Privy Council Appeal No. 110 *of* 1917.

Pratapsing Shivsing and another - - - - - *Appellants*

v.

Thakor Shri Agarsinghji Raisinghji - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 13TH DECEMBER, 1918.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

This is an action in ejectment brought by the Thakur of Gamph in the Court of the Subordinate Judge of the Ahmedabad District for possession of a village called Piparia. His suit is based on the ground that the village in question forms part of the estate of Gamph, that many years ago it was granted for maintenance or *jivai* by one of his ancestors to a junior member of the family to be held and enjoyed so long as the grantee's male line lasted, and that on the death of the last holder named Kalian Sing in 1903 without male issue, it reverted to him as the owner of the original estate under the custom attached to such *jivai* grants.

The action was brought on the 15th July, 1907, against Bai Devla, the widow of Kalian Sing, who was admittedly in possession of the village claiming to hold the same for her minor adopted son, who was also joined as defendant No. 2, whom she alleged she had taken in adoption shortly after the death of her husband. Devla has since died, and the adopted son is the present appellant before this Board. The third defendant is a mortgagee claiming under a bond executed by Kalian Sing.

Both the plaintiff and the defendant Shivsing are Chudasama Girassias, a caste of Hindu Rajpoots who, it is said, settled several generations ago in the Dhanduka Taluka appertaining to the Ahmedabad District. The Thakur of Gamph appears to have been one of their principal chiefs, and possessed at one time a considerable number of villages which, by successive grants to junior members of the family, have dwindled now to eight or nine, and the Thakur is naturally anxious to get back as many of these grants as possible.

The plaintiff states in his plaint that the grant in question in this case was made by one Milaji, his ancestor in the fifth degree, in favour of his third son Rupsingi, that on the death of Rupsingi it came into the possession of his two sons Kesarising and Kaliansing ; that subsequently on Kesarising's death without issue, the entire village came into the hands of Kaliansing who held it until his death in 1903 ; that Kalian also died without leaving any male issue, and that accordingly the village reverted to the grantor's estate, but the defendants were holding the property wrongfully and illegally without any title. The relief sought was of a twofold character, viz. (1) a decree for possession and (2) for a declaration that the second defendant's adoption was " void and illegal."

The widow and the adopted son, Shivsing, denied the right of reversion claimed by the plaintiff ; they alleged that in 1871 there were disputes between the plaintiff's father and Kaliansing regarding his title to Piparia, which were settled by arbitration, and documents were exchanged between the parties by which the plaintiff's father acknowledged the absolute title of Kaliansing to the village in question excepting a small area which was taken by the plaintiff's father as consideration for the settlement. They also alleged that there was no failure of Kaliansing's male line as the second defendant had been validly adopted. To this the plaintiff demurred and alleged on his side a custom among the Chudasama Girassias which precluded the widow from making an adoption to her deceased husband or inheriting a *jivai* grant. This latter allegation was evidently put forward in order to strengthen the first, for it seems to have been thought that she could not make an adoption unless she could vest the adopted son with any rights to property owned by the deceased in his lifetime, the idea apparently being that the son's right was dependant on the widow's right to inheritance.

Upon these allegations a number of issues were framed by the Trial Judge, but, as usually happens in India, the case was overladen with a variety of considerations which had only an indirect bearing on the main questions for determination. The Subordinate Judge held that, although there was no definite evidence from examples within the Taluka of Gamph regarding the custom relating to the right of reversion, judging, however, from cases in neighbouring estates, the plaintiff had succeeded in establishing it. He further held that the plaintiff had failed to establish the custom debarring the widow of a *jivaidar* from inheriting his

estate or from making an adoption to him. But, throwing the onus on the defendant, he also held that although the defendant was validly adopted he had not shown that his adoption affected the plaintiff's right to resume the *jivai*. And he went on to hold that the documents executed in the proceedings of 1871 amounted to an acknowledgment on the part of the plaintiff's father of an absolute title and interest in Kaliansing in the village of Piparia which descended to the defendant No. 2, and that the plaintiff was estopped from questioning his title. Proceeding on these grounds the learned Judge dismissed the plaintiff's claim.

On the plaintiff's appeal from this decree the learned Judges of the Bombay High Court have affirmed the finding of the first Court with regard to the factum and, as their Lordships understand the judgment of the High Court, the validity of Shivsing's adoption; they agreed with the Trial Judge as to the existence of a right of reversion in the owner of the *Taluka* in respect of the *Jivai* on the death of the last *Jivaidar* without male issue. But they disagreed with him on the construction of the documents of 1871; they considered that the words on which the Subordinate Judge rested his judgment that the plaintiff's father acknowledged an absolute title in Kalian Sing did not bear that meaning; and that even if those words did have that meaning, the agreement entered into would amount to an "alienation," and as the estate of Gamph was at the time in charge of the Talookdari Settlement officer the transaction was inoperative under the provisions of Section 12 of Bombay Act VI of 1862. Finally, they considered that although the first defendant was validly adopted and was entitled to succeed to other property left by his adoptive father, yet as his adoption took place after the reversion had taken effect and after Piparia had vested in the plaintiff which occurred immediately Kaliansing died, the plaintiff became entitled to possession of this *Jivai* village free of any burden created by the *Jivaidar*. They accordingly reversed the order of the Subordinate Judge and decreed the plaintiff's claim.

The present appeal to His Majesty in Council is by the defendants, and the points in issue have been elaborately argued on both sides. Their Lordships are disposed to agree with the Subordinate Judge with regard to the intent and meaning of the documents of 1871, but in the view they take of the principal question involved in the case, they do not consider it necessary to decide whether the transaction evidenced by those documents amounted to an "alienation" within the meaning of Section 12, Bombay Act VI of 1862, and was consequently invalid. They wish to deal with the case on the assumption that the nature of the grant and the status of the *Jivaidar* remained unchanged since the grant, and that what took place in 1871 did not enlarge his rights. They also accept the conclusion at which the Courts in India arrived regarding the existence of a right of reversion in the holder of the Gamph estate.

Now it is to be observed that when a hereditary grant of the nature in dispute is made by a Hindu subject to the limitation that it shall be descendible in the direct male line, or, in other words, that it shall enure so long as the grantees' male line lasts, the existence of the line must be determined by the rules and provisions of the Hindu law, unless there be any custom varying those rules. The limitation itself is a variation of the Hindu law; where a further custom is alleged confining the line to natural-born issue alone, it must be proved affirmatively and conclusively, and not derived from implications. The plaintiff in order to prove this further limitation, put forward a custom among the Chudasama Girassias prohibiting widows from making an adoption—a custom wholly at variance with the Hindu law and Hindu religious conceptions. It it not necessary to determine in this case whether such a custom, even if proved to exist in certain localities, would be recognised in the British Indian Courts. But here the plaintiff has entirely failed to establish the custom alleged by him. In the case of *Verabhai Ajubhai* v. *Bai Hiraba*,[1] which also arose among the Chudasama Girassias, the same custom was put forward with the same result. Both the Courts in India have in this case found that the second defendant was duly taken in adoption by Devla Bai. With that conclusion their Lordships concur. Their Lordships also hold that she had the power to make the adoption, and that Shivsing has the status of a validly adopted son.

Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son. And a learned authority on Hindu law has explained that the only express text by which the heritable rights of an adopted son are "contracted" refers to the case of his sharing the heritage with an after-born natural (*aurasa*) son. "In every other instance the adopted son and the son of the body stand exactly in the same position."[2] Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no *hiatus* in the continuity of the line. In fact, as Messrs. West and Bühler point out in their learned treatise on Hindu law, the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible.[3] Much reliance has been placed on behalf of the respondent on the case of *Bamundoss Mookerjea* v. *Mussumat Tarini*.[4] The only point decided in that case was that a mere power given to a widow to adopt does not preclude her from maintaining an action in her own name and in her own right in respect of the property in her possession as her husband's widow.

[1] L.R. 30 I.A. 234.
[2] Rajcomar Sarbadhikary's "Lectures on Hindu Law," p. 557.
[3] P. 996. [4] 7 Moo. I. A. 169.

But it was also pointed out that there was no power under the Hindu law to compel a widow to adopt. Unless there is a time limit imposed in the authority which empowers her to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted. The circumstance under which her power becomes extinguished is clearly pointed out by their lordships in *Bhoobun Moyee's* case,[5] and in the judgment of this Board delivered by Lord Haldane in *Madana Mohana Deo* v. *Purushothama Deo*.[6]

The right of the widow to make an adoption is not dependant on her inheriting, as a Hindu female owner, her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her. In *Raghunadha* v. *Brozo Kishoro*[7] on the death of an elder brother in an undivided family the estate, which was impartible, had devolved on the younger brother. Two years after the death of her husband the widow of the elder brother adopted a son to him. And this Board held that the adoption had the effect of defeating the right of the younger brother to the estate, and that the adopted son was entitled to possession. The rule enunciated in *Raghunadha's* was followed in *Bachoo Harkisondas* v. *Mankorebai*.[8] In this case two brothers, Harkisondas and Bhagwandas, were members of a joint undivided Hindu family. Harkisondas died on the 14th September, 1900, leaving his widow pregnant. On the 30th November following Bhagwandas made a will authorising his widow to adopt a son to him. Bhagwandas died on the 17th December, 1900. Harkisondas' widow gave birth to a son Bachoo next day, and in the then state of the family Harkisondas' son became entitled to the entire family property. On the 17th February, 1901, Bhagwandas' widow adopted Nagar Dass. This Board affirmed the right of the adopted son to the share of his father, holding that the case was governed by the principle laid down in *Raghunadha's* case. Their Lordships consider that the rule enunciated in these two cases supplies the governing principle for the determination of the present case. It was contended with considerable force and some degree of plausibility that in the case of a *jivai* grant on the death of the holder thereof there is no property left for the adopted son to take, as it reverts to the grantor's estate immediately the *jivaidar* dies. But it was admitted that a posthumous son would prevent the reversion. If the widow happened to be *enceinte* the reversion naturally would remain in suspense until the birth of the child, to see whether it was a male or a female. It is futile, therefore, to say that the property reverts to the grantor's estate immediately the breath leaves the body of the *jivaidar*. Here the adoption was made within the period of natural gestation, and the property was at the time of the adoption in the possession of the widow and still is in the possession of the adopted son. It may be that

[5] 10 Moo. I. A. p. 165.
[6] 46 I. A. 156.
[7] 3 I. A. p. 154.
[8] 34 I. A. 107.

if a Hindu widow lies by for a considerable time and makes no adoption, and the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such a case totally different considerations would arise. But here there is nothing of the kind to modify the true application of the Hindu law.

Their Lordships are of opinion that this appeal should be allowed, the decree of the High Court of Bombay should be reversed, and the suit of the plaintiff dismissed with costs in all the courts, including the costs of this appeal.

And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

PRATAPSING SHIVSING AND ANOTHER

THAKOR SHRI AGARSINGHJI RAISINGHJI

DELIVERED BY MR. AMEER ALI.

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