shown to have taken place, only one of them was a permanent transfer to a non-*Brahman*, and the power of alienation was restricted by the provisions of the *wajib-ul-arz*.

There is one case, not cited before us, which in some respects resembles the present one, namely, *Lachhman Das* v. *Pahla Mal* (3) a case relating to *Brahmans* of Gopalpur in the Amritsar District. Those *Brahmans* formed, as in the present case, a compact village community and they followed agriculture, although they were not wholly dependent upon it and followed other professions also. But in a previous case a daughter's son had been allowed to succeed, as it was found to be proved that daughters excluded collaterals, and as the evidence adduced in the case before the Chief Court did not lead to a different conclusion the findings of the Lower Courts that the plaintiffs' family were governed by Hindu Law as regards alienation of ancestral property were affirmed.

(1) 56 P. R. 1909. (2) 34 P. R. 1911.

(3) 59 P. R. 1908.

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We think that in the present case the learned District Judge is right in finding that the defendant has succeeded in discharging the *onus* of proving that Sant Ram was governed by Hindu Law.

As regards the validity of the defendant's adoption, although under the strict Hindu Law the adoption of a person standing to his adoptive father in the relation in which the defendant stood to Sant Ram would not be permissible, it must be borne in mind that that law is in practice often modified by custom, and we find in the present case sufficient evidence that it has been so modified in respect of adoptions, sisters' and daughters' sons and grandsons having, as already remarked, been adopted in several instances, and no such adoptions having ever been declared invalid.

The appeal consequently fails and we dismiss it with costs.

A. N. C.

Appeal dismissed.