

APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Campbell.

1924

Oct. 17.

HIRA AND OTHERS (PLAINTIFFS) Appellants,
versus
 SHIBBU AND GIRDHARI (DEFENDANTS) Respondents.

Civil Appeal No. 717 of 1921.

Custom—Adoption—of a sister's son—Jats of village Lakraya, Jhajjar Tahsil, Rohtak District—Entries in the Riway-i-am of 1879 to prove the existence of the custom in 1890 when the adoption took place—Effect of different entry in the Riway-i-am of 1909.

Held, that amongst Jats of village Lakraya the adoption of a sister's son in the year 1890, in the absence of near-agnates, was valid.

Civil Appeal No. 701 of 1882 (unpublished), referred to.

Held also, that the entries in the *Riway-i-am* of 1879, supported by instances, were valuable evidence of the existence of this custom in 1890; and that the entry in the *Riway-i-am* of 1909 to the effect that now-a-days daughters' and sisters' sons are not adopted, coupled with the author's note on the subject, merely showed that a previous custom was in the process of abandonment.

Ralla v. Budha (1), *Jhanda v. Balwant* (2), and *Khuda Bakhsh v. Mst. Fateh Khatun*, (3), distinguished.

Rattigan's Digest of Customary Law, 9th Edition, para. 37, referred to.

Second appeal from the decree of F. W. Skemp, Esquire, District Judge, Karnal, dated the 24th December 1920, reversing that of Mehta Dwarka Nath, Subordinate Judge, 1st Class, Rohtak, dated the 17th January 1920, and dismissing the claim.

JAGAN NATH, for Appellants.

SHAMAIR CHAND, for Respondents.

(1) 50 P. R. 1893 (F. B.). (2) 39 P. R. 1897.

(3) 13 P. R. 1919.

The judgment of the Court was delivered by—
 CAMPBELL J.—The suit from which this second appeal has resulted was brought by collaterals in the ninth degree of one Dani, deceased, for possession of land once owned by Dani. Dani died on the 10th of December 1909. On the 19th of March 1910 his land was mutated in the name of Molar, his sister's son, who was said to have been adopted by him in 1890. Two out of fifteen collaterals objected to the mutation, but no action was taken until July 1919 when the present suit was brought. One of the collaterals, Girdhari, whose share would amount to 1/12th of Dani's estate, has been joined as a defendant and has supported Molar throughout.

The Lower Appellate Court decided that Molar was adopted in 1890 and that the adoption was valid by custom. The suit accordingly was dismissed ; but the learned District Judge has given a certificate under section 41 (3) of the Punjab Courts Act to enable the plaintiffs to contest the finding as to the validity of the adoption in second appeal.

The parties are Jats of the village of Lakraya in the Jhajjar Tahsil of the Rohtak District. The learned District Judge has based his decision mainly upon the *Riwaj-i-am* of the Sampla Tahsil compiled in 1879. Lakraya was at that time in the Sampla Tahsil. According to this *Riwaj-i-am* the Jats of Sampla were unanimous that certain relatives including a sister's son could be adopted without restriction and without regard to the consent or dissent of the agnates. It was noted that instances of such adoptions were numerous and that no attempt was necessary to quote them all. Seven instances were cited as examples, and of these two were adoptions of sisters' sons.

At the 1909 settlement it was recorded in the new *Riwaj-i-am* that the custom had changed, and that

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“now-a-days daughters’ and sisters’ sons are not adopted.” A note on page 41 of Joseph’s Customary Law of the Rohtak District relates that adoptions of daughters’ or sisters’ sons used to be fairly common, but had become rare in the last five or ten years. It quotes an example of an adoption of a sister’s son in 1909, and states that a suit was expected.

The declaration in the 1879 *Riwaj-i-am* is supported by a decision of the Chief Court (Civil Appeal No. 701 of 1882) in which the parties were Jats of the Rohtak District, and in which it was held that there was a presumption in favour of the adoption of a sister’s son.

The oral evidence given in the present case is not of much value, the witnesses of the plaintiffs asserting that custom does not recognise such adoptions as the one under discussion and the defendants’ witnesses saying that such adoptions are valid. Mansa Ram, Zaildar (P. W. 1), appears to admit the occurrence of sisters’ sons’ adoptions, but says that the adoptees after inheriting their adoptive fathers’ property sold it and left their adoptive families. Some such practice may possibly account for the change in custom stated in the 1909 *Riwaj-i-am*.

The defendant Molar produced three instances of which one, that of Kishna, is very vague, while the other two admittedly were cases of adoptions of sisters’ sons with the consent of the collaterals.

It cannot be said that the *Riwaj-i-am* of 1909 contradicts that of 1879. It merely shows that a previous custom was in process of abandonment, and we have to determine not the present existing custom but the custom prevailing in 1890, eleven years after the 1879 *Riwaj-i-am* was compiled. For this purpose the 1879 *Riwaj-i-am* undoubtedly is an important piece

of evidence and, supported as it is by instances, it was in our view sufficient to shift the *onus* laid upon the defendant Molar to the other side. Mr. Jagan Nath for the plaintiffs-appellants has argued, firstly, that the *Riwaj-i-am* entry of 1879 is contrary to the general custom and therefore should be discounted, and, secondly, that in the south-east of the Punjab Hindu agriculturists are more inclined to follow the principles of Hindu Law in their customary observances than those of the central parts of the Punjab.

The first argument is based upon paragraph 37 of Rattigan's Digest of Customary Law which states that amongst Hindu non-agriculturists a daughter's son or a sister's son is generally recognised as a proper person to be appointed, but that amongst agriculturists, specially in the eastern districts of the Punjab, such appointments are not now favoured, unless made with the consent of the agnates. The latter portion of this proposition is based upon two rulings *Ralla v. Budha* (1), and *Jhanda v. Balwant* (2); but these decisions lay down that, when a sonless agriculturist asserts that he is competent to adopt a daughter's son or other non-agnate in the presence of near agnates irrespective of their assent, the presumption at the outset is against the power. In the present instance we are not concerned with near agnates but with distant agnates of the ninth degree.

In any case, at its very worst, the 1879 *Riwaj-i-am* propounds as its rule a definitely well known exception to the general rule and not something entirely out of the ordinary. *Khuda Bakheh v. Mst. Fatteh Khatun* (3) therefore has no application.

The answer of Mr. Shamair Chand for the respondents to the second argument is complete, namely,

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that under Hindu Law *Sudras* can adopt a sister's son and *Jats* are *Sudras* as has been pointed out, *inter alia*, in *Mst. As Kaur v. Sawan Singh* (1), and *Har Dial v. Kali Ram* (2). We are unable to accept the reasons suggested by Mr. Jagan Nath for holding that the *Riwaj-i-am* of 1879 does not effectively support the respondents' case and the Lower Appellate Court's decision. The evidence which it furnishes has not been rebutted in any way and the appeal must fail.

Accordingly we dismiss the appeal with costs.

A. R.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Martineau and Mr. Justice Zafar Ali.

MUHAMMAD IDRIS—Appellant,

versus

THE CROWN AND ANOTHER—Respondents.

Criminal Appeal No. 232 of 1924.

Criminal Procedure Code, Act V of 1898 (as amended by Act XVIII of 1923), sections 476, 476-A, 476-B—Appeal to High Court from an appellate order of the District Judge making a complaint which the Subordinate Judge refused to make—Whether competent.

Held, that no appeal lies under section 476-B of the Code of Criminal Procedure to the High Court from an appellate order of the District Judge making a complaint under section 476, which the Subordinate Judge might himself have made but refused to make.

Appeal from the order of D. Johnstone, Esquire, District Judge, Delhi, dated the 18th February 1924, filing a complaint against the appellant.

ABDUL RASHID, for Appellant.

SAGAR CHAND, for the Government Advocate, and
J. L. KAPUR, for the Complainant, for Respondents.