1926

KHUSHI RAM v. MANGAL SINGH.

matter and hold that they follow the rule as laid down in the current *Riwaj-i-am*, namely, that while they do not succeed to their father's estate in the presence of their brothers they retain the right of collateral succession in their father's family and do not acquire any right of collateral succession in the adoptive father's family.

We accept the appeal and restore the decree of the trial Court. The costs of the plaintiff will be paid throughout by the contesting defendants, Mangal, Sundar and Chanan, in all three Courts.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Dalip Singh.

1926

June 9.

JOLI AND ANOTHER (PLAINTIFFS), Appellants

versus

KHAZANA AND ANOTHER (DEFENDANTS), Respondents.

Civil Appeal No. 2134 of 1922.

Custom—Adoption—of a person of the same tribe but of a different got—Jats of Tika Mallan, Dakhli Pathiar, Tahsil and District Kangra—Onus of proof of validity of—Suit by reversioner contesting gift to adoptee—Limitation—Indian Limitation Act, IX of 1908, Article 118—whether applicable to a suit for possession.

Held, that article 118 of the Limitation Act, does not apply to a suit to recover possession which involves the decision of an issue as to the validity or invalidity of defendant's adoption. The reversioner has the option of treating an adoption as a nullity and to bring a suit for possession, whether the transaction in question was void or voidable.

Kalyandappa v. *Chanbasappa* (1), followed.

Khushal Singh v. *Kanda* (2), referred to.

(1) (1924) I. L. R. 48 Bom. 411 (P.C.). (2) (1920) 56 I. C. 931.

1926

JOLI
v.
KHAZANA.

Held further, that as by implication the answer to question 75 in the *riwaj-i-am* of the district shewed that a person of a different *got* though of the same tribe cannot be adopted, and as this is supported by the general custom, at any rate for Eastern and Central districts of the Punjab (*vide* Rattigan's Digest of Customary Law, last edition, para. 35 and remark 1 on page 69), the *onus* of proving that the adoption was valid lay upon the adopted son and that he had failed to discharge that *onus*.

Second appeal from the decree of M. V. Bhide, Esquire, District Judge, Hoshiarpur, dated the 8th June 1922, reversing that of Lala *Devi Das, Munsif, 1st class, Kangra, dated the 24th August 1921, and dismissing the plaintiffs' suit.*

MEHR CHAND, MAHAJAN, for Appellants.

SOHAN LAL, for Respondents.

The judgment of the Court was delivered by—

DALIP SINGH J.—The plaintiffs sued for a declaration that an alienation by way of gift made by defendant No. 2 in favour of defendant No. 1, of which mutation was effected on the 21st November 1919, should not affect their reversionary rights after the death of defendant No. 2. The defendant denied that the land was ancestral or the plaintiffs were heirs of defendant No. 2 and he also pleaded that the suit was time barred because he (defendant No. 1) had been adopted by defendant No. 2 in 1894. The learned District Judge held that defendant No. 1 was *pichhlag* (step-son) of defendant No. 2 and that he could be validly adopted with the consent of the collaterals. On this he held that as there was a valid adoption about the year 1894 the recent gift created no new cause of action and therefore must be upheld. *Khushal Singh* v. *Kanda* (1) was relied on by him as authority for the above proposition.

(1) (1920) 56 I. C. 931.

1926

JOLI
v.
KHAZANA.

In second appeal the plaintiffs have contended that the learned District Judge is wrong on the question of custom. The necessary certificate has been attached.

Now the sole evidence on which the learned District Judge relied for the proposition that a person of a different *got* could be adopted with the consent of the collaterals was the oral evidence of P. W. 1, Fateh Singh. P. W. 1 states that a person of a different *got* can be adopted if there is no collateral or if none of the collaterals existing are willing to be adopted. There is no proof on the record that none of the collaterals existing were unwilling to be adopted and it is clear that there were collaterals existing. The evidence therefore on which the learned Judge relied does not apply to this case. The *riwaj-i-am* of the district, question No. 75, states that as a general rule only a collateral can be adopted but that a person of the same *got* may be adopted. It is further stated that a person of a different tribe cannot be adopted. Now, no doubt it is not clearly stated that a person of the same tribe but of a different *got* cannot be adopted but the implication would clearly be that such a person cannot be adopted. In Rattigan's Digest of Customary Law, paragraph 35, and in remark 1 at page 69 of the latest edition it is stated that at any rate for the Eastern and Central districts of the Punjab the general custom is against the adoption of a person of a different *got*. The *onus*, therefore, of proving that a person of a different *got* could be adopted lay on the defendant and we do not consider that that *onus* has been at all discharged by the evidence produced by him and we, therefore, hold that it is not proved that the adoption of defendant No. 1 was valid.

Counsel for the respondent has also argued that the suit is barred by limitation under article 118. His argument is that as the adoption was not wholly void, though it might be declared voidable at the instance of the reversioners, article 118 barred the suit, though in form a suit for a declaration to set aside a subsequent gift and not a suit to set aside an adoption. This matter on which there has been controversy must now be held to be concluded by the decision of the Privy Council in *Kalyandappa* v. *Chanbasappa* (1). Put shortly the question in that case was whether in a suit to recover possession which involved the decision of an issue as to the validity or invalidity of the defendants' adoption article 118 applied. Their Lordships of the Privy Council held that article 118 did not apply and that it applied only to a suit to obtain a declaration and that it was the option of the reversioner to treat an adoption as a nullity and bring a suit for possession whether the transaction in question was void or voidable. We, therefore, hold that the suit is not barred by limitation.

* * * * *

On these findings it follows that the plaintiffs had a cause of action on account of the mutation which was sanctioned on the 21st November 1919 and we accordingly accept the appeal and decree the plaintiffs' claim. In the circumstances of the case we leave the parties to bear their own costs throughout.

N. F. E.

Appeal accepted.

(1) (1924) I. L. R. 48 Bom. 411 (P.C.).