## APPELLATE CIVIL.

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

1924

*May 20.*

POHLO (DEFENDANT) Appellant,

*versus*

NAUWARDHAN AND OTHERS (PLAINTIFFS), BARWANA AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 478 of 1921.

*Custom—Adoption—of an agnate—Hindu Rajputs of Salohar* got *of Mauza Saloh, Tahsil Una, Hoshiarpur District*—Onus probandi *that no custom of adoption exists—Value of entries in the* Riwaj-i-am.

*Held*, that as the adoption of an agnate is allowed by Hindu Law as well as by the custom prevailing generally amongst Hindus of this Province, the initial *onus* of proving that no custom of adoption exists amongst Hindu Rajputs of the Salohar *got* of Mauza Saloh in the Una Tahsil of the Hoshiarpur District should have been laid on the plaintiffs.

*Held also*, that a statement made in the *Riwaj-i-am* of 1913-14 in answer to question 61, being (1) unsupported by instances, (2) opposed to general custom, (3) at variance with the previous *Riwaj-i-am* and (4) contradicted by the answer given to question 69, was of no value and could not have the effect of throwing the *onus* on to the defendant.

*Wazira* v. *Mst. Maryan* (1), *Manohar* v. *Mst. Nanhi* (2), and *Budha* v. *Mst. Fatima Bibi* (3), referred to.

*Held further*, that the plaintiffs had failed to discharge the onus.

Civil Appeal No. 143 of 1921 (unreported), referred to.

*Partab Singh* v. *Jai Singh* (4), *Bishen Singh* v. *Amir Chand* (5), and *Jehnu* v. *Saudagar* (6), distinguished.

*Second appeal from the decree of A. H. Parker, Esquire, District Judge, Hoshiarpur, dated the 26th*

(1) 84 P. R. 1917.
(2) (1921) I. L. R. 2 Lah. 366.
(3) (1922) I. L. R. 4 Lah. 99.
(4) 12 P. R. 1893.
(5) 13 P. R. 1894.
(6) 138 P. R. 1894.

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*October 1920, affirming that of* Mirza *Abdul Rub, Subordinate Judge, 1st Class, Hoshiarpur, dated the 13th July 1920, decreeing plaintiffs' claim in part.*

TEK CHAND, for Appellant.

SUNDAR DAS, for Respondents.

The judgment of the Court was delivered by—

MARTINEAU, J.—The plaintiffs in this case sue for possession of the land left by their collateral, Mahtaba, a Hindu Rajput of the Salohar *got* of Mauza Saloh in the Una Tahsil of the Hoshiarpur District. Mahtaba had adopted his brother's grandson Pohlo, but the plaintiffs contest the validity of the adoption on the ground that no custom of adoption exists in their tribe, and the only question in dispute is whether the custom exists or not. The Courts below have held that it does not, and the defendant Pohlo has filed a second appeal, having obtained the certificate required by section 41 (3) of the Punjab Courts Act.

The *onus* of proving the existence of the custom was laid by the trial Court on the appellant, but, as the adoption of an agnate is allowed by the Hindu Law as well as by the custom prevailing generally among Hindus in this Province, the initial *onus* should have been laid on the plaintiffs to prove that the custom did not exist in their tribe.

The *Riwaj-i-am* of 1869 recognised the existence of the custom of adoption among Rajput male proprietors in seven *talukas* of the Una Tahsil, including the *taluka* of Panjal, to which the parties belong, and the neighbouring *taluka* of Dangoh, but not in the other three *talukas*, of which one, it may be noted, was Nurpur.

In the current *Riwaj-i-am* of 1913-14 for the Una Tahsil the question whether the custom of adoption

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prevailed was not put, but question 61 was whether it was necessary that the person adopting should have no son, grandson, or great-grandson, and whether a daughter's son was a bar to the right of adoption. The reply given was, without any distinction between different *talukas*, that there was no custom of adoption, and it was also stated that a daughter's son could not be adopted. The instances given were only of cases in which adoptions of daughters' sons had been set aside, those being the cases reported as *Bishan Singh* v. *Amir Chand* (1) and *Partab Singh* v. *Jai Singh* (2).

Question 69 was whether it was necessary that the person adopted should be related to the person adopting, and, if so, what relations might be adopted. The answer for the whole tahsil was that there was no custom. But the four instances given were not in point, one relating only to the claim of an adopted son to succeed to an occupancy tenure, two others to cases which were compromised, and the fourth being the case of a mere paper adoption, whilst four exceptions were mentioned, which included instances of adoptions of brothers' sons, so that the answer to question 69 was in effect in favour of the existence of the custom.

It is clear therefore that the statement made in the *Riwaj-i-am* of 1913-14, in answer to question 61, that no custom of adoption existed at all among Rajputs in the Una Tahsil, being (1) unsupported by instances, (2) opposed to the general custom, (3) at variance with the statement made in the *Riwaj-i-am* of 1869, and (4) contradicted by the answer given to question 69, is of no value and cannot have the effect of throwing the *onus* on to the defendant, see *Wazira* v.

(1) 13 P. R. 1894. (2) 12 P. R. 1893.

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*Mst. Maryan* (1), *Manohar* v. *Mst. Nanhi* (2) and *Budha* v. *Mst. Fatima Bibi* (3).

*Bishen Singh* v. *Amir Chand* (4), on which the plaintiffs rely, was a case relating to the adoption of a daughter's son by a Rajput of the Luddu *got* living at the other end of the Una Tahsil in the Nurpur *taluka*, where it was stated in the *Riwaj-i-am* of 1869 that the custom of adoption did not exist. The observation made in the first paragraph of the final judgment of the Chief Court that the Courts below had after further enquiry adhered to their former conclusions as to the custom of the Rajputs of the Hoshiarpur District, and of the Una Tahsil in particular, being opposed to the practice of adoption was too broadly expressed, as the remand report showed that the finding of the Lower Courts related only to the question of the existence of the custom of adoption among Luddu Rajputs. It cannot therefore be regarded as an authority as to the non-existence of the custom among Rajputs other than those of the Luddu *got*.

Another judgment in the same volume, *viz. Jehnu* v. *Saudagar* (5), the parties to which were Rajputs of the Una Tahsil, shows that they recognised the existence of the custom, for the defendant's adoption in that case was not disputed, the question being only whether he was entitled to succeed collaterally in his adoptive father's family.

The learned District Judge has not discussed the evidence in the present case, but has merely adopted the arguments of the trial Court. That Court referred to certain judgments of which the plaintiffs had filed copies. The first of those related to Rajputs of the Garhshankar Tahsil and is therefore not in point, as

(1) 84 P. R. 1917.
(2) (1921) I. L. R. 2 Lah. 366.
(3) (1922) I. L. R. 4 Lah. 99.
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(5) 138 P. R. 1894.

the statement in the *Riwaj-i-am* by the Rajputs of that tahsil was that there was no custom of adoption among them. The second case is also not in point as it related to Luddu Rajputs, and the Court accordingly followed *Bishen Singh* v. *Amir Chand* (1). The name of the *got* to which the parties in the third case belonged is not stated, but they lived at the other end of the tahsil and the Court followed *Bishen Singh* v. *Amir Chand* (1) so that that case also is not applicable. The fourth case was one which the Subordinate Judge had recently decided relating to Hindu Rajputs of Dangoh near Saloh. But his decision in that case was reversed on appeal by the District Judge Mr. Campbell, who upheld the adoption, and whose judgment has recently been affirmed in second appeal by this Court in Civil Appeal No. 143 of 1921. That is therefore a case in the appellant's favour. No instances relating to Salohar Rajputs have been given.

Holding therefore that the plaintiffs have failed to discharge the *onus*, which in view of the prevalence of the custom of adoption generally and of the statement contained in the *Riwaj-i-am* of 1869 rested on them, we accept the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs throughout.

*A. R.*

*Appeal accepted.*

(1) 13 P. R. 1894.