1961

March 21.

SALIG RAM

v.

MUNSHI RAM AND ANOTHER

(P. B. GAJENDRAGADKAR and K. N. WANCHOO, JJ.)

Punjab Customary Law—Customs in Amritsar district—Adopted son's right to inheritance in his natural family—Brahmin and Khatri community—Punjab Laws Act, 1872 (Punj. 4 of 1872), s. 5.

M, a Hindu belonging to the Brahmin community in the Amritsar District of Punjab, instituted a suit for the possession of a half share in the property left by his natural paternal grandfather. His father had pre-deceased him, but another son of his grandfather was alive. He had been adopted away in a different family but he claimed that according to the custom of his community in the district he was entitled to get his share in the estate of his natural grandfather. He based his claim on the principle of representation that he stepped into the shoes of his natural father.

Held, that under s. 5 of the Punjab Laws Act, 1872, the law applicable to Hindus in Punjab in respect of questions regarding succession and other matters referred to in that section, is Hindu law in the first instance, but where a custom different from Hindu law is proved then the rights of the parties would be governed by that custom; and whosoever asserts a custom at variance with Hindu law has to prove it, though the quantum of proof required in support of the custom which is general and well recognised may be small while in other cases of what are called special customs the quantum may be larger.

Held, further, that in the Amritsar district of Punjab amongst Brahmins and Khatris, a son given away in adoption can succeed to the property of his natural father if there is no other son of the natural father, but if there is another son he cannot succeed.

Held, also, that in the present case neither under Hindu law nor under the customary law of Punjab could M succeed to the property of his natural grandfather.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 461 of 1957.

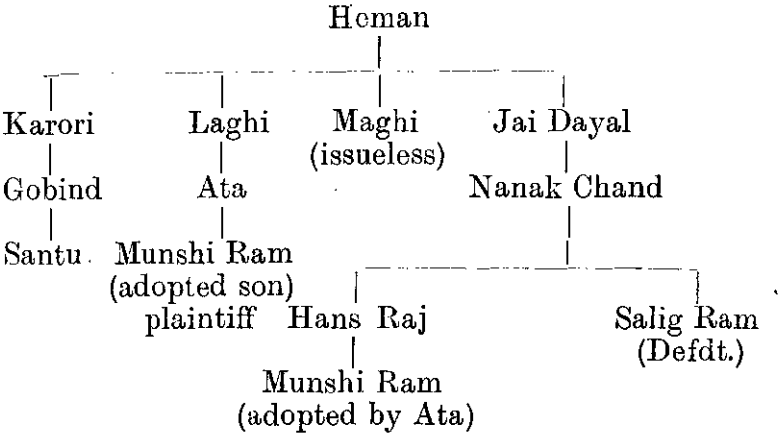
Appeal by special leave from the judgment and decree dated July 5, 1954, of the Punjab High Court in L. P. A. No. 29 of 1953.

N. S. Bindra and *Sardar Singh*, for the appellant.

P. D. Ahuja and *H. P. Wanchoo*, for respondent No. 1.

1961. March 21. The Judgment of the Court was delivered by

WANCHOO, J.—This is an appeal by special leave from the judgment of the Punjab High Court and arises out of a suit for possession of land brought by Munshi Ram, respondent. The following pedigree-table will be useful in understanding the claim put forward by the respondent:—



The claim of Munshi Ram was with respect to the property left by Nanak Chand who is his natural grandfather and also Santu. There is no dispute now about the property of Santu and we are concerned in this appeal only with the property of Nanak Chand. Nanak Chand died in 1939. Munshi Ram's natural father Hans Raj had pre-deceased Nanak Chand. Munshi Ram himself was adopted by Ata in 1918 before the death of his natural father Hans Raj which took place in 1920. It will be clear from these dates therefore that Hans Raj never succeeded to the property of his father Nanak Chand and Munshi Ram had been adopted by Ata even before Hans Raj's death. The case of Munshi Ram was that he was entitled to one-half share of the property left by Nanak Chand as his heir according to Zamindara custom. The parties, it may be mentioned, are Brahmins and Munshi Ram claimed joint possession of the half share of the property left by Nanak Chand on his

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death. The suit was resisted by Salig Ram (defendant-appellant) who is the other son of Nanak Chand. His case was that Munshi Ram was not entitled either according to personal law or the *riwaj-i-am* of Amritsar district to any share in the property left by Nanak Chand. The trial court held that Munshi Ram was entitled to succeed to the property left by Nanak Chand along with Salig Ram and decreed the suit accordingly. Salig Ram went in appeal to the District Judge but failed. He then went in second appeal to the High Court but the second appeal was also dismissed. The High Court having refused to grant a certificate the appellant applied to this Court for special leave which was granted; and that is how the matter has come up before us.

In questions regarding succession and certain other matters, the law in the Punjab is contained in s. 5 of the Punjab Laws Act, No. IV of 1872. Clause (b) of that section provides that the rule of decision in such matters shall be the Hindu law where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act or has been modified by any such custom as is referred to in cl. (a) thereof. Clause (a) provides that any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished and has not been declared to be void by any competent authority shall be applied in such matters. The position therefore that emerges is, where the parties are Hindus, the Hindu law would apply in the first instance and whosoever asserts a custom at variance with the Hindu law shall have to prove it, though the quantum of proof required in support of the custom which is general and well recognised may be small while in other cases of what are called special customs the quantum may be larger. As was pointed out by Robertson, J., as far back as 1906 in *Daya Ram* v. *Sohel Singh and others* (1), "in all cases under s. 5 of the Punjab Laws Act, it lies upon the person asserting that he is ruled

(1) 1906 P.R. No. 110.

in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary it is only when the custom is established that it is to be the rule of decision." These observations were approved by the Privy Council in *Abdul Hussein Khan* v. *Bibi Sona Dero and another* (1). The same view has been taken by this Court in *Ujagar Singh* v. *Mst. Jeo* (2).

We have therefore in the first instance to apply Hindu law to the parties to this suit, and it is only when a custom different from Hindu law is proved that rights of the parties would be governed by that custom. Munshi Ram's case was that he was adopted by Ata according to custom (i.e., in accordance with the mode prevalent in the community for purposes of adoption) during the lifetime of Hans Raj. Thus Munshi Ram having been adopted by Ata would have no right left in the family of his natural father Hans Raj, unless the adoption was in the *dvyamushyayana* form. It was however never the case of Munshi Ram that the adoption was in *dvyamushyayana* form and so far as Hindu law is concerned, if it applies to this case Munshi Ram would not be entitled after the adoption to succeed to the property left by Nanak Chand.

But Munshi Ram's case was that according to Zamindara custom he was entitled to succeed to half of the properties left by Nanak Chand. The question therefore arises: what the Zamindara custom is in the present case. In the plaint the custom was not actually pleaded, though strictly speaking this should have been done. However, the custom that is relied upon is to be found in para. 48 of the Digest of Customary Law in the Punjab by Rattigan at p. 572, 13th Edition. This paragraph appears in section V dealing with "Effect of Adoption on Succession" and is in the following terms:—

"An heir appointed in the manner above described ordinarily does not thereby lose his right to succeed

(1) (1917) L.R. 45 I.A. 10, 13. (2) [1959] Supp. 2 S.C.R. 781.

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to property in his natural family, as against collaterals, but does not succeed in the presence of his natural brothers."

It is not disputed before us that para. 48 applies in the case of adoption also; but what is contended on behalf of the appellant is that para. 48 only mentions a custom prevalent throughout the Punjab while the *riwaj-i-am* of Amritsar district from which area the parties come also records a custom confined to that area which really governs the parties. It appears that in 1865 the *riwaj-i-am* of Amritsar district stated that "an adopted son will not be a co-sharer amongst his brothers, in the property left by his natural father", *i.e.*, a son given away in adoption will not inherit in the natural father's family. We may in this connection refer to *Jai Kaur and others* v. *Sher Singh and others* (1), where this Court held that—

> "there is therefore an initial presumption of correctness as regards the entries in the *Riwaj-i-am* and when the custom as recorded in the *Riwaj-i-am* is in conflict with the general custom as recorded in Rattigan's Digest or ascertained otherwise, the entries in the *Riwaj-i-am* should ordinarily prevail except that as was pointed out by the Judicial Committee of the Privy Council in a recent decision in *Mt. Subhani* v. *Nawab* (2), that where, as in the present case, the *Riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weak, and only a few instances would suffice to rebut it."

As females are not concerned in this case, the entries in the *riwaj-i-am* of Amritsar district in 1865, if they conflict with para. 48 of Rattigan's Digest, should prevail. On that view Munshi Ram would have no right to succeed in the family of his natural father after he was adopted by Ata. The High Court, however, pointed out that there were decisions of courts which did not accept the *riwaj-i-am* of Amritsar district of 1865 as laying down the correct custom and therefore para. 48 of the Digest by Rattigan would still prevail.

(1) A.I.R. 1960 S.C. 1118. (2) A.I.R. 1941 P.C. 21.

In this connection the High Court relied on *Majja Singh and others* v. *Ram Singh* (1). That was however a case of Jats and not of Brahmins and the person who was adopted in that case was an only son. That case would not therefore necessarily override the custom so far as it applies to Brahmins. In any case the position is made clear by the Manual of Customary Law prepared in 1911-12 by Mr. Craik. The custom recorded in that compilation is that with the exception of Brahmins and Khatris, an adopted son does not retain his right to inherit from his natural father, even if the latter dies without leaving any other son. The High Court however pointed out that the Brahmins and khatris did not accept this custom; but it failed to notice a further paragraph in answer to that very question where it was pointed out that among Brahmins and Khatris the same custom prevailed except that where there was no other son, the son who was adopted in another family would succeed to the property of his natural father. In 1940 the customary law of Amritsar district was again compiled and the custom recorded is that an adopted son loses his right to inherit from his natural father but if the latter dies without other sons the adopted son cannot inherit as a son but may inherit collaterally as a successor of his adoptive father.

The position as it emerges from a comparison of the entries in the *riwaj-i-am* of 1865, 1911-12 and 1940 is somewhat confused and the High Court therefore thought that the custom recorded in para. 48 should be adhered to as Brahmins and Khatris did not accept the extreme position that a son given away in adoption was excluded altogether from succeeding in his natural father's family as recorded in 1911-12. This conclusion seems to be fortified by the statements of Brahmins and Khatris in 1911-12 that a son given away in adoption succeeded in the family of his natural father if he had no brothers—though the High Court did not notice this part of the answer in the *riwaj-i-am* of 1911-12. The conclusion therefore at which we arrive is that amongst Brahmins and

(1) 1879 P.R. No. 43.

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Khatris of Amritsar distict, a son given away in adoption can succeed to the property of his natural father only if there is no other son of the natural father; if there is another son he cannot succeed.

Now let us see how this proposition works out in the present case. In this case Munshi Ram was claiming to succeed not to the property of Hans Raj, his natural father, but to the property of Nanak Chand his natural grandfather. If the case was for succession to the property of the natural father, namely, Hans Raj, the custom might have favoured Munshi Ram, for Hans Raj had no other son and Munshi Ram would thus have succeeded to the property of Hans Raj. But Hans Raj, having died in the lifetime of his father (Nanak Chand), never succeeded to the property of his father. The High Court, however, thought that on the principle of representation Munshi Ram stepped into the shoes of Hans Raj and therefore was entitled to succeed to the estate left by Nanak Chand as his father would have succeeded if he had been alive at the time of the death of Nanak Chand. But if Munshi Ram is to succeed by the application of the principle of representation it would follow that Munshi Ram would really be deemed to be Hans Raj at the time of the death of Nanak Chand. In that case the position would be that Nanak Chand would have died leaving two sons, namely, Salig Ram and Munshi Ram in the guise of Hans Raj. But Munshi Ram having been adopted away and there being another son of Nanak Chand, even the custom recorded in para. 48 would exclude Munshi Ram because then there would be a brother of Munshi Ram alive in the family of Nanak Chand and this brother would succeed in exclusion of Munshi Ram who would be representing his father. The argument on behalf of Munshi Ram is that though for the purpose of representation Munshi Ram would be treated as if he stood in the shoes of his father, the representation could not go further and it could not be held that there were two sons of Nanak Chand living at the time of his death, one of whom in the guise of Munshi Ram was adopted away. We cannot accept this

argument; and if Munshi Ram is to succeed on the principle of representation that principle must be fully worked out and he must for all intents and purposes be deemed to be Hans Raj. As the person who is deemed to be Hans Raj was adopted away and has a brother in the shape of Salig Ram he would not succeed even under the custom recorded in para. 48 of Rattigan's Digest. The position therefore is that neither under Hindu law nor under the custom recorded in para. 48 can Munshi Ram succeed to the property of Nanak Chand. We therefore allow the appeal and set aside the decree of the courts below and dismiss the suit of the plaintiff-respondent so far as the property of Nanak Chand is concerned. In the circumstances we also order the parties to bear their own costs throughout as the High Court did.

Appeal allowed.

LAKSHMAN SINGH KOTHARI

v.

SMT. RUP KANWAR

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March 22.

(K. SUBBA RAO and RAGHUBAR DAYAL, JJ.)

Hindu law—Adoption—Validity—Essential requirements—Ceremony of giving and taking—Delegation of authority.

In order that an adoption may be valid under the Hindu Law there must be a formal ceremony of giving and taking. This is true of the regenerate castes as well as of the Sudras. Although no particular form is prescribed for the ceremony, the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent must receive him, the nature of the ceremony varying according to the circumstances. After exercising their volition to give and take the boy in adoption, the parents may, both or either of them, delegate the physical act of handing over or receiving to a third party.

Consequently, in a case where the natural father merely sent the boy in another's company to the house of adoptive father who received him but there was no delegation of the power to give in adoption or the ceremony of giving and taking,