Privy Council Appeal No. 14 *of* 1920.

Ramkishore and others - - - - - - - *Appellants*

v.

Jainarayan and others - - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

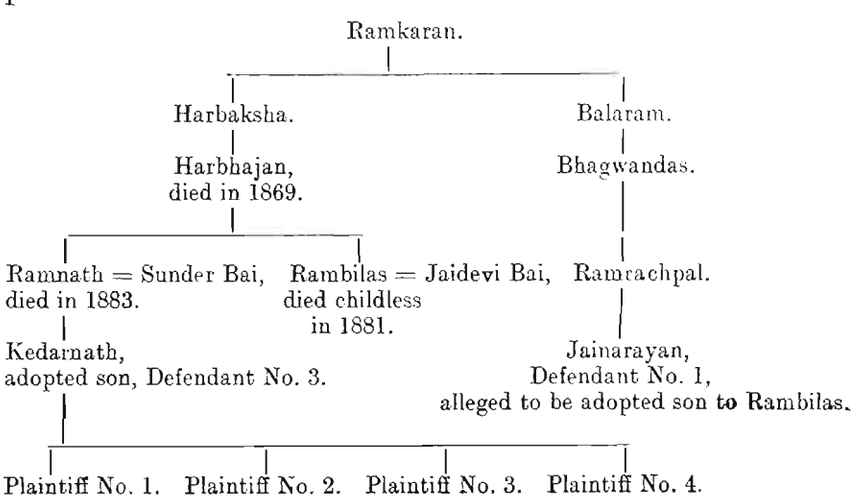
JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JULY, 1921.

Present at the Hearing:

LORD ATKINSON.
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR ROBERT STOUT.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal by the plaintiffs in the suit from a decree, dated the 22nd October, 1917, of the Court of the Judicial Commissioner, Central Provinces, which reversed a decree, dated the 7th August, 1916, of the District Judge of Wardha, and dismissed the suit. The suit is a suit on title for possession of the properties mentioned in the amended plaint. The plaintiffs are the sons of Kedarnath, who is one of the defendants. The principal defendant is Jainarayan, and it is his title to the properties claimed by the plaintiffs which is in question. Jainarayan's title depends on whether he was validly adopted as a son to Rambilas, who was a brother of Ramnath who had adopted Kedarnath. The following pedigree will show the position of the parties.



The parties to the suit are Hindus of the Dhusar caste. The members of the Dhusar caste claim to be Brahmins, but that claim is not admitted, nor is it proved in this suit. Ramkaran and his two sons lived at Kutubpur in the district of Gurgaon, which was a district of the North-Western Provinces until after the mutiny of 1857, when, in 1858, it was transferred to the Punjab. Balaram and his descendants continued to live at Kutubpur until after the adoption of Jainarayan, the validity of which is in dispute in this suit. In or about the year 1836, Harbhajan migrated from Kutubpur to the Central Provinces and settled at Ashti in the District of Wardha; and acquired considerable property, which included the immovable property to which the suit relates. It is admitted that Harbhajan carried his personal law with him, and that this appeal has to be decided in accordance with that personal law. Harbhajan died in 1869, leaving his sons, Ramnath and Rambilas him surviving. Ramnath married Sunder Bai, and, being childless, he adopted Kedarnath as a son to him. Ramnath died in 1883. The four plaintiffs are the sons of Kedarnath. Rambilas married Jaidevi Bai and died childless in 1881, leaving his wife Jaidevi him surviving.

In 1886 or 1887, the exact date is uncertain, Jaidevi Bai in fact adopted Jainarayan as a son to her deceased husband Rambilas. Whether that adoption was or was not valid is the question upon which this appeal depends. At the time of the adoption of Jainarayan he was an orphan, his father and his mother being then dead, and he was nine or ten years of age, and was under the guardianship of Sunder Bai, the widow of Ramnath. Of the fact of the adoption there cannot be a doubt, the factum of the adoption is not disputed. It took place at Kutubpur, in the presence of members of the Dhusar caste then assembled, and of others, including Brahmins, some of whom recited Mantras, and the ceremonies observed on the occasion were apparently similar to those which were usually observed when Dhusars of Gurgaon adopted sons. Jainarayan was, in the presence of those assembled at Kutubpur, given in adoption by Sunder Bai to Jaidevi Bai and was placed by Sunder Bai on the lap of Jaidevi Bai as an adopted son. No one at the time, or for many years afterwards, questioned the validity of the adoption. On the adoption Kedarnath, without any protest or dispute, admitted Jainarayan as an 8 annas sharer in the joint family estate, that being the position which Rambilas had held when he was alive. Ramkishore, who is the plaintiff No. 1, is said to have been born on the 20th December, 1886, but whether he was born before or after the adoption of Jainarayan has not, so far as their Lordships are aware, been proved. His brothers, the plaintiffs No. 2, No. 3 and No. 4, were born after Jainarayan had been adopted. In 1897 Jaidevi Bai died, and in 1898, Kedarnath and Jainarayan partitioned the family estate between them in two equal parts, and Jainarayan got as his share the property which is now claimed by the plaintiffs in this suit.

The plaintiffs' case is that the law of the Mitakshăra, as

recognised by the School of Benares, applies to the family, and that no custom at variance with that law has been proved ; and, consequently, that the adoption of an orphan, as Jainarayan was when he was adopted, is invalid. The case of Jainarayan is that the Dhusars of the District of Gurgaon are governed by a custom and not by the law of the Mitakshăra, as recognised by the School of Benares, and that according to that custom the adoption of an orphan is valid. It was for Jainarayan to establish that custom.

It is beyond question that, according to the law of the Mitakshăra, as recognised by the School of Benares, an orphan cannot be adopted. It is also beyond doubt that in some parts of Northern India, particularly in districts now in the Punjab or adjacent to the Punjab, the strict rules of the Mitakshăra, as recognised by the School of Benares, have not been followed by some castes, tribes and families of Hindus, and that customs which are at variance with the law of the Mitakshăra, as recognised by the School of Benares, have been for long consistently followed and acted upon, and that when such customs are established they, and not the strict rules of the Mitakshăra with which they are at variance, are to be applied. Such customs relate to a variety of subjects, as for instances to widows, adoptions, and the descent of lands and interests in lands ; they are to be found principally amongst the agricultural classes, but they are also to be found amongst classes which are not agricultural. It has been found by each of the courts below that the Dhusars are not an agricultural class, although many of them are owners of land.

The Trial Judge, in a very carefully considered judgment, came to the conclusion that "Jainarayan's adoption was not valid, as he was an orphan at the time of his adoption." There was evidence before him upon which he might have found that there was a custom amongst the Dhusars according to which an orphan might be validly adopted, but he did not consider it strong or satisfactory. Three cases in which it was alleged that orphans had been previously adopted were mentioned by witnesses ; in one of those cases that of Ramchandra, the evidence that an orphan had been publicly adopted was, their Lordships consider, convincing. In the other two cases, those of Harnarayan, otherwise Narayan Das, and Jwalaprashad, there was evidence that an orphan had been adopted, although the Trial Judge did not consider it satisfactory, in one case—because it appeared to be evidence of repute, and in the other case—because it did not appear that the witness had been present at the adoption. The evidence to which the Trial Judge referred had been taken on commission and not before him. It appears from his judgment that the Trial Judge in considering the evidence of witnesses as to adoption of orphans by Dhusars did not overlook the fact that such adoptions must have been few and of rare occurrence. In coming to the conclusion that Jainarayan's adoption was invalid, the Trial Judge was obviously much influenced by the fact that the "Code of Tribal Custom of the Gurgaon District" did not

expressly say anything about the adoption of an orphan. The "Code of Tribal Custom of the Gurgaon District," to which the Trial Judge referred, was a record of the customs of the Gurgaon District, which was prepared at various dates in 1878 and 1879 by Mr. Wilson, who was the assistant settlement officer in the revision of the settlement of the District of Gurgaon ; it was prepared from the answers of the village headmen of each of the principal land-owning tribes of the district to a series of questions put to them with the approval of the Punjab Government. Some of those answers show that the Dhusars had by their customs materially departed from the rules of the Mitakshăra, as recognised by the School of Benares, but no question was expressly directed to the adoption of an orphan.

That the adoption of Jainarayan was considered to have been a valid adoption at the time, and for years afterwards, by everyone concerned, the Trial Judge found. In his judgment he said : "Under the same impression (*i.e.* that the family was governed by special customs), the right of Jaidevi Bai to adopt a son for her husband was not disputed, and the status of Jainarayan as an adopted son of Rambilas, and as being capable of owning the share and interest of his adoptive father in the family estate, was as a matter of course recognised. None thought otherwise. There was no occasion for dispute--all concerned thought that what was done was perfectly valid. None had any idea that they were governed by the ordinary Hindu law, and that under the law by which they were governed, Jainarayan's adoption by Jaidevi Bai was invalid and had no legal existence. Several circumstances must have supported them in this their impression, which he however, considered as mistaken. There was not that strictness in the observance of the conditions of an adoption, recognised by Hindu law, in their caste. The customs of the Punjab were being observed by them, and the landed property owned by them in that province was being dealt with accordingly, so everybody accepted the right of Jaidevi Bai to adopt, and the status of Jainarayan as her adopted son."

As the Trial Judge had come to the conclusion that the adoption was invalid he made a decree in favour of the plaintiffs for possession of the lands claimed, except some tenancy lands, to which he held that the plaintiffs had no title. From that decree Jainarayan appealed to the Court of the Judicial Commissioner, and the plaintiffs filed cross objections as to the tenancy lands.

The learned judges of the Judicial Commissioner's Court, who heard the appeal, considered that if the Trial Judge had been of opinion that the Revaj-i-am applied to Dhusars, who are not an agricultural class, he would have held that the adoption of Jainarayan was valid, and they pointed out that some of the special customs relating to adoption set out in the Revaj-i-am are specificially stated to apply to Dhusars, and establish the proposition that Dhusars are governed in matters of adoption not by the orthodox Hindu law but by customary law. They came

to the conclusion that under the Punjab customary law there is no religious significance attached to the appointment of an heir, and that there is nothing in the customary law applicable to Dhusars which precludes the adoption of an orphan, and as to the oral evidence as to orphans having been adopted by Dhusars, they said : " We agree with the District Judge's remarks in paragraph 23 of his judgment, to this extent, that if the oral evidence were the only evidence to prove a custom of adopting orphans, it would not be sufficient to prove such a custom if the parties were orthodox Hindus. The instances given of adoption of orphans do, however, support the view that the adoption of an orphan is not considered contrary to proper usage, and the adoption of at least one orphan besides Jainarayan, namely, Ramchandra, is satisfactorily proved. It is hardly possible to suppose that even one instance would be possible if the Dhusars consider themselves governed by the Mitakshara law as to adoption."

The learned judges of the Judicial Commissioner's Court found that the adoption of Jainarayan was valid, and by their decree allowed the appeal and dismissed the suit. From that decree this appeal has been brought.

Their Lordships are satisfied that the parties to this suit are governed, not by the Mitakshăra as recognised by the School of Benares, but are governed by the customary law of the Dhusars of the District of Gurgaon. They have further come to the conclusion that it is consistent with that customary law that the adoption of orphans by Dhusars is valid. They have come to that conclusion for the following reasons. Adoptions which would be invalid if not permitted by that customary law are by that customary law permitted, as for example, a brother can be adopted, a daughter's son can be adopted, there is no limit as to the age of the person who may be adopted, a married man who has had children may be adopted, and a guardian may give a boy in adoption. Besides the case of Jainarayan there is clear evidence of one who had been present at the adoption, that another orphan, Ramchandra, had been adopted, and there is evidence that Harnarayan and Jwalaprashad, who were orphans, had been adopted. Jainarayan's adoption took place openly in the presence of Dhusars at Kutubpur, and of many others who had been assembled there for the purpose of Jainarayan being adopted. There was no concealment. Everyone knew that he was an orphan. For years after that adoption everyone treated Jainarayan as a lawfully adopted son, and no one suggested that he had not been validly adopted. Kedarnath, who was the person who was most interested to dispute the adoption, acknowledged that the adoption was valid, and admitted Jainarayan as a validly adopted son to Rambilas, to the share in the family property which a naturally born son of Rambilas, if there had been one, would have enjoyed. Their Lordships can come to no other conclusion than that Jainarayan was validly adopted.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

RAMKISHORE AND OTHERS

v.

JAINARAYAN AND OTHERS.

DELIVERED BY SIR JOHN EDGE.

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