

Privy Council Appeal No. 66 of 1922.

Oudh Appeal No. 33 of 1919.

Bishwa Nath Singh - - - - - *Appellant*

v.

Jugal Kishore and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH APRIL, 1923.

Present at the Hearing :

LORD DUNEDIN.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal by Bishwanath Singh, the surviving plaintiff, against a decree of the Court of the Judicial Commissioner of Oudh, which reversed a decree of the Subordinate Judge of Sitapur and dismissed the suit. The suit is for the possession of a two-thirds share of the village Pakauri in the district of Sitapur.

The other plaintiff in the suit was Musammat Gulab Kuar, who is now dead. She was the widow of Baldeo Bakhsh Singh, who died sonless in or about 1891. He was a Hindu and by caste a Raghubansi, and lived in the village of Bamhnawan in the district of Sitapur and owned the village of Pakauri. The widow adopted on the 17th October, 1915, the appellant as a son to her deceased husband, who had given her no authority to adopt a son to him. The question which their Lordships have had to consider in this appeal is whether that adoption was valid, and apparently that was the only question as to which there was a

contention in the Appellate Court. The learned Judges of the Appellate Court, in their judgment, said :—

“ There are thus two points for decision in this appeal, namely, whether Musammat Gulab Kuar had authority from her husband to adopt, and secondly, whether failing such authority she had a right of (by) custom to adopt without authority from her husband.”

The fact of the adoption is not now disputed and is beyond dispute. The family to which Baldeo Bakhsh Singh belonged was subject to the law of the Mitakshara as interpreted by the school of Benares, according to which an adoption by a widow of a son to her deceased husband would be invalid if made without an authority to adopt given to her by her husband, unless such an adoption was authorised by a custom of the family.

The evidence that there was such a custom in this family consisted of statements as to the right of widows to adopt sons to their deceased husbands contained in the *wajib-ul-arzes* of eight villages which had been recorded in the settlement of 1871, that is about forty-four years before the adoption in question here. One of those villages was the village of Bamhnawan, in which Baldeo Bakhsh Singh had lived ; at least two other of the villages were villages in which he or members of his family were interested as proprietors ; and the remaining four villages were villages in which members of his caste had been interested, although their relationship to his family was not proved. There was also some oral evidence of witnesses in support of the custom.

In the *wajib-ul-arz* of Bamhnawan and in some of the other *wajib-ul-arzes* it was stated that widows could adopt sons to their deceased husbands without having had the authority of their husbands to adopt. In the other *wajib-ul-arzes* it was simply stated that widows could adopt. In their Lordships' opinion those statements meant the same thing, that is that widows could adopt sons to their husbands although they had had no authority from their husbands to adopt ; it was so that the Subordinate Judge construed the *wajib-ul-arzes*, and he found that the custom was proved. The Appellate Court was of opinion that the mere statement in a *wajib-ul-arz* that a widow could adopt meant that a widow, who had the authority of her husband to adopt, could make an adoption to him, and consequently held that the statements as to the custom were not consistent and that the custom was not proved. It did not occur to the learned Judges of the Appellate Court that if the statement that a widow could adopt meant that she could adopt if she had had the authority of her husband to adopt, the statement was not a statement of a special family custom, and was unnecessary, as it would be merely a statement of a right which a Hindu widow of a sonless Hindu enjoys everywhere in India, except possibly in families governed by the law of the Mithila School.

Their Lordships are of opinion that the custom was proved and that the adoption of the appellant was valid. It may be

mentioned that the learned Judges of the Appellate Court did not doubt the credibility of the witnesses as to the custom, whose evidence the Subordinate Judge has accepted as true, but they thought that it had not been proved that these witnesses belonged to the family to which Baldeo Bakhsh Singh had belonged.

This appeal has been heard *ex parte*, no respondent having appeared. As the appeal has been heard *ex parte* the Counsel for the appellant has drawn their Lordships' attention to the fact that the learned Judicial Commissioners have not in their judgment expressed a finding on the seventh ground of the appeal to their Court, which was as follows :—“ 7. That the Lower Court should have held that the deed dated the 10th September, 1894, was executed for legal necessity.” The deed of the 10th September, 1894, was a mortgage of the village Pakauri granted by the widow while she was in possession of a Hindu widow's interest in the estate. On that mortgage a decree for sale was made and at the sale the two-thirds share in the village now claimed by this appellant was purchased by some of the defendants to this suit. The Subordinate Judge had found in this suit that the mortgage was not made for necessity. The learned Judicial Commissioners said in their judgment that: “ They (the defendants) denied the adoption and they denied the widow's power to adopt. They also pleaded that even if the adoption was proved, it could not affect the interest acquired by the purchasers before the adoption. On this last pleading no issue was framed and nothing has been said in argument in appeal. It must therefore be taken to have dropped.” The question as to whether the mortgage was or was not granted for necessity was involved in the question as to whether the purchasers at the sale under the decree had acquired title by their purchase. In their Lordships' opinion the learned Judicial Commissioners were under the circumstances justified in holding, as they did, that the only question which remained for them to decide in the appeal was the question as to the validity of the adoption.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Court of the Judicial Commissioner should be set aside with costs, and the decree of the Subordinate Judge should be restored and affirmed.

In the Privy Council.

BISHWA NATH SINGH

o.

JUGAL KISHORE AND OTHERS.

DELIVERED BY SIR JOHN EDGE.

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