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Court : Allahabad

Decided On : Sep-08-1943

Reported in : AIR1944All5

Appellant : Ramu

Respondent : Kashi and ors.

Judgement :

Yorke, J.

1. This is a first appeal by the defendant in a suit for recovery of possession of certain property described in the plaint. The parties describe themselves as Doms Ghotia Khor and the property in suit consisted of a grove and certain houses in Benares City besides some other miscellaneous property including turns at certain burning ghats situated in Masan Mankarnika Ghat and Harish Chandra Ghat, Benares City, as also at Rameshwar in the same district and certain ghats in the Ghazipur district, the whole property being valued at Rs. 48,000. The plaintiffs alleged that the defendant Ramu was in possession of this property as a trespasser and claimed that they were the next reversioners of the last owner Sital, who had died childless in July 1934, upon the death of Sital's widow who died on 18th May 1935. The suit was instituted on 5th September 1935, the plaintiffs founding their claim upon the following pedigree:

MOHAN|-----| |Dhuman Gulab = Mt. Janki| |Umrao Sital = Mt. Jasoda| (born about 1834 A.D.)|-----| | |Chingan Gudar Debi| |Kharbar |-----| | | Sahdeo Kashi Lachhmi Narain,(deceased) (plaintiff born 1891) (plaintiff).

2. The defendant Ramu took a number of defences. He alleged the pedigree put forward by the plaintiffs to be fictitious and wrong and he put the plaintiffs to the proof of their pedigree. He next contended that Sital was a Koeri by caste and entered into adverse possession of such property as was left by Gulab and himself acquired more, so that he was ultimately the proprietor of all the property left by him either by adverse possession or by reason of it being his own acquisition. The plaintiffs, it will be noted, had filed their suit on the assumption that Sital was the real son of Gulab, but at a later date, 20th April 1936, the plaintiffs admitted him to have been adopted son of Gulab Dom and contended that the adoption was valid and that as a result Sital himself became a Dom. The defendant further pleaded that Sital on 4th January 1918 executed a will under which Mt. Jasoda upon his death became absolute owner of the property. He alleged that Mt. Jasoda on 12th May 1935, that is a week before her death executed a will in the defendant's favour. In addition, he put forward a plea that he was the adoptive son of Sital and therefore owner of the property. Lastly, he put forward in rather a vague fashion a contention that even if there had been no such adoption and the will of Mt. Jasoda were to be rejected, even then he was the nearest stridhan heir of Mt. Jasoda. The learned civil Judge framed the following issues:

(1) Whether the plaintiffs are reversioners of Sital? (2) Could there be any legally valid adoption of Sital by Gulab, and whether Sital was a Dom or a Kunbi and could, not be adopted if he was a Kunbi? (3) Was the defendant Bamu adopted by Sital, if so, with what effect? (4) Did the will of (Sital) dated 4th January 1918 confer only a limited life estate on Mt. Jasoda? (5) Is the will (of Mt. Jasoda) dated 12th May 1935 genuine and effective and does it confer any title to the property in suit on the defendant? (6) Were the properties in suit stridhan properties of Mt. Jasoda, if so, is the defendant alone entitled to succeed to those properties

3. Upon these issues the learned civil Judge arrived at the following findings. He held that the plaintiffs had succeeded in establishing the pedigree put forward by them and that they were therefore the collaterals and reversioners entitled to the estate of Sital upon the death of Mt. Jasoda. The finding upon this issue has been strongly contested on behalf of the appellant Ramu. Upon issue 2 he held that Sital was a Kunbi but that by his adoption by Gulab he became a Dom, the adoption being a valid adoption. The finding upon this issue has not been contested in the appeal. Upon issue 3 he held that the adoption of Ramu was not established and that, in fact the theory of adoption was an after thought on the part of the defendant. Learned Counsel has mentioned this issue but he has scarcely sought to argue that the finding is incorrect. The reasons given by the Court below for arriving at its finding are quite convincing. According to his story, Ramu was adopted by Sital as far back as 1910 or 1911 and continued right up to the death of Sital to live in Sital's house and to be kindly treated by him but if Sital had actually adopted the defendant, it is difficult to understand why he should in 1918 have disinherited him and executed a will in favour of Mt. Jasoda. Moreover, it was the defendant's own case that Mt. Jasoda executed a will in his favour but even in that will Ramu was described not as the adoptive son of Sital deceased but as the son of his natural father Mangru. Upon issue 4 as to the nature of the estate conferred upon Mt. Jasoda by Sital under his will, the learned Civil Judge held that it was quite clear upon a comparison of the latter part of this document with the earlier part that nothing more than a life interest was conferred upon Mt. Jasoda. This finding has been strongly contested before us. Upon issue 5 the learned Civil Judge held that the will of Mt. Jasoda propounded by the defendant could not be accepted. He held that the will was defective on four grounds, namely :

- (1) that the story of its execution by Mt. Jasoda could not be believed;
- (2) that on the evidence she was unconscious on the date of the alleged execution, that is, she was not possessed of a sound disposing mind;
- (3) that even if she was of sound mind, she had no independent advice and U) that contrary to the terms of the will of Sital deceased she executed the will without the consent of Chandar, one of the managers of the estate. Learned Counsel for the

appellant, although he mentioned this issue in his argument, did not attempt to contest the correctness of the finding. Lastly upon issue 6 the learned Civil Judge held that the defendant had failed to prove the pedigree put forward by him and to establish that he was a relative of Mt. Jasoda on her father's side. Accordingly even if it were to be assumed that as a result of the will of Sital the property in suit came into the hands of Mt. Jasoda as her stridhan, the defendant could not be entitled to the property as stridhan heir of Mt. Jasoda. As regards this finding the learned Counsel for the appellant Ramu has put forward the contention that if this Court should come to the conclusion that the property in suit passed from Sital to Mt. Jasoda as her stridhan, the plaintiffs are not entitled to recover possession of the property in the present suit because they have not established those factors whose presence is necessary to make them the heirs of Mt. Jasoda. It was necessary, he contends, for them to show that the property was of such a nature and came to Mt. Jasoda in such circumstances (that is by virtue of such a marriage) as would make the succession to it go through the father of Mt. Jasoda and not to the heirs of Sital. Upon the findings at which we have arrived in the present case, that question does not arise.

4. On behalf of the appellant Dr. Katju has devoted his arguments to two aspects of the case only, namely : (1) the effect of Sital's will and (2) whether the learned Civil Judge has rightly held the plaintiffs to have succeeded in establishing the pedigree upon which the whole of their case rests. It is of course clear that if the plaintiffs failed to establish their pedigree, then their suit should have been dismissed without further ado. The first question for consideration then is the correct interpretation of the will of Sital which he executed on 4th January 1918 in favour of his wife Mt. Jasoda. In this document after mentioning that he was in possession of property worth about rupees one lac by way of turns at burning ghats etc., etc., of which he was the sole owner, he further stated that he had no issue of either sex and no one to succeed him except his wife Mt. Jasoda. He went on to state that he executed this will in her favour appointing her as his future legatee and that by this document he covenanted that just as he would be during his lifetime 'the owner of' (or 'in possession of,' there being no word in the original document expressing either ownership or possession), so also his widow would be in relation to this property after his death. In the next sentence he stated : 'After my

death the legatee aforesaid shall have all sorts of power.' From this stage however Sital proceeded to limit the powers of his legatee in a number of ways. He provided that she would look after the management of the entire property in consultation with and under the supervision of a committee of five persons against whose wishes she should not in any way act. She was to maintain certain idols installed in the testator's house and cause their puja, sewa and ragbhog to be performed and to appoint and pay a Brahman at the rate of Rs. 4 per mensem as pujari. The legatee was to have no right to mortgage, sell or make a gift of the property. By the next clause the testator provided that after his death the legatee might at any time when she thought it proper and necessary execute a will in respect of the entire property in favour of any person whom she might consider fit to maintain Sital's name after fully satisfying herself in consultation with the managers that he would not spoil or ruin the property. Under this will it was Mt. Jasoda's duty to deprive her legatee of the power to make any transfer. The words used are : 'But the power to make a mortgage etc., of the property shall not be granted under any will.' By a later clause Sital sought to limit the control of the managers by providing as follows : 'The managers shall, at no time, have power to have any of the properties transferred by the legatee aforesaid.' This clause is followed by the following very significant clauses:

At all events the legatee aforesaid and the managers shall only have power to maintain my property always and to perpetuate my name. Any transfer made by any legatee aforesaid with respect to my property bequeathed shall not be considered to be valid. Every legatee (literally 'all legatees') shall only have power to maintain the property bequeathed and to enjoy its profits (i.e., as long as she or he might live.

5. It is patent that on a general view of this document the testator had no intention of making a gift outright of his property in favour of his widow. At no stage did he describe the widow as absolute owner of the property, the most he said being that she should have all sorts of powers. It is true that he conferred on the widow one power which a Hindu widow in possession of her deceased husband's property does not have, namely, the power to execute a will and thus nominate her own successor; but on the other hand he deprived her entirely of the power to manage

her property freely, as a Hindu widow can manage her husband's property, by insisting on consultation with a committee of five persons and by depriving her of all rights of transfer, even those rights of which a Hindu widow is ordinarily possessed. Again, reading the document as a whole, the clue to its interpretation appears to us to be found in the emphasis laid upon the prohibition of transfers of all kinds by Mt. Jasoda, the selection by her as her legatee of a person about whom she is satisfied in consultation with the managers that he would not spoil the property and the declaration that Mt. Jasoda and the managers shall only have power to maintain the property and to perpetuate the testator's name and that subsequent legatees shall similarly only have power to maintain the property. The intention of the testator really appears to have been in some rather vague fashion to execute such a will as would create something in the nature of a trust and would secure the testator's property against disposal in future. With that end in view he was seeking to create in Mt. Jasoda an estate which in our judgment is one unknown to Hindu law.

6. On behalf of the appellant Dr. Katju has contended that the essential intention of the will is to bequeath the property to Mt. Jasoda subject to a definite prohibition of alienation and he contends that as a result of such a will the property passes to the widow as a kind of modified stridhan in the sense that although the property is inalienable, it is nonetheless heritable by the stridhan heirs of the legatee and not by the reversioners of the last male, owner. In support of this proposition, Dr. Katju has relied on para. 664 of Mayne's Hindu Law, Edn. 9, 1922, in which Mr. Mayne says:

Immovable property when given or devised by a husband to his wife, is never at her disposal, even after his death. It is her stridhana so far that it passes to her heirs, not to his heirs. But, as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male even though the gift is made in terms which create a heritable estate. It is different if the gift or devise is coupled with an express power of alienation. Whether this is so, is of course a question of construction of the terms of the particular gift.

In the latest edition of Mayne's Hindu Law by Section Srinivasa Iyengar, 1938, this paragraph is no longer to be found and the present paragraph on the subject runs as follows:

Immovable property, when given or devised by a husband to his wife, is stated by the Sanskrit authorities to be never at her disposal, even after his death though it is her stridhana in that it passes to her heirs, not to his. It is however settled that a husband can by gift inter vivos or by will confer upon his wife an absolute estate in his immovable property. And it is only a question of construction as to what he intended to give or bequeath. Accordingly, in *Salig Ram v. Charanjit Lal* the Judicial Committee referred to the supposed rule of Hindu law that in the case of immovable property given or devised by a husband to his wife, she had no power to alienate unless the power of alienation was conferred upon her in express terms, and held that that proposition was unsound. The husband either intends, that his wife should have a life estate in the immovable property or intends that she should have an absolute estate. In the former case, no rule of Hindu law is required; in the latter, the husband agrees to her full powers of alienation. And in both cases the intention is either express or inferred as a matter of construction.

7. Dr. Katju has contended that the proposition as stated in the 1922 Edition of Mayne's Hindu Law was approved by their Lordships of the Privy Council in *Narsingh Rao v. Mahalakshmi Bai* ('28) 15 A.I.R. 1928 P.C. 156 at page 914, where they said in regard to a gift of property made four years prior to the death of the donor:

In their Lordships' opinion there is nothing so far in the deed to cut down the gift or prevent the Rani from taking such an estate in the properties, which are the subject of the gift, as a wife takes in immovable property given her by her husband. According to the Hindu law, such property is taken by her as stridhana and is descendible to her heirs and not to his, and would devolve first on her daughter's daughter and failing them on her daughter's son, thus effectually excluding Balwant; but over such property, it is stated by Mr. Mayne, para. 664, she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of

sufficient amplitude to confer it upon her.

We do not think it necessary to enter into a consideration of the exact meaning of what was said in the passage in question because this case was decided by their Lordships of the Privy Council on 31st January 1928 two years prior to the decision in *Salig Ram v. Charanjit Lal* in which latter case they remarked:..at one time it was held by some of the Courts in India that, under the Hindu law, in the case of immovable property given or devised by a husband to his wife, the wife had no power to alienate unless the power of alienation was conferred upon her in express terms. It has been held by decisions of this Board that that proposition was not sound, and that : 'if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended.'

We do not find either in *Narsingh Rao v. Mahalakshmi Bai* ('28) 15 A.I.R. 1928 P.C. 156 or in the subsequent case any support for the view that a husband's gift or devise of property to his wife can have the effect under the Hindu law (as now construed) of passing the property to her as stridhan and heritable by the widow's heirs but yet not alienable by the widow. There seems to be in fact, as has been said in the latest edition of Mayne, only two alternative constructions in the case of property gifted or devised by a husband to his wife, namely the property in the hands of the wife is either her stridhan in every sense or she has nothing more than a Hindu widow's estate in respect of it. We may refer in this connexion to Mulla's *Hindu Law*, Edn. 9 (1940), para. 144 at p. 135, headed 'Rights over Stridhana during widowhood.' That paragraph runs:

A Hindu female has during widowhood absolute power of disposal over every kind of stridhana whether acquired before or after her husband's death.

As regards the passage in *Narsingh Rao v. Mahalakshmi Bai* ('28) 15 A.I.R. 1928 P.C. 156 upon which reliance has been placed, we might remark that nothing follows from it in the sense that their Lordships did not express themselves in terms as approving the passage to which we have referred in the 1922 edition of Mayne's *Hindu Law*, while in the event, they remarked:

In their Lordship's opinion the terms of the deed clearly show that they (the Rani and her successors) were given an estate which was not limited but absolute, in point of duration, and subject only to defeasance in case of Balwant having a son who attained majority or the Rani dying before the settler.

Their Lordships never in any way gave their approval to the proposition suggested by Dr. Katju that where a husband gives or devises property to his wife but it is not made clear either by express terms or by convincing inference that an absolute estate is conferred she will hold the property as a kind of limited stridhan. Alternatively, Dr. Katju has contended that by his will the testator bequeathed the property absolutely to his wife and the subsequent limitations are to be construed as conditions or limitations which are void for repugnance. On behalf of the respondents Mr. Malik has contended, as we think rightly, that as laid down by their Lordships of the Privy Council in the Tagore's case : *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* ('72) I.A. Sup. Col. 47 at page 79:

The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances, to be conferred.

We have already examined the will in detail' and in our judgment applying these principles it is impossible to hold that the will of Sital was intended to confer an absolute estate in the property of the testator upon the legatee. On the contrary, it was the clear intention of the testator to confer upon Mt. Jasoda only a very limited power of disposal, considerably less than that enjoyed by a Hindu widow, while at the same time conferring upon her one power not enjoyed by a Hindu widow, and thus in fact to create an estate unknown to Hindu law. It must necessarily follow that the will of Sital as a whole fails. In consequence Mt. Jasoda succeeded to the estate on the death of Sital and held the property with a Hindu widow's estate. Upon the death of Mt. Jasoda the property would go to Sital's reversioners and if the plaintiffs have succeeded, as the learned Civil Judge says, in establishing that they were the reversioners of Sital, their suit was rightly decreed. We come now to

the question raised in issue (1), namely, whether the plaintiffs are reversioners of Sital? On behalf of the appellant Ramu, Dr. Katju has criticised the evidence led on behalf of the plaintiffs respondents in detail and he has contended that the learned Civil Judge was led to regard the witnesses favour, ably by his taking into consideration a piece of evidence which he discussed and rejected but which nonetheless had some mental effect upon him, and by his making a presumption against the defendant Ramu in circumstances in which no such presumption could rightly be made. He contends that if the oral evidence led by the plaintiffs is considered by itself and with a mind unaffected by either of these two matters, it will be impossible to accept the view of the plaintiffs' witnesses taken by the Court below. We will deal first with these two matters both of which were dealt with by the Court below in its discussion of issue (1).

8. In the first place, the plaintiffs, who had to prove that Dhuman, the great grandfather of the plaintiffs was the son of the same Mohan who was the grandfather of Sital, produced in evidence a certified copy of a sarkhat executed in the year 1826. The copy, which purported to have been issued from the Benares State office on 24th September 1935, purported to be a copy of a qabuliat 'forming part of a case relating to a qabuliat in respect of rent agreement of Meer Ghat in the Benares City.' It is a qabuliat executed by one Dhuma, son of Mohan Dom, of mohalla Pipar Bhairwi (? Tripura Bhairwi) in favour of one Lala Kalyan Shanker vendee of the Meer Ghat pushta. We are, I suppose, to understand that Lala Kalyan Shanker had purchased some rights in the Meerut Ghat pushta from the Benares State and this document, of which a copy was issued, is to be supposed to be a sub-lease given by Kalyan Shanker to the executant of the qabuliat. The plaintiffs summoned officials of the Benares State to produce the original file but, the Benares State not being subject to the process of the Court no compliance was made. The learned Civil Judge rightly held that the presumption allowed by Section 90, Evidence Act, has no application in the case of a copy, and therefore this copy was not admissible in evidence. It seems to us that the learned Judge would have done better to make an entirely separate order upon this document rejecting it as not admissible in evidence instead of bringing the matter into his judgment and therefore possibly allowing his mind to be in some way affected by what he evidently thought was the misfortune of the plaintiffs in being unable to

bring the original into Court. In point of fact there seems to be no reason why the Benares State file should have contained such a document as the original document of which it purports to be a copy. The State was concerned with its own vendee or lessee and not with those persons to whom their vendee might sub-let portions of the property.

9. The second matter is one to which the learned Civil Judge devoted considerable space in his judgment and to which he made a subsequent reference showing that it had had a considerable effect upon his view of the evidence led for the plaintiffs. This was what he considered to be the withholding of certain documents by the defendant Ramu. The circumstances are as follows : Mt. Jasoda, it appears, died at about 4 A.M. on 18th May 1935, and there arose at once a dispute between the plaintiffs and the defendant Ramu in regard to the cremation. Actually the body was not cremated but was thrown into the river with all due ceremony. At the time of this dispute there was an application by the plaintiffs to the Magistrate and as a result some intervention by the police. Ramu, it is said, produced the will of Mt. Jasoda and in consequence he was also allowed to make arrangements for the disposal of the body. The police took possession of a number of bundles of papers no less than 34 in all and sealed them and made them over to the defendant's custody. The fact that these bundles were in the possession of Ramu was therefore known to the plaintiffs from 18th May 1935 and it was open to the plaintiffs at any time after the institution of their suit to have come to the Court and asked for the appointment of a Commissioner to go to Sital's house and to inspect and list the documents contained in these bundles. Thereafter they could have taken steps to summon from the defendant any documents contained in the Commissioner's list upon which they desired to rely. The plaintiffs did nothing of the kind and in fact took no action of any sort whatever so far as we have been able to ascertain until 20th April 1936, one day prior to the commencement of oral evidence. They then made an application to the Court in which they mentioned these bundles of papers listed by the police and left in the defendant's charge and put forward the extraordinary contention that it lay upon the defendant to produce in Court all the said documents 'as they relate to the suit.' There was, of course, nothing whatever to show that any of these documents had any bearing upon the suit of any kind and without an inspection by a competent person such as has

been suggested above, the application was founded upon a fallacious assumption. Moreover, the Code of Civil Procedure contains definite provisions for discovery and inspection of documents in Order 11, and it was the duty of the plaintiffs if they wanted discovery, to have availed themselves of the provisions of that order. The learned Civil Judge passed an order on 21st April : 'Defendant to file these papers or a reply to the application by to-morrow.' It does not appear to have occurred to the Court that the order was not really a proper order in the circumstances. It was more or less equivalent to granting the plaintiffs permission on the very day that the oral evidence was starting to make a search of the defendant's house in the hope of finding something useful to their case.

10. The circumstances being so, we feel some doubt whether the Court would have been justified in drawing any inference against the defendant even had he failed entirely to produce any of those papers or bundles. It appears however that the defendant Ramu did produce Some of these papers (for aught we know, all) because on 25th, April the plaintiffs wrote out an application which they filed on the 27th in which they said that on 22nd April the defendant did not file the papers on the plea that the said bundles were huge and bulky and they should be arranged properly and so he might be allowed one day's time more to file them in Court. They went on to say that as the defendant was wilfully evading to file them in Court 'which under the law he was bound to file, so presumption should be made under law against the defendant for the non-production of the said documents in Court. This application of course again contains a clear fallacy, namely, that the defendant was bound to file in Court all the papers contained in these 34 bundles, whereas in fact he could not even be allowed to file in Court any papers which were not relevant to the matter in dispute. Upon this application the Court passed the order : 'I shall take that point into consideration one way or the other.' The application itself contains an indication that the defendant was seeking time to file the papers on 23rd April, but does not make it clear whether any papers had been filed or not. On the other hand, learned Counsel for the plaintiffs themselves has drawn our attention to the application made by the plaintiffs a month later on 28th May (three days after the lower Court's judgment was delivered) in which they asked that certain papers said to be contained in a tin box filed by the defendant be retained by the Court. The tin box in question has not been produced before us

and we have no idea what papers it contains, few or many, relevant or irrelevant. The learned Civil Judge says that the defendant filed a few of those documents but not all; but he never seems to have considered the question whether those documents were or were not relevant. Considering the whole of the circumstances, we are of opinion that the learned Civil Judge should not have lent himself to this manoeuvre on the part of the plaintiffs unwarranted by law, nor should he have drawn any inference against the defendant Ramu from his partial failure to comply with what was at best an improper order. The learned Civil Judge has omitted to notice that although Section 114, Evidence Act, permits a Court to presume that evidence; which could be and is not produced, would, if produced, be unfavourable to the person who withholds it, it does not allow any such presumption to be made in the case of papers about which there is no certainty that they would even have been relevant evidence in the case with which he was dealing. For ourselves therefore in disposing of this appeal we propose to discard this matter of the alleged non-production of these papers as having no bearing upon the view we should take of the oral evidence led by the plaintiffs.

11. Dr. Katju has, on the other hand, urged that we should in considering that evidence attach considerable weight to the fact that the plaintiffs, when they filed their plaint on 5th September 1935, and until the written statement of the defendant was filed on 16th October, were admittedly ignorant of the fact that Sital Dom whose nearest reversioners they claim to be was not the real son of Gulab but an adopted son. It is contended that if the plaintiffs were really, as they allege and seek to prove, reversioners and collaterals by no means distantly removed from Sital (in English terminology first cousins twice removed) they should be expected to have knowledge of this adoption. On the other hand, Kashi, the eldest of the three plaintiffs, was born only as far back as 1891. We do not know the dates of births and deaths of the sons of Umrao, but Umrao himself died not earlier than about the year 1880. Sital is supposed to have been 100 years old when he died in 1934. This is probably an exaggeration as Sital in the year 1918 described himself as aged 65 which would mean that he was born in about 1853. Even assuming that to be the correct date, the adoption of Sital took place during Sital's childhood and therefore somewhere in the neighbourhood of the year 1860. By the time Kashi and his brothers were beginning to grow up, the adoption of

Sital was so much a matter of ancient history that he would have been ordinarily known as the son of Gulab and not as the adoptive son of Gulab. In these circumstances, we are doubtful whether the ignorance of the plaintiffs on this point has any real bearing in the case. The point for decision between the parties has ultimately boiled down to the question whether Dhuman great grand-father of the plaintiffs, was the son of the same Mohan who is the grandfather of Sital. The plaintiffs had relied upon a document of 1881 in their possession showing that Chingan and Debi were the sons of Umrao and a document of the year 1866 in their possession showing that Umrao was the son of Dhuman. Their pedigree was satisfactorily made out up to the stage of Dhuman. The defendant himself admitted that Sital was the adoptive son of Gulab son of Mohan. The plaintiffs had therefore to succeed in connecting their ancestor Dhuman with Mohan, father of Gulab. For this purpose they called five witnesses with whom we shall deal seriatim.

12. Three of these witnesses are members of the plaintiffs' family, namely, Lachhmi Narain, plaintiff 2 himself, Masur his father-in-law and Panna Lal brother-in-law of the two plaintiffs Kashi and Lachhmi Narain. The other two witnesses are Bharose Dom, originally a Kal-war, and Chandar Dom a servant of Sital from 1894 upto the time of his death. Admittedly since the death of Mt. Jasoda, this witness is in the service of Kashi plaintiff; but on the other hand, he is undoubtedly a person whom we should expect to have been present on the occasions on which this pedigree would be recited. All the witnesses without exception attribute their knowledge of the pedigree to Sital who, they say, was present on the two occasions of the marriage of the daughter of Masur to Lachhmi Narain and the sister of Lachhmi Narain to Panna Lal. It is not in dispute that those are the occasions on which a recital of the names of the immediate ancestors of the bride or bridegroom, as the case might be, would be expected to be recited by some elder of the family. If the story that Sital did the reciting of the names at all be believed, that in itself would be an indication that Sital was a member of the same family as the plaintiffs. Dr. Katju for the appellant Ramu has criticised severely the evidence of Bharose Chaudhri of the community upon the ground that Bharose did not at any stage specify the source of his knowledge and also on the ground that he did not know the name of his natural father who was a Kalwar. As this adoption must have taken place over 50 years ago, there is perhaps not much in the latter

point. As regards the former, the circumstances being that Bharose could not possibly have first hand knowledge as to whether Dhuman was the son of Mohan father of Gulab, his evidence was really directed to proving the statement of some dead person and unless there is an indication as to who> that person was and in what circumstances he made the statement upon which Bharose founds his own statement, Bharose's evidence would be mere hearsay and barred by the provisions of Section 60, Evidence Act.

13. Dr. Katju has laid considerable stress on the contention that the defendant is in possession as a trespasser and that the plaintiffs had therefore to establish their pedigree by cogent evidence in order to obtain a decree for possession. In our judgment, there is a weakness in this argument, which makes a good deal of difference to the standard of evidence which the Court must require to be led on behalf of the plaintiffs. It is admitted that Ramu was in the service of and living with Sital and Mt. Jasoda at the time of their deaths, his position *prima facie* having been that of a servant. It is further clear that upon the death of Sital the plaintiffs as well as the defendant took part in the funeral ceremonies. The entry in the death register maintained at Mankarnika Ghat in respect of the death of Sital was made 2 by Mst. Jasoda through Kashi Dom (vide Ex. 1, the extract from that register) this would seem to indicate some relationship between Kashi and the family. Upon the death of Mt. Jasoda a dispute began immediately between the plaintiffs and Ramu and it was only because the defendant Ramu was able to produce a will in his favour that the property of the deceased was entrusted to him by the police instead of to some third independent person. In his defence in the present case Ramu has relied upon the will in question and upon an alleged adoption by Sital, both of which defences have failed. In the circumstances, the position of Ramu is not so much that of a trespasser as that of a custodian of property 'in medio' and the burden of proof which lay upon the plaintiffs was not so heavy as that which would lie upon the plaintiffs seeking to dispossess a trespasser in possession, as it were, in his own right. We have examined the evidence of the witnesses for the plaintiffs with some care and the above being the circumstances, we are of opinion that we would not be justified in rejecting the evidence of witnesses whose statements have been believed by the learned Civil Judge who had the advantage of hearing them, more particularly bearing in mind that the defendant Ramu made

no attempt to call any witness of the community to give evidence in rebuttal. It was suggested that it is difficult to give negative evidence, but here the plaintiffs gave evidence as to definite occasions, at which many members of the Dom community must have been present, on which they said that Sital recited the pedigree in question. If this story was not true, it should not have been difficult for the defendant to find other members of the community ready to come forward and testify that the whole story was false.

14. One other small point which was urged was that according to the ordinary practice such recitations of names of ancestors go back only to three degrees in which case Sital would have stopped short at Dhuman and not have mentioned that Dhuman was the son of Mohan, his own grand-father. We do not think there is any particular improbability, in the case of so short a pedigree, in Sital's having recited the pedigree as far back as the common ancestor, his Own grandfather. In our judgment, the learned Civil Judge construed the will of the deceased Sital correctly and rightly held that the plaintiffs were the collaterals and nearest reversioners of Sital deceased and entitled to a decree for possession of the property in dispute. We therefore dismiss this appeal with costs.