

and the effect of such being the case remains open. The above order applies only to the three defendants, Gokal Chand, Hari Chand and Puran Chand, since before us the plaintiffs have withdrawn their appeal against the three minors Miwan Mal, Brij Lal and Bihari Lal, and so far as they are concerned the dismissal of the suit by the trial Court will stand.

N. F. E.

*Appeal accepted in part;
Case remanded.*

APPELLATE CIVIL.

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

SHITAB SINGH AND OTHERS (PLAINTIFFS)

Appellants

versus

HAZARI SINGH AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 2616 of 1921.

Custom—Adoption—by widow—of a collateral one degree higher than her deceased husband—Rajputs of Mauza Bahora Kalan, Gurgaon district—Riwaj-i-am

Held, that the parties being agricultural Rajputs for many generations past were governed by custom and not by Hindu Law.

Held also, that among Rajputs of the Gurgaon district, as stated in the *Riwaj-i-am*, a widow can without any permission adopt one of her husband's male collaterals as her husband's heir.

Held further, that having regard to the other evidence on the record and in the absence of any instances directly bearing on the point, the condition laid down in the *Riwaj-i-am* under the question "who may be adopted?" viz., that the adopted person should be of a lower generation than the person adopting (Wilson's Tribal Custom of the Gurgaon District, page 28), must be taken to be merely indicative and not mandatory.

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SHITAB SINGH
v.
HAZARI SINGH.

First appeal from the decree of Lala Suraj Narain, Senior Subordinate Judge, Gurgaon, dated the 17th August 1921, dismissing the plaintiffs' suit.

SHAMAIR CHAND, SAGAR CHAND and PARKASH CHAND, for Appellants.

OERTEL and G. S. SALARIYA, for Respondents.

The judgment of the Court was delivered by—

CAMPBELL J.—This appeal has abated so far as three appellants and six respondents are concerned, but admittedly this fact does not necessitate the dismissal of the whole appeal and its effect does not require consideration since the appeal must fail on its merits.

The suit was by the collaterals of one Ganga Sahai, a Chauhan Rajput of the village of Bahora Kalan in the Gurgaon District, for possession of his landed estate, part of which is in the hands of another collateral Hazari Singh and part in the hands of alienees from Hazari Singh and from *Mussammat Anar Kaur*, the widow of Ganga Sahai.

The defence was that Hazari Singh was the validly adopted son of *Mussammat Anar Kaur*, and as such the sole and rightful heir of Ganga Sahai. The lower Court has upheld this contention, and the plaintiffs appeal.

There can be no doubt that the lower Court was correct in holding that the parties being agricultural Rajputs for many generations past, are ordinarily governed by custom and not by Hindu Law. We agree also with the lower Court that the factum of adoption of Hazari Singh by *Mussammat Anar Kaur* in the manner laid down by the *Riwaj-i-am* as requisite has been proved. The *Riwaj-i-am* is clear that among Rajputs of the Gurgaon District a widow

can, without any permission, adopt one of her husband's male relatives as her husband's heir. The statement to this effect in the *Riwaj-i-am* is supported by instances and also by the results of an elaborate enquiry made by the Settlement Officer in 1875.

The only point which helps the appellants in any way is a passage in the *Riwaj-i-am* dealing with the question of 'who may be adopted.' It is there set forth that the adopted son ought to be a member of the family of the adopter. If the adopter be a widow he ought to be a member of her husband's family. The son of the husband's elder brother has a preferential right over the younger brother's son. Failing them preference goes to the more distant male relatives related through males. *The adopted person should be (hona chahiye) of a lower generation than the person adopting* (whether one or two generations lower). (Wilson's Tribal Custom of the Gurgaon District, page 28).

Hazari Singh was a distant collateral in the 10th degree of Ganga Sahai as were the plaintiffs, and it does not appear that Ganga Sahai left any nearer male relative. The common ancestor is Tulsi Das, and Ganga Sahai is in the 9th generation from Tulsi Das, while Hazari Singh is in the 8th. The adoptee therefore is in a higher generation than that of the adopter. It is not clear from its actual words whether the sentence italicised above regarding the generation in which the adopted person should be is mandatory or merely indicative. There are no instances which solve the question, but in this particular case there is proof that Hazari Singh's adoption by *Mussammatt Anar Kaur* took place many years ago and that Hazari Singh has since been continuously recognised as her adopted son by the com-

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munity, including at least some of the plaintiffs. We take this fact to be evidence that the adoption of a distant collateral younger than the deceased husband, but still in a higher generation was one sanctioned by custom, and we deduce that the provision in the *Riwaj-i-am* referred to above means no more than that when it is a question of adopting a distant male relative it is fitting that endeavour be made to select one in a lower generation than that of the adopter. Our view that failure to do so does not invalidate an adoption is supported by the comprehensive language in which, in a separate passage, a widow is empowered to adopt "any one she pleases of her husband's male relatives related through males." There are also two other passages which are at least consistent with it, one permitting the adoptee to be a married man with children and of any age whatsoever, and the other permitting him to be the son of a woman whom the adopter could not have married.

There is thus no ground for interference with the lower Court's dismissal of the suit on the ground that Hazari Singh was the legal heir of Ganga Sahai. We dismiss the appeal with costs.

C. H. O.

Appeal dismissed.
