APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

1922

Dec. 20.

NAMAN AND OTHERS (PLAINTIFFS) Appellants,

versus

BATAN SINGH AND GHANIA (DEFENDANTS) Respondents.

Civil Appeal No. 697 of 1919.

Custom—Adoption—Sister's son—Hindu Jats—Hoshiarpur District—Riwaj-i-am—Onus probandi.

K, a sonless Hindu Jat of Kukran, district Hoshiarpur, adopted his sister's son. His first cousins on the father's side sued to have it declared that the adoption was invalid by custom, and should not affect their rights as reversioners.

Held, that as the *Riwaj-i-ams* of the Hoshiarpur District prepared in 1884 and 1914 declared that the adoption of a sister's son had the sanction of custom, and as the later entry was supported by instances, the *onus* of proving that such an adoption was not valid lay on the plaintiffs, and that they had failed to discharge this *onus*.

Ralla v. *Budha* (1), and *Budhu* v. *Bur* (2), distinguished. Mussammat *Ishar Kaur* v. *Raja Singh* (3), *Chhuttan* v. *Hazari Lal* (4), *Wazira* v. *Mst. Maryam* (5), and *Beg* v. *Allah Ditta* (6), followed.

Second appeal from the decree of F. W. Kennaway, Esquire, District Judge, Hoshiarpur, dated the 13th December 1918, *reversing that of* Lala *Durga Parshad,* Munsif, *1st Class, Hoshiarpur, dated the 7th December* 1917, *and dismissing the plaintiffs' claim.*

HAR GOPAL, for TEK CHAND, for Appellants.

NANAK CHAND, for Respondents.

The judgment of the Court was delivered by—

ZAFAR ALI J.—Kanhaya, a sonless Hindu *Jat* proprietor of the village Kukran, district Hoshiarpur, having adopted his sister's son, his first cousins on the father's side sued to have it declared that the adoption was invalid by custom and would not affect their rights as reversioners.

(1) 50 P. R. 1893 (F. B).
(2) 84 P. R. 1895.
(3) 94 P. L. R. 1911.
(4) 7 P. R. 1916.
(5) 84 P. R. 1917.
(6) 45 P. R. 1917 (P. C.).

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The *Riwaj-i-am* of the Hoshiarpur District prepared in 1884 declared that adoption of a sister's son had the sanction of custom and this was repeated in the *Riwaj-i-am* compiled in 1914 which cited several instances in support of the said custom. However, the trial Court (Munsif of Hoshiarpur) placed the *onus* of proving the custom on the defendants and eventually came to the conclusion that they had failed to discharge it. On appeal the learned District Judge held that the burden of proof was wrongly placed on the defendants and should be placed on the plaintiffs, and remanded the case to enable the latter to discharge the *onus* thus placed on them. Both parties produced further evidence before the Munsif who reported that that adduced by the plaintiffs was not sufficient to discharge the *onus* laid on them. On receiving this return to the order of remand, the learned District Judge issued a commission to the Revenue Assistant, Hoshiarpur, for a local enquiry which he accordingly made and submitted a report. When this was received, counsel for the plaintiffs admitted before the District Judge that they had failed to discharge the burden of proof placed on them, and therefore he accepted the appeal and dismissed their suit. They preferred a second appeal to this Court which was admitted on a certificate which though originally refused was granted subsequently by the District Judge in pursuance of an order of this Court.

It is again contended before us on the authority of *Rallu* v. *Budha* (1) that the initial burden of proof lay on the defendants who alleged that the adoption of a sister's son was valid and that the District Judge was wrong in shifting the burden on to the plaintiffs. In the case referred to the parties were *Arains* of a village in the Nawanshahar Tahsil of the Jullundur District and the adoption contested was of a daughter's son. According to the *Riwaj-i-am* of the Jullundur District, a daughter's or sister's son could not be adopted, as stated in the penultimate paragraph at page 228 of the said judgment itself, and therefore the *onus* of proving that the adoption of a daughter's son was valid by custom was rightly thrown on the party who set up that custom contrary to the *Riwaj-i-am*. This ruling

(1) 50 P. R. 1893 (F. B.).

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therefore lends no support to plaintiffs' contention as to burden of proof. Another ruling cited on this point was *Budhu* v. *Bur* (1) in which it was held that the *onus* of proving the validity of the adoption of a daughter's son lay on the person asserting it, and that the *Riwaj-i-am* of 1884 did not correctly represent existing custom; but the latest decisions of this Court relating to the evidential value of a *Riwaj-i-am* are that where a statement in a *Riwaj-i-am* as to the existence of a custom is supported by instances, it affords sufficient proof of that custom unless rebutted by the party who denies it [see Mussammat *Ishar Kaur* v. *Raja Singh* (2), *Chhuttan* v. *Hazari Lal* (3) and *Wazira v.* Mussammat *Maryam* (4)]. Apart from these decisions there is the ruling of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (5), that an entry in a *Riwaj-i-am* as to a custom is a strong piece of evidence in support of that custom, and that it lay on the person denying that custom to rebut that evidence. We are therefore of opinion that the *onus* of proving that the adoption of a sister's son was not valid lay on the plaintiffs and was rightly placed on them by the learned District Judge.

Next it is argued that the plaintiffs did succeed in discharging the *onus* placed on them, but we are of opinion that they did not. Undoubtedly there is evidence either way, but there is a preponderance of evidence in support of the custom. In the first place this custom is stated in the two *Riwaj-i-ams* prepared in 1884 and 1914, successively, which shows that general opinion has uniformly been in favour of the custom. *Secondly*, the *Riwaj-i-am* compiled in 1914 cites no less than eight judicial instances (Nos. 130 to 133, 135, 137, 139 and 142) and three from registers of mutations (Nos. 313 to 315) in support of the custom. As against these eleven, there are only six instances to the contrary (Nos. 129, 134, 136, 138, 140 and 141). To give further instances the plaintiffs produced copies of judgments marked P-2 to P-13. P-3 relates to instance No. 134; P-5 to No. 129 and P-6 and P-7 to No. 141 of the *Riwaj-i-am*. P-8 is the same as P-2, and P-9, 10 and 11 relate to the same instance. Thus only five new instances were cited by the plaintiffs, but instance

(1) 84 P. R. 1895.
(2) 94 P. L. R. 1911.
(3) 7 P. R. 1916.
(4) 84 P. R. 1917.
(5) 45 P. R. 1917 (P. C.).

No. 141 is not relevant because it is of an adoption of a sister's son by a sonless occupancy tenant in whose case succession was governed by section 59 of the Tenancy Act. The defendants also produced copies of judgments relating to two new instances. These judgments are marked D-4 and D-5. In this way there were 13 instances in support of the custom as against ten to the contrary. *Thirdly*, in the course of the enquiry made by the Revenue Assistant it transpired—

(1) that the plaintiffs themselves had lately gifted 8 *kanals* and 3 *marlas* of land to their sister's son, and

(2) that one Diwan Singh of the village of the parties and a member of their *got* had adopted his daughter's son, Surat Singh, that lately Diwan Singh's son brought a suit to have the adoption cancelled, but that the suit ended in a compromise according to which Surat Singh's uncles (the sons of Diwan Singh) gave him 80 *kanals* of land in 1916-17.

These gifts to sisters' sons, though not instances of adoption, strongly illustrate the force of the custom recognizing the claims of sisters' sons. Having regard to these instances and other evidence taken by the Revenue Assistant he arrived at the conclusion that the defendants' evidence outweighed that adduced by the plaintiffs. *Fourthly*, though the instances of adoption of daughters' sons given in the *Riwaj-i-am* are not directly in point, they undoubtedly may be taken into consideration as indicating that the agricultural tribes of the Hoshiarpur District are not devoted votaries of the agnatic theory, and that the general custom is so far modified amongst them that it does not look with disfavour upon the drifting of ancestral land into the hands of such non-agnates as are related through daughters or sisters.

Taking into consideration all the evidence reviewed above we are of opinion that the custom stated in the *Riwaj-i-am* does obtain, and that the plaintiffs have failed to prove that it does not. The appeal fails and is dismissed with costs.

A. R.

Appeal dismissed.