APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

ROSHAN LAL AND OTHERS (PLAINTIFFS) Appellants,

versus

SAMAR NATH AND OTHERS (DEFENDANTS) Respondents.

1937

June 10.

Civil Regular First Appeal No. 337 of 1936.

Hindu Law — Mitakshara — modified by Custom — Khatris of Amritsar — adoption — validity of adoption of daughter's son made 45 years before suit — presumption that ceremonies were duly performed — Custom — rights of adopted son regarding succession — joint family property not devisable by will.

One F. a *Khatri* of Amritsar sued his brother S. for partition of certain property on the ground that it had devolved on both in equal shares on their father's death. F. further alleged that his father had made a will by which he had devised his property to both of them, and had admitted that he owed a sum of Rs.3,000 to F. In answer to the suit, S. pleaded that F had been adopted by his maternal grandfather, and had thus lost his rights to succeed in his natural family. He further pleaded that the property being ancestral the father had no power to devise it by will. The lower Court dismissed the suit. In appeal it was contended by F. that the adoption was not proved, that the adoption of a daughter's son was invalid under the Hindu Law; that in any case the adoption did not deprive the adoptee from the right to succeed in his natural family.

Held, that the adoption having taken place 45 years before the suit, it must, in the absence of anything to indicate to the contrary, be presumed that all the requisite ceremonies were duly performed including the " giving and taking ".

Achal Ram v. *Kazim Husain Khan* (1), *Kailash Chandra Nag* v. *Bejoy Chandra Nag* (2), and *Jagan Nath Marwari* v. *Chandni Bibi* (3), relied upon.

Held also, that though under the Mitakshara School of Hindu Law as administered in the British Indian Courts, a

(1) I. L. R. (1925) 27 All. 271 (P. C.). (2) 1923 A. I. R. (Cal.) 18, 24. (3) (1922) 67 I. C. 31, 34.

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daughter's son cannot be adopted, this general rule may be varied by custom and has been so varied among high caste non-agricultural Hindu residents of towns in the Punjab.

Rup Narain v. *Mst. Gopal Devi* (1), *Atma Singh* v. *Jatta Singh* (2), *Parma Nand* v. *Shiv Charan Das* (3), and *Shiv Dev* v. *Dwarka Das* (4), *relied* upon.

And, that the adoption of a daughter's son under this modified rule has the full effect of a formal adoption under Hindu Law, by which the adopted son severs his connection with his natural family and becomes the male lineal descendant of the adoptive father.

Baldeo Sahai v. *Ram Chander* (5), per Jai Lal J., relied upon.

Baij Nath v. *Shamboo Nath* (6) and *Mela Ram* v. *Malik Ram* (7), distinguished.

Held further, that where joint family property of a father and his son is ancestral, the former cannot devise it by will.

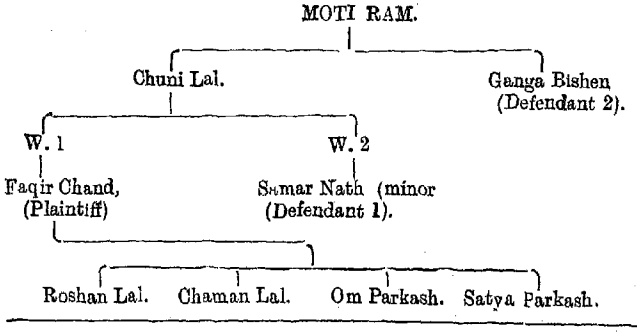
First appeal from the decree of Mr. J. N. Kapoor, Subordinate Judge, 1st Class, Amritsar, dated 22nd June, 1936, dismissing the plaintiffs' suit.

ACHHRU RAM and INDER DEV DUA, for Appellants.

SHAMAIR CHAND, H. S. KHORANA, and L. C. MEHRA, for Respondents.

TEK CHAND J.

TEK CHAND J.—The parties to this litigation are Khatris of Amritsar and are related as follows :—



(1) 93 P. R. 1909, p. 467 (P.C.).
(2) 64 P. R. 1883.
(3) I.L.R. (1921) 2 Lah. 69.
(4) 1933 A.I.R. (Lah.) 1050.
(5) I.L.R. (1932) 13 Lah. 126, 138 to 142.
(6) 53 P. W. R. 1908.
(7) (1926) 93 I. C. 956.

It is common ground between the parties that Chuni Lal and Ganga Bishen separated in 1928. Chuni Lal died in 1930, leaving considerable moveable and immoveable property, which is the subject of this litigation. In June, 1932, Faqir Chand instituted the present suit for partition of these properties against Samar Nath (defendant No.1). The other defendants were impleaded *pro forma*, as they were co-sharers in one of the houses, in which Chuni Lal was a part owner.

In the plaint it was alleged that on Chuni Lal's death, the property in dispute devolved on his sons, plaintiff and defendant No.1, and since then they had been in joint possession. It was also stated that, on the 10th of March, 1929, Chuni Lal had executed a will (Exhibit P.1), by which he had devised his entire property to plaintiff and defendant No.1 in equal shares. In the will Chuni Lal had admitted that he owed a sum of Rs.3,000 to Faqir Chand (plaintiff), and directed that if Chuni Lal failed to repay it in his life-time, Faqir Chand would be entitled to receive one-half of the amount, *i.e.*, Rs.1,500 from Samar Nath. It was stated that the plaintiff did not want to keep the properties joint any longer, and accordingly he sued for partition.

The suit was resisted by Samar Nath, who denied that Faqir Chand (plaintiff) was a co-owner with him in the properties in dispute. He averred that Faqir Chand had been adopted by his maternal grandfather, Narain Das, in 1888, when he was completely severed from his natural family and, therefore, he had no right to succeed to Chuni Lal. The due execution of the will (Exhibit P.1) by Chuni Lal was denied, and it was pleaded that the properties being ancestral of Chuni Lal, he had no power to devise them by will.

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It was also denied that Chuni Lal owed to Faqir Chand Rs.3,000 or any other sum.

Soon after the institution of the suit, Faqir Chand died, and in his place were substituted his sons, who are the appellants before us.

The trial Judge framed several issues, of which those material for the purposes of this appeal are the following :—

(2) Whether Faqir Chand was adopted by his maternal grandfather Narain Das, and hence he has got no connection in the property in suit left by Chuni Lal?

(4) Whether Chuni Lal made a will according to which Faqir Chand is entitled to get one-half share in the property left by Chuni Lal?

(9) Whether Chuni Lal, deceased, had authority to make the will in question?

(10) Whether Chuni Lal was in his full senses and was of disposing mind at the time of the execution of the will?

(11) If issues 4, 9 and 10 are proved in favour of the plaintiff, whether the will in dispute was written under undue influence?

(14) Whether Rs.3,000 mentioned in the will, were not borrowed by Chuni Lal, and whether the plaintiff is not entitled to recover half of this amount?

The learned Judge found that Faqir Chand had been adopted by Narain Das, to whose family he had been transplanted and, therefore, he had no right to succeed to his natural father. He found that the execution of the will (Exhibit P.1) by Chuni Lal had been proved, but that " some sort of influence was exercised on him " at the time, and, in any case, the

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will was invalid as the property was ancestral in the hands of the testator, in which Samar Nath was a co-parcener. He also decided issue No.14 against the plaintiff, and, in the result, dismissed the suit with costs. Faqir Chand's sons have appealed.

The first question to be decided is whether Faqir Chand was, in fact, adopted by his maternal grand-father Narain Das, and if so whether on his adoption he ceased to be a member of his natural father's family and lost his right to succeed to him. As already stated, the adoption is alleged to have taken place 45 years before suit, *i.e.*, some time about 1888, and at this distance of time it is not possible to get direct evidence of the factum of adoption. The oral evidence produced by the parties, is vague and mostly hearsay. There is, however, ample circumstantial evidence, including the admissions of Chuni Lal and Faqir Chand himself, which conclusively prove that he had been adopted by Narain Das. The only child of Narain Das was the mother of Faqir Chand, who had married Chuni Lal and died soon after the birth of Faqir Chand. It is admitted that at the age of two, Faqir Chand went over to live with Narain Das and was brought up and educated by him. His marriage was performed by Narain Das in his house in *katra* Parja. Faqir Chand's four sons, who are the appellants before us, were all born in Narain Das's house, and they have continuously lived there up to the present day. On Narain Das's death, Faqir Chand succeeded to his property as his son. In the Municipal Registers, the owner of the house which he got from Narain Das, is described as "Faqir Chand, *son* of Narain Das, Khatri." On the will, Exhibit P.1, executed by Chuni Lal on the 10th of March, 1929, which was

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produced and relied upon by Faqir Chand himself, his signatures appear as an attesting witness, and there he described himself as " son of Lala Chuni Lall " the aforesaid testator, *adopted son of Narain Das*, caste " Khatri, resident of Amritsar, *Katra* Parja, legatee." In the body of the will, Chuni Lal is recorded as having stated that " Faqir Chand had been adopted by his maternal grandfather in his childhood," though this was qualified by the further statement that " this adoption is not such as might have severed all the connections of the said Faqir Chand with me. Notwithstanding this adoption the said Faqir Chand is my son as before and is entitled to my heritage as a son." It is quite clear from these facts and admissions that Faqir Chand had, in fact, been adopted by Narain Das, when he was a child.

Mr. Achhru Ram, however, strenuously argued that none of the defendant's witnesses had stated that the essential ceremony of " giving and taking " was performed at the time of adoption and in the absence of proof of this ceremony the adoption cannot be regarded as having been validly made. But, as pointed out already, the adoption took place 45 years ago, and at this distance of time it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony. In such circumstances, in the absence of anything to indicate the contrary, it must be presumed that all the requisite ceremonies were duly performed. As held in *Achal Ram* v. *Kazim Husain Khan* (1), *Kailash Chandra Nag* v. *Bejoy Chandra Nag* (2) and *Jagan Nath Marwari* v. *Chandni Bibi* (3), when a person has for nearly half a century enjoyed the status of an

(1) I.L.R. (1905) 27 All. 271, 290 (P.C.). (2) 1923 A.I.R. (Cal.) 18, 21.
(3) (1929) 67 I. C. 31, 34.

adopted son, and has been treated as such all his life, it must be assumed that all the necessary ceremonies were duly and regularly performed at the time of his adoption. No facts have been brought out, which might displace this presumption.

The learned counsel next urged that under the Hindu law of the Mitakshara School, a daughter's son cannot be legally adopted and, therefore, the adoption, even if it took place in fact and with all due ceremonies, was invalid. It is note-worthy that the validity of the adoption was not challenged in the Court below and, therefore, the appellants are not entitled to raise this question for the first time in appeal. It is no doubt true that under the Hindu law of the Mitakshara School, as administered in the British Indian Courts, a daughter's son cannot be adopted, but as observed by their Lordships of the Privy Council in *Rup Narain* v. *Mst. Gopal Devi* (1) " this general rule may be varied by custom and often is so varied in the Province from which this appeal comes (Punjab)." There are numerous cases in which it has been held that among high caste non-agricultural Hindus, resident in towns, strict Hindu law has been so varied, and a daughter's son can be validly adopted. It is not necessary to discuss all these cases here; reference may, however, be made to three reported cases of *Khatris* of Amritsar, to which tribe and city the parties to this litigation belong; *Atma Singh* v. *Jatta Singh* (2), *Parma Nand* v. *Shiv Charan Das* (3) and *Shiv Dev* v. *Dwarka Das* (4). I must, therefore, hold that this contention also is without force.

Lastly, Mr. Achhru Ram urged that assuming that the adoption of a daughter's son is valid among

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(2) 64 P. R. 1883.
(3) I. L. R. (1921) 2 Lah. 69.
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non-agricultural high caste Hindus of Amritsar in particular and the Punjab in general, such an adoption has not the effect of severing the adoptee from his natural family and transplanting him into the family of the adoptor. This contention, again, was not raised in the Court below in this form, and there is no evidence whatever on the record to suggest that a daughter's son, who is validly adopted by his maternal grandfather among the *Khatris* or other Hindus of Amritsar or any other place in the Punjab, has a status different from that which a son adopted in the *Dattaka* form possesses under Hindu law. This identical question was raised in *Baldeo Sahai* v. *Ram Chander* (1) and was examined at great length by Jai Lal J. at pages 138 to 142 of the report. The learned Judge, after an elaborate examination of the previous rulings bearing on the point, held that such an adoption has the full effect of a formal adoption under Hindu law and the adopted son severs his connection with his natural family and becomes the male lineal descendant of the adoptive father. This, if I may say with all respect, lays down the law correctly, and I have no hesitation in following it. Mr. Achhru Ram referred us to a Single Bench decision of the Punjab Chief Court in *Baij Nath* v. *Shamboo Nath* (2), but as explained in *Baldeo Sahai* v. *Ram Chander* (1) that case was decided on strict Hindu law; and the observations made therein must be confined to its peculiar facts. The same is true of *Mela Ram* v. *Malik Ram* (3), where Campbell J. sitting in Single Bench, followed without discussion *Baij Nath* v. *Shamboo Nath* (2). It was conceded by Mr. Achhru Ram that

(1) I. L. R. (1932) 13 Lah. 126, 138. (2) 53 P. W. R. 1908.
(3) (1926) 93 I. C. 956.

where among high caste Hindus a daughter's son is allowed to be adopted, he becames a co-parcener in his adoptive father's family. If this is so, he cannot obviously retain his status as a co-parcener in his natural family; for, as was admitted by counsel, a person cannot, at one and the same time, be a member of two different co-parcenaries.

For all these reasons, I hold that the learned Subordinate Judge came to a correct conclusion in holding, that Faqir Chand having been adopted by Narain Das, had no right to succeed to the property of Chuni Lal.

In the plaint the plaintiff had based his claim, in the alternative, on the will, Exhibit P.1, executed by Chuni Lal. The execution of this will has been duly proved and it is no longer contended that the testator did not have a disposing mind at the time. It was urged, however, that it had been executed under undue influence, exercised by Faqir Chand on Chuni Lal. The learned Subordinate Judge has given a very halting finding on this point. He did not find definitely that undue influence was exercised, but observed that "some sort of influence was put forth on Chuni Lal and the will is not free from doubts." Mr. Shamair Chand for the plaintiff-respondents frankly conceded that there was no evidence on the record to warrant this conclusion. The will is a registered document and Chuni Lal lived for more than two years after its execution. It is not suggested that during this period he continued to be under the influence of Faqir Chand. Indeed, it is admitted that for all these years he lived amicably with his junior wife, the mother of Samar Nath defendant, and yet he did not repudiate the will. It must, therefore, be held that the will had been executed by Chuni Lal of his free

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will and accord. There is, however, ample evidence on the record that the property was ancestral in the hands of Chuni Lal, and Samar Nath, on his birth, had acquired an interest in it. The property thus belonged to a joint family, consisting of Chuni Lal and Samar Nath, and consequently the former could not devise it by will. Mr. Achhru Ram conceded that, on the finding that Faqir Chand had been severed from his natural family and that the property had been inherited by Chuni Lal from his father, he had no power to bequeath it. Faqir Chand, therefore, did not acquire any right to the property in dispute by the aforesaid will.

The will, however, can clearly be relied upon by the appellants in proof of the allegation that the sum of Rs.3,000 had been borrowed by Chuni Lal from Faqir Chand, and that he owed it to the latter at the time of the execution of the will. The admission in the will shifted the onus on the contesting defendant to prove that this amount was not due, and admittedly he has produced no evidence to discharge it. There is also no proof that the whole, or any part, of this amount had been repaid by Chuni Lal in his life-time. The plaintiffs are, therefore, entitled to recover the whole of this amount from the estate of Chuni Lal, to which Samar Nath has succeeded.

No doubt, in the plaint the plaintiff had claimed only one-half of this amount and issue No.14 was also framed on that basis; but this was on the assumption that Faqir Chand was entitled to one-half of the property of Chuni Lal. It has, however, been found that Faqir Chand had no share in Chuni Lal's property the whole of which has devolved on Samar Nath. The plaintiffs are, therefore, entitled to recover the whole of Chuni Lal's debt from defendant No.1.

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For the foregoing reasons I would accept this appeal in part, and grant the plaintiffs-appellants a decree for Rs.3,000 against Samar Nath defendant-respondent No.1; but would dismiss their claim for partition of the properties in suit. As none of parties has succeeded in full, I would leave them to bear their own costs in both Courts.

The plaintiffs-appellants shall not be entitled to execute the decree for Rs.3,000, until and unless they have paid Court-fee on this amount both in the lower Court and in this Court.

ABDUL RASHID J.

ABDUL RASHID J.—I agree.

A. N. K.

Appeal accepted in part.

CIVIL REFERENCE.

Before Addison J.

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Feb. 9.

DEPUTY COMMISSIONER, GUJRAT—
Petitioner,
versus
ALLAH DAD AND OTHERS—Respondents.

Civil Reference No. 16 of 1936

Punjab Alienation of Land Act (XIII of 1900) S. 21-A — Failure of the Civil Courts to comply with the terms of the section — whether sufficient cause for extending the time for Revision in High Court — Section 14 — Permanent alienation of land requiring sanction of the Deputy Commissioner —Sanction refused — Alienation to be regarded as a usufructuary mortgage — Adverse possession of alience — starting point of.

Where both the Sub-Judge, 4th Class and the District Judge on appeal failed to send to the Deputy Commissioner a copy of their decree involving permanent alienation of land by a member of a notified agricultural tribe with the result that the Deputy Commissioner moved the High Court very late.