Privy Council Appeal No. 53 *of* 1945

Mangibai Gulabchand and another – – – – *Appellants*

v.

Suganchand Bhikamchand and others – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH APRIL, 1948

Present at the Hearing :

LORD NORMAND

LORD MACDERMOTT

SIR JOHN BEAUMONT

[*Delivered by* LORD NORMAND]

This is an appeal from a judgment of the High Court at Bombay reversing a judgment of the First Class Sub-Judge Thana. The suit is for a declaration that the plaintiff (now the first respondent) is entitled as an adopted son to a half-share and partition of certain joint family property in the Thana district, Bombay. The only question now in issue is whether the adoption of the first respondent by the second respondent, the widow of one Bhikamchand, a member of the joint family, is valid. The Sub-Judge held it invalid because it was made without the consent either of the adopter's deceased husband or of the nearest male member of his family, his brother Gulabchand, whose heirs are the present appellants. The High Court held that the adoption was valid notwithstanding the absence of these consents.

The joint family are Marwari Jains of the Visa-Oswal community. The family migrated some generations ago from Jodhpur state to the Thana district. The two brothers, Gulabchand and Bhikamchand, lived together till Bhikamchand died in April, 1926. In 1927 his widow Jadavbai wanted to adopt a son (not the first respondent) but Gulabchand objected and she then abandoned the idea. On the 30th April, 1936, however, she sent a formal notice announcing her intention to make an adoption to Gulabchand, who replied that she had no right to make an adoption and that he was strongly opposed to it. Nevertheless she adopted the first respondent on 8th May, 1936; a deed of adoption was executed on the same day and registered on the 2nd June, 1936. The appellants refused to admit the validity of the adoption and to give the first respondent a share of the family property. Accordingly on 3rd September, 1936, the first respondent, through his natural father as guardian and next friend, instituted the suit.

Both the Sub-Judge and the High Court have laid on the first respondent the *onus* of proving that a childless Jain widow in Bombay is by custom entitled to adopt a son to her deceased husband, without either the consent of her deceased husband or of his nearest male relations. The Sub-Judge held that this *onus* had not been discharged, and he regarded

as important an answer given in cross-examination by the first respondent's natural father that a widow in a joint family in the community to which the parties belong must have the permission of her husband or of the eldest male member of the family before she could make a valid adoption. The High Court on the other hand attached little importance to this piece of evidence, and held that the *onus* had been discharged by evidence of the customary law in the state of Jodhpur from which the parties had originally come. This evidence consisted of a certified copy produced by the first respondent of a letter from the Chief Minister of the Jodhpur Government to the Judicial Minister, communicating the decision of the Maharaja on three appeals to him from the Chief Court that an adoption by a Jain widow without consent was valid.

Since the High Court gave judgment there has been a decision of this Board (*Pemraj* v. *Musammat Chand Kanwar*) that in all parts of India except Madras and the Punjab, there is a presumption that the custom prevails among all Jains by which a widow may adopt without consent, and that the *onus* lies on those who assert a family or local custom to the contrary.

Counsel for the appellants submitted that it would now be proper that they should have an opportunity of adducing further evidence to discharge the *onus* thus laid upon them. The argument was that the appellants might not have offered all the evidence available to them because they were entitled to assume that the *onus* lay on the first respondent and to regard the evidence of his natural father, referred to above, as fatal to his case. Their Lordships are unable to assent to the appellants' submission. The appellants were in no way misled into withholding evidence; they were not entitled to assume, when they were leading their evidence, that the *onus* would ultimately be found to rest on their opponent, and it was for them to adduce all the evidence that they deemed helpful for their case. They therefore cannot be allowed the indulgence of a second opportunity.

On the evidence as it stands the appellants have entirely failed to discharge the *onus*. The single answer of the first respondent's father is not an admission binding the first respondent, and it is no more than an opinion of a witness not specially qualified to give one.

It is therefore unnecessary for the decision of the appeal to consider whether the certified copy of the letter by the Chief Minister of the Government of Jodhpur was admissible. It seems, however that both parties without going to the trouble and expense of legal proof put forward documents bearing on the law of Jodhpur, and that these documents were received and referred to in the Court of the Sub-Judge without objection. In these circumstances the High Court were entitled to have regard to them.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed and that the judgment of the High Court should be affirmed. The appellants must pay the costs of the appeal.

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DELIVERED BY LORD NORMAND

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