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BOMANJI ARDESHIR v. SECRETARY OF STATE FOR INDIA

Viscount Dunedin

appellants all right to building assessment, and that a declaration should be made to the effect just stated. The rest of the judgment will stand. The appellants must have the costs before this Board and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: Messrs. *Ranken Ford & Chester.*

Solicitor for respondents: *Solicitor, India Office.*

A. M. T

APPELLATE CIVIL.

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Murphy.

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August 28

BABU MOTISING, WHO CALLS HIMSELF BALIRAM DAGDUSING, MINOR BY HIS GUARDIAN *ad litem* THE DEPUTY NAZIR, DISTRICT COURT, DHULIA (ORIGINAL DEFENDANT NO. 1), APPELLANT *v.* DURGABAI, WIDOW OF DAGDUSING, AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 2), RESPONDENTS.*

Hindu law—Benares school—Presumption in the case of immigrants that they are governed by their personal law—Adoption—Express authority of husband essential for validity of adoption.

The Raghuvamshis of Nandurbar who migrated from the province of Oudh and settled in Khandesh are governed by the Benares School of Hindu law.

Abdurahim Haji Ismail Mithu v. *Halimabai*,[1] *Balwant Rao* v. *Baji Rao*[2] and *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*,[3] referred to.

Under the Benares School of Hindu law, express authority by the husband is essential for the validity of an adoption by the widow.

One Dagdusing Ganpatsing residing at Nandurbar in the Khandesh District died on December 14, 1915, leaving his mother, two widows, Hirabai, the elder, and Durgabai, the younger, one daughter, and a brother's widow. The family of Dagdusing belonged to the community of Raghuvamshis which had migrated from Oudh where the Benares School of Hindu law

*Appeal No. 53 of 1925 from the decision of V. P. Raverkar, First Class Subordinate Judge at Dhulia, in Suit No. 407 of 1921.

(1) (1915) L. R. 43 I. A. 95. (2) (1920) L. R. 47 I. A. 218 ; 48 Cal. 30.
(3) (1902) L. R. 29 I. A. 82 ; 29 Cal. 433.

prevailed and had settled in Khandesh five or six generations ago. Since then it was not shown that they had abandoned their original law and had adopted the Hindu law prevailing in Khandesh either with respect to succession or adoption.

Dagdusing died at Nandurbar on December 14, 1915.

On January 16, 1916, the elder widow, Hirabai, purporting to act under an authority given to her by her husband, adopted defendant No. 1.

On August 21, 1921, Durgabai, the junior widow, filed the present suit for a declaration that defendant No. 1 was not validly adopted. The trial Court held that the family of the deceased Dagdusing was governed by the Benares School of Hindu law, that Dagdusing had not given Hirabai any express authority which was required by the law governing the parties, that the adoption of defendant No. 1 was not legal and valid. The plaintiff was granted the declaration sought and was held entitled to a half share in the suit properties. The defendant No. 1 appealed against this decision to the High Court.

Coyajee, with *K. H. Kelkar*, for the appellant.

G. N. Thakor, with *R. W. Desai*, for respondent No. 1.

P. V. Kane, for respondent No. 2.

MARTEN, C. J.:—This is an appeal by the minor defendant No. 1, Babu Motising alias Baliram Dagdusing, against the decision of the learned trial Judge in favour of the plaintiff Durgabai, the widow of one Dagdusing, to the effect that the deceased Dagdusing was governed by the Benares School of Hindu law at the date of his death, and that, accordingly, it was necessary for the validity of any adoption by his widow that she should have been given express authority by the deceased, and that on the facts of this particular case no express authority was proved. Before the

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learned Judge it was also contested whether the adoption had been made at all, but that point was found in favour of the minor, and no contest arises as to that before us.

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We are left, therefore, with two main points: (1) Did the deceased ever expressly authorise his widow to adopt the minor? (2) If not, was the deceased governed by the Benares School as being the school of Hindu law governing his community before it migrated to Khandesh? Or, on the other hand, was his law that of the Bombay school as being the law prevailing in Nandurbar in West Khandesh where he and his community had lived for a great number of years? I propose to take these two points in that order because that is the order in which they were argued before us.

[The learned Chief Justice here discussed the documentary and oral evidence at length and came to the conclusion that the lower Court was right in holding that the minor had not discharged the onus of proof that lay upon him to establish the alleged express oral authority.]

I now come to the next point as to what school of law the deceased was governed by, because, if he was governed by the Bombay school of law, then no express authority would be necessary and the senior widow could adopt. Now here I may interpolate this because I had intended to say it before. The learned Judge thinks that the true explanation of the omissions in the documentary evidence is that Dodhusing, the pleader's clerk, knew a little law but not quite enough, and that he did not realise that, if the deceased was governed by the Benares school, express authority was necessary. Accordingly all his plans were laid on the basis that the ordinary law of Bombay applied and that that is the explanation of, incidentally, the delay

in the case, and why the validity of the adoption was not in the first instance effectively challenged.

On the main point, I think, it is clear that to borrow the language used in *Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah*,[1] this community of Raghuvamshis migrated to Khandesh at some distant period of which no record is preserved. It must be at least five or six generations ago. It may very well be at a much earlier date. On the evidence before us it is impossible to give even an approximate date, except that it is long before living memory. The place from which they migrated was in all probability Oudh. Before us, it was not disputed that the law of the place from which they migrated was the Benares school of law.

Now that being so, the ordinary presumption that the law to apply is the law of the Province in which the parties reside, is rebutted. The presumption next applicable is that this community on migration to Khandesh carried with them the law which had governed them up to migration, namely, the Benares school of law. That is quite clear from numerous authorities. Thus it is stated by Lord Haldane in *Abdurahim Haji Ismail Mithu* v. *Halimabai*[2] (p. 41) :—

"Where a *Hindu family migrate* from one part of India to another, *prima facie* they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they *have so acted as* to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicil on settling in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from *the circumstances*."

[1] (1868) 12 Moo. I. A. 81 at p. 96. [2] (1915) L. R. 43 I. A. 35.

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That was a Mahomedan case. Cases where the parties were Hindus will be found in *Balwant Rao* v. *Baji Rao*,[1] and also in *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*,[2] where it is said (p. 96) :—

"The tenacity of such customs, even under the strain of migration, has been repeatedly recognised by the law in questions such as the present. Accordingly, the question being primarily one of personal as distinguished from geographical custom, it is of the first importance to inquire of the origin of the family."

Then at page 97 it is said :—

"When, returning from successions, regard is had to the evidence relating to ceremonies at marriages, births, and shradhs, it cannot be disputed that there is a strong body of affirmative evidence in support of the continuance and against the relinquishment of the Mitakshara in this family."

Then in *Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah*,[3] to which I have already alluded, it is said (p. 96) :—

"This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rights, and yet acquiesce in a devolution of property in the common course of descent of property in that district, amongst persons of the same race. But still there is in the Hindoo law so close a connection between their religion and their succession to property, that the preferable right to perform the Shradh is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union."

These last two cases show the importance to be attached to ceremonies as indicative of the prevailing personal law of the community in question.

So, too, in *Sarada Prasanna Roy* v. *Umakanta Hazari*,[4] the way in which a presumption may shift according to various facts is shown in the judgment of Mr. Justice Mookerjee at page 373. That was a case where the family of the deceased had migrated into Bengal from the North West Provinces where the Mitakshara law prevailed, but had adopted the Dayabhaga law of Bengal for generations; and it was held

(1) (1920) L. R. 47 I. A. 213 ; 48 Cal. 30.
(2) (1902) L. R. 29 I. A. 82 ; 29 Cal. 433.
(3) (1868) 12 Moo. I. A. 81.
(4) (1922) 50 Cal. 370.

that the succession to the deceased ought to be governed by the Dayabhaga law.

Another instance where the change of personal law was held proved will be found in an old case from Bengal, viz., *Rajchunder Naraen Chowdry* v. *Goculohund Goh*.[1] There there had been a somewhat similar migration, and the Court came to the conclusion that as the family priest was then a Brahmin of Bengal, and as the ancestors of the parties had intermarried with Bengal women, and as their religious ceremonies connected with funerals or marriages were conducted sometimes according to the Mithila law and sometimes according to the Bengal law, and there had been no uniform observance of the ordinances of the Mithila law, under all the circumstances of that particular case the law of Bengal ought to prevail.

Now those being the general principles of law, we have to consider whether the minor has discharged the onus of proof that this community had abandoned their original law, and had adopted the law prevailing in Khandesh with respect to succession to Hindu property. As regards any evidence to show that they had expressly accepted the law of adoption prevailing in West Khandesh, it is quite clear that nothing of the sort is shown. The evidence as to any adoptions at all having ever taken place is extremely meagre. Much less is it shown that any particular custom of adoption has been engrafted on to the personal law of that community. Therefore any attempt to prove an express custom of adoption according to the Bombay school is hopeless on the evidence before us.

But what the appellant does rely on is the fact that in many important respects the community has departed from the customs of the place from which they

[1] (1801) 1 S. D. A. (Beng.) 43.

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migrated. These are principally in relation to marriage. For instance, as regards Oudh, the evidence is that the community there is looked at as one family, and that its members can only marry outside that one family, which is regarded as being one gotra. On the other hand in the present community, they are broken up into many gotras, and it is clear that they are not confined to marriages outside the community.

Another important point is that in Oudh widows cannot remarry. In this community they can and do. In fact we understand that the plaintiff Durgabai herself had a previous husband before she married the deceased. So, too, about divorce. In Oudh, there is no divorce, whereas, in this community there is. Thus in the present case the deceased, in addition to the two widows we are concerned with here, had another wife, whom he had divorced.

On the other hand, as the learned Judge points out, the actual ceremony connected with their marriages is the ceremony that prevailed in Oudh. His view is that this particular community closely resembles a similar community in the Central Provinces, who had also migrated from Oudh; and that in the course of that migration this community had gradually fallen away from the higher standard prevailing in Oudh, and prevailing possibly amongst a rather higher class of people than the ones we have to deal with in the present case. Accordingly, his view is that, though in certain particulars this community has deteriorated according to an orthodox standpoint, yet that deterioration does not amount to this that they have abandoned their original personal law of succession and acquired as a new personal law the law of the country to which they have migrated.

We have carefully considered what has been urged upon us in this respect, and in our opinion the view the learned Judge took is the correct one. In other words the minor has also failed to discharge the onus of proof that lies upon him in this respect also.

The result is that the learned Judge's judgment in our opinion ought to be affirmed on both points with the necessary result that the appeal must be dismissed.

MURPHY, J. :—This appeal relates to the estate of one Dagdusing Purdeshi, who died at Nandurbar, on December 14, 1915. About a month later, on January 16, 1916, one of Dagdusing's widows, Hirabai, adopted a minor boy to her husband. The plaint in the case was filed by another widow Durgabai, and her complaint was that defendant No. 1, the boy alleged to have been adopted by defendant No. 3, had not really been adopted but that the adoption had been put up by interested persons, including one Dodhusing, a relative of the late Dagdusing, and Nathu Ravji, who had been Dagdusing's gumasta. It is also alleged in paragraph 6 of the plaint that, if the adoption had been carried out, it was invalid by the personal law of the parties, who are governed, not by the Bombay school, but by the Benares school of Hindu law, and that by the teachings of that school an adoption by a widow is invalid, unless she has been expressly authorised by her late husband to carry it out.

The first point involved in the appeal, therefore, is, what is the personal law which applies to the family of the late Dagdusing? The ordinary presumption in India is that the inhabitants of a particular district are governed by the provisions of Hindu law which prevail generally in that district. But this presumption does not exist in the case of immigrants, the reason of this exception being that a Hindu is allowed to

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carry his personal law with him, because this personal law is so closely connected with his religion, that it cannot well be separated from it. It appears that Dagdusing belonged to a colony of people of an extraction different from the ordinary inhabitants of Nandurbar in the Khandesh district, and known as Raghuvamshis. They are mentioned in the Bombay Gazetteer, Vol. XII, at p. 54, and are described as immigrants from Northern India, and the evidence in the case also points to the same conclusion, as it shows that there are colonies of Raghuvamshis scattered over a large area at various places in India, and with a common tradition that their clan came originally from somewhere in Oudh. The Raghuvamshis in fact appear to be one of the Rajput clans, and a good deal of evidence has been produced to show what their proper ceremonies and customs as to and in connection with marriage, inheritance and adoption are. It is unnecessary now to discuss all this evidence in detail, but I think it has been made out that in the cases of the better class of Raghuvamshis, the customs in Benares and Oudh and the Central Provinces, where there are similar colonies of Raghuvamshis, differ from those in Khandesh. For instance, in one part of the country the Rāghuvamshis possess only one "gotra," and consequently can only marry their daughters to a man of a different clan. But in Khandesh the Raghuvamshis as a whole are divided into several "gotras," and a Raghuvamshi may marry another Raghuvamshi, provided the sub "gotra" is different. Again, in Oudh, widow remarriage is not allowed: so also divorce. While in Khandesh, both these customs have been introduced into the caste. There is, however, no evidence as to any custom allowing a widow of a man of this caste to adopt without his express authority. In fact, according to the witnesses,

adoptions among them are very rare indeed, and very few have been instanced in the evidence. The Raghuvamshis of Khandesh appear to have departed in many important particulars from the customs of their ancestors, but there is nothing to show that on the one point with which we are now concerned, that is, the custom of adoption, they have come over to the Bombay school of Hindu law which allows a widow to adopt without any express authority from her husband.

I, therefore, think that the Benares school of law has been correctly applied by the learned Judge to this family of Raghuvamshis of Nandurbar.

That being so, it is next necessary to consider whether Hirabai, the adopting widow, had her husband's authority for it when she adopted the appellant in 1916. [After discussing the evidence the learned Judge proceeded:]

For these reasons I agree with the learned Chief Justice that it has not been satisfactorily proved that Dagdusing gave specific directions to his widow to adopt the appellant, and that the lower Court's decree must be confirmed and the appeal dismissed.

Decree confirmed.

B. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Fawcett and Mr. Justice Kemp.

SIR TUKOJIRAO HOLKAR (ORIGINAL DEFENDANT), APPELLANT *v.* SOWKABAI PANDHARINATH RAJAPURKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

1928
September 11.

Letters Patent, clause 14—Joinder of causes of action—Trespass—Conversion—False imprisonment—One of several causes of action arising outside jurisdiction of Court—Cause of action not being for land or other immoveable property—Jurisdiction of Court—Civil Procedure Code (Act V of 1908), Order II, rules 3 and 4, Order XLIX.

The plaintiff alleged that under the orders of the defendant, who was the ruling prince of Indore, she was decoyed from Bombay to Indore in 1915 and

*O. C. J. Appeal No. 1 of 1928; Suit No. 402 of 1927.