APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Zafar Ali.

HARI SINGH AND ANOTHER (DEFENDANTS) Appellants

versus

RATTAN SINGH AND OTHERS (PLAINTIFFS) & LALU (DEFENDANT) } Respondents.

1924

July 17.

Civil Appeal No. 2393 of 1921.

Custom—Adoption—of a daughter's son by a sonless Hindu Jat proprietor of village Chunni Khurd, tahsil Kharar, district Ambala—Whether valid in the presence of collaterals of the 5th degree—Riwaj-i-am—Wajib-ul-arz.

Held, that the defendants, the adoptive father and adopted son, on whom the *onus* lay, had failed to prove that the adoption of a daughter's son by a sonless Hindu Jat proprietor of village Chunni Khurd, is valid by custom.

Ralla v. *Budha* (1), followed.

Harri Singh v. *Gulaba* (2), *Bhup Singh* v. *Nihal Singh* (3) and *Sunder Singh* v. *Mst. Mano* (4), dissented from.

Lallu v. *Fatteh Singh* (5), referred to.

Gurbakhsh Singh v. *Mst. Partapo* (6), distinguished.

Second appeal from the decree of A. H. Parker, Esquire, District Judge, Ambala, dated the 11th August 1921, affirming that of Chaudhri *Niamat Khan, Junior Subordinate Judge, 2nd Class, Ambala, dated the 13th June 1921, decreeing plaintiffs' claim.*

DEVI DAYAL, for Appellants.

MAN SINGH, for Respondents.

The judgment of the Court was delivered by—

ZAFAR ALI J.—The only question argued before us in this second appeal is whether the adoption of a daughter's son by a sonless Hindu Jat proprietor of

(1) 50 P. R. 1893 (F. B.).
(2) 50 P. R. 1874.
(3) 129 P. R. 1882
(4) 68 P. R. 1888.
(5) 18 P. R. 1899.
(6) (1921) I. L. R. 2 Lah. 346.

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the village Chunni Khurd, tahsil Kharar, district Ambala, is valid by custom in the presence of collaterals of the 5th degree. The Courts below have answered this question in the negative, holding that the defendants have failed to prove the alleged custom. There can be no manner of doubt that the adoption was not valid unless sanctioned by custom and that the *onus* of establishing the custom lay on the defendants. The evidence that the learned counsel for the defendants-appellants relied on before us consists of—

(*a*) A statement in the *wajib-ul-arz* ;

(*b*) the *Riwaj-i-am* ; and

(*c*) the three judicial instances afforded by *Bhup Singh* v. *Nihal Singh* (1), *Sunder Singh* v. *Mst. Mano* (2) and *Gurbakhsh Singh* v. *Mst. Partapo* (3).

The statement (*a*) runs as below :—

" According to the custom of the village a gift to a daughter's son or sister's son cannot be made in the presence of (the donor's) male issue."

The learned counsel draws from the above statement the inference that a gift to a daughter's son or sister's son is valid in the absence of male issue, but this inference does not necessarily follow. The *wajib-ul-arz* mentions a circumstance under which a gift to a daughter's son or sister's son would not be valid, but does not mention the circumstances under which it would be valid. Moreover, a gift to a daughter's son of a portion of the donor's property may be valid but not of the whole of it, and if a gift of a portion of the property only were valid, it would not necessarily follow that the adoption also would be valid. The *wajib-ul-arz* is silent on these points, and as the state-

(1) 129 P. R. 1882. (2) 68 P R. 1888.
(3) (1921) I. L. R, 2 Lah. 346

ment referred to is not directly in point, its evidential value is very slight indeed.

(*b*) The *Riwaj-i- am* also is not in favour of the defendants. In the *Riwaj-i-am* prepared in 1887 and again in 1918 it was stated that the people are generally opposed to adoption. It is nowhere stated that a sonless proprietor has the sanction of custom to adopt a daughter's son.

(*c*) Before 1893 the view of the Punjab Chief Court as expressed in *Harri Singh* v. *Gulaba* (1) was that by the general custom of the Punjab the adoption of a daughter's son was valid, and it was on the basis of that ruling that the adoption of a daughter's son by a Sikh Jat of a village in the Kharar tahsil, Ambala district, was declared valid in *Bhup Singh* v. *Nihal Singh* (2), though the Commissioner had disallowed the adoption, holding that the evidence was most distinctly against any such custom. But the theory that there was a general custom in favour of the adoption of a daughter's son was not accepted by a Full Bench of the Punjab Chief Court in *Ralla* v. *Budha* (3) which lays down that the burden of proof was on the defendants who alleged the adoption of a daughter's son to be valid against the plaintiffs, and that generally— creed, tribe and locality apart—when a sonless man in any land-holding group which recognises a power to adopt asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near agnates, irrespective of their assent, the presumption at the outset is against the power. Since the question of burden of proof has been set at rest by the above ruling, *Bhup Singh* v. *Nihal Singh* (2) and *Sunder Singh* v. *Mst. Mano* (4) have lost their value

(1) 50 P. R. 187'. (3) 50 P. R. 1893 (F. B.).
(2) 129 P. R. 1832. (4) 63 P. R. 1888.

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as judicial instances because in those cases the existence of the custom was presumed and not proved. The third case *Gurbakhsh Singh* v. *Mst. Partapo* (1) was from the village Hassanpur (tahsil Kharar) which is at a considerable distance from the village Chunni Khurd. If the custom is found to prevail in Hassanpur, it does not follow that it obtains in Chunni Khurd also, the two villages being many miles apart. The plaintiff himself stated that Chunni Khurd is 400 years old and that there has been no gift or adoption in favour of a daughter's son in the village until the one now in dispute. In *Lalu* v. *Fateh Singh* (2) it was found that among the Jats of Rupar tahsil, Ambala district, the adoption of a daughter's son is invalid by custom.

In view of what has been stated above, it is clear that the defendants failed to prove the alleged custom and therefore this appeal fails and is dismissed with costs.

A. N. C.

Appeal dismissed.

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(1) (1921) I. L. R. 2 Lah. 346. (2) 18 P. R. 1899.