

Shambhu Nath and ors. Vs. Prem Devi and ors.

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Court : Allahabad

Decided On : Feb-24-1920

Reported in : (1920)ILR42All382

Judge : Piggott and ;Walsh, JJ.

Appellant : Shambhu Nath and ors.

Respondent : Prem Devi and ors.

Judgement :

Piggott and Walsh, JJ.

1. The main question in issue in this case was whether one Badri Das had or had not been validly adopted as his son by one Ramanand, who died about the year 1822. One of the principal documents on the record does prove that the adoption, assuming it to have been made, was not made by Ramanand personally but by that gentleman's widow. Even then it must have been made prior to the execution of this document, which is a deed of gift of the 12th of February, 1847. It is not surprising in dealing with a transaction so ancient that there was a complete want of direct evidence as to the factum of the adoption, as to the performance of ceremonies, or as to formal authorization by Ramanand of his widow to adopt a son to him. 'What the defendants who set up the adoption relied upon was a mass of documentary evidence, supported by some oral evidence, to the effect that Badri Das had as a matter of fact been treated, and had behaved himself, over a

long course of years as the adopted son of Ramanand and that in certain transactions he had been recognized as such by ancestors of the plaintiffs themselves. One difficulty, however, stood in their way, It was admitted that by natural relationship Badri Das was the daughter's son of Ramanand and, in argument at any rate, the question was raised whether such an adoption, assuming it to have been made or attempted, could operate as a valid adoption under the Hindu law. The first court, in a carefully reasoned judgment, found in favour of the adoption. and dismissed the suit on that ground, leaving untried a number of other issues which required to be determined before the plaintiff's suit could be decreed. In appeal the learned District Judge purports to reverse the finding of the first court and has remanded the case for trial of the remaining issues. The appeal before us is against the order of remand. One of our difficulties has been to determine with certainty what the lower appellate court has found. We do not think that the learned District Judge can be taken to have found positively that no adoption of Badri Das by the widow of Ramanand ever in fact took place. What he does say is that there is 'no proof, by which he apparently means no direct evidence, that Ramanand had authorized his widow to adopt a Son to him after his death Further, he has held that there is no adequate evidence on the record to prove a contention set up by the defendants to the effect that there is a clan or family custom binding upon the parties by which the adoption of daughters' sons is authorized and validated. With regard to the question of the authority of., Ramanand's widow to adopt a son to him, we only wish to say this much at present, that we do not think the absence of direct evidence on the point ought, in a case like the present, to be regarded as conclusive. The authorization, if ever given,' was given almost, or 'possibly quite, a hundred years ago and direct evidence on the point could not be expected. The question is whether it could not be presumed, as a fair matter of inference from established facts, that the lady must have had authority to make the adoption, that her authority, to do so was known and recognized in the family and that it could safely be inferred from the conduct of members of the said family, including the ancestors of the present plaintiffs. The question of the alleged family custom is a more difficult one. In so far as the decision of the lower appellate court is limited to this that, on the evidence on the record, no such custom is satisfactorily established, that finding has not

been challenged in argument before us. What we have been asked to hold is that, in view of the pleadings in the court of first instance, the defendants should not be regarded as having been properly put to proof of the existence and binding force of the alleged custom, and that the order of remand should either have been preceded, or at least accompanied, by the framing of an express issue on this point, with opportunity offered to the parties to produce such evidence as they might think proper regarding it. The point is a fairly arguable one; but on consideration of the record as a whole, we have come to the conclusion that the defendants are entitled to a clear issue on the point and opportunity of producing evidence regarding it. While, therefore, we affirm the order of remand now under appeal we make the following addition to it, which in our opinion could have been made, and ought to have been made, by the lower appellate court. We frame the following issue:

Is there a family or tribal custom, binding on the parties to this suit, by which the adoption of a daughter's son is validated in spite of the ordinary rule of Hindu law prohibiting the same.

2. The burden of proof will be on the defendants, but both parties should be allowed to produce evidence. We think the trial court should comply with the order of remand by trying out, not only this issue, but also the -remaining issues framed by it and should pass a decree after recording findings upon all the issues. The costs of this' appeal will be costs in the cause.