SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Deepsingh and ors. Vs. Jorsingh and ors.

Deepsingh and ors. Vs. Jorsingh and ors.

SooperKanoon Citation : sooperkanoon.com/750730

Court : Rajasthan

Decided On : Sep-27-1949

Reported in : AIR1950Raj14

Judge : Nawal Kishore and; Bapna, JJ.

Acts : Hindu Law; Evidence Act, 1872 - Sections 101 to 103

Appeal No. : Civil Appeal No. 8 of 1949

Appellant : Deepsingh and ors.

Respondent : Jorsingh and ors.

Advocate for Def. : Pragraj, Adv. for Respondent Nos. 2 to 5

Advocate for Pet/Ap. : Radhamohan, Adv.

Disposition : Appeal allowed

Judgement :

1. This is a first appeal by the contesting defendants in a declaratory suit. The pedigree table so far as relevant to the matter in issue is as under :

ZORAWAR SINGH

_____|_____

| |

Budh singh, His deoen- Sawai Singh

dant in many degrees is |

Bijoy Singh, the present Jawan Singh

Thakar of Thikana Makrana. |

Nand Singh

_____|_____

| | |

Gopal Singh Sursingh Pratapsingh

| | _____|_____

Prem Singh Balsingh | |

| Gulab Singh Anand Singh

Dhokal Singh | _____|____

_____|_____ | | |

| | | Himmatsingh P-5 Hanumansingh P-6

Mool Singh D-3 Deep Singh D-1
|_____

| | | | | |

Shivjising D-4 Narainsingh D-2 Kalyan Singh Jorsingh Monsingh Agarsing

P-1 P-2 P-4 |

Dhulsingh P-3

2. Kalyansingh, Jorsingh, Dhulsingh, Monsingh, Himmatsingh and Hanumansingh who are all descendants of Pratapsingh sued Deepsingh, Narsingh, Moolsingh and Shivjisingh in District Court No. 2, Jodhpur for a declaration that the deed of adoption executed by Balsingh in favour of Deepsingh on 17th March 1939 and registered on 4th April 1939 was Bull and void and inoperative against the plaintiffs. Under the law in Marwar, a registered deed of adoption is only necessary for the validity of an adoption and the relief prayed for amounts to a declaration that the adoption of Deepaingh by Balsingh be declared to be null and void. It was alleged by the plaintiffs that there was a custom amongst the Chhutbhais of Thikana Makrana, to which family the parties belong, by which a member of that family had no right to take any person in adoption. The defendants, Deepsingh and Moolsingh by their separate written statements denied the alleged custom and urged that the adoption was according to Hindu law and Marwar Rajput Adoption Rules and the deed had been duly registered and the adoption was quite valid. Only one issue was framed which though not happily worded covered the matter in dispute, namely, whether there was a custom among the Chhutbhais of Thikana Makrana whereby a member of the said family was not entitled to adopt any person and for that reason the adoption of defendant 1 was invalid. There is no documentary evidence in proof of the alleged custom or disproof thereof, but the parties have led oral evidence on the issue. The District Judge, Nagaur to which Court the case was transferred subsequently found in favour of the plaintiffs on the question of custom and decreed the suit.

3. Deepsingh and his son Narainsingh defendants have preferred this appeal. Of the plaintiffs, Kalyansingh is dead and the remaining five plaintiffs have been made respondents in the appeal. It is argued by the learned counsel for the appellants that the learned District Judge has erred in coming to a finding as to the existence of the custom.

4. We have carefully gone through the evidence and in our opinion, the finding arrived at by the trial Court is entirely erroneous if not perverse.

5. It is settled law that a custom derogatory to the Hindu law in order to be valid, must be proved to be ancient, certain and reasonable and should be construed

strictly. It is essential that it should be established to be so by clear and unambiguous evidence, for, it is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possessed the conditions of antiquity and certainty on which alone its legal title to recognition depends.

6. The parties are Hindus and according to Hindu law, every male Hindu, subject to the provisions of any law for the time being in force who is of sound mind and baa attained the age of discretion may lawfully take a son in adoption provided he bas no son, grandson or great grandson (natural or adopted) living at the time of adoption. None of the disqualifications which may bar adoption according to Hindu law are alleged by the plaintiffs in this suit, but the right of adoption by Balsingh is denied on the sole ground of the existence of a custom in the particular family as aforesaid.

7. It is again well settled that the burden of proof of a custom derogatory to the Hindu law lies upon the person who sets up the same and therefore, the burden of proof of the custom alleged by the plaintiffs in this case lay heavily on them. The plaintiffs produced only 7 witnesses, of whom P. W. 4 Chandrasingh was not relied upon by the trial Court. The other witnesses Balwantsingh P. W. 1, Phoolsingh P. W. 2, Khemchand P. W 8, Gumansingh, P. W. 5 and Hanumansingh P. W. 6 in their examination-in-chief depose generally to the existence of a custom as alleged in the plaint but their evidence has been considerably shaken by what they have deposed in the course of their statements. P. W. 5 Gumansingh, for instance, has admitted incross-examination that Bharatsingh had adopted Madhosingh and Surajsingh had adopted Vishal singh. It is not disputed that the two incidents admitted by the witness were in the family of the Chhutbhai of Thikana Makrana. The effect of these admissions is sought to be wiped off by an argument that even after adoption, they did not get more from the property of their adoptive father than what they would have got without the adoption. This argument relates to the effect of adoption rather than to the adoption itself which is the only matter in issue in this case. P. W. 3 is the Kamdar of the present Thakur Bijeysingh of Makrana. His evidence on the question of custom in issue is of no value since he has been in service only for the last 12 years and be has not disclosed the source of his knowledge about the custom among the Chhutbhais of the Thikana. P. W. 2

Phoolsingh admits even in examination-in-chief that on the death of Junjar singh leaving without issue his Pag was worn by Asusingh. While it was disputed by the advocate for the plaintiffs as to the meaning of wearing Pag of the deceased, the statement of this witness in cross-examination is clear to indicate that the wearing of Pag of the deceased is tantamount to an adoption. The witness clearly stated in cross-examination that he did not remember how long ago As using was adopted but that his father had given him that information. He added that the deed of adoption was not however executed P. W. l :Balawantsingh admits that in case the Pag of the deceased be worn by somebody, the landed property would be divided. As stated earlier, the wearing of Pag according to the witnesses was the same thing as adoption and the statement about the division of property is meaningless. The witness is not clear whether the person who wears the Pag would get the property by virtue of wearing the Pag or in some other way. His evidence appears to be ambiguous and inconclusive. The witness admits having had some litigation with Deep Singh and his evidence is unreliable. There only remains the evidence of one of the plaintiffs Hanumansingh P. W. 6. His mere assertion of the existence of a custom is of no value. The defendants in rebuttal have produced 7 witness some of whom mention instances of adoption in the family. D. W. 1 Pandysingh who is in the family of Chhutbhais, gave three instances of adoption among the Chhutbhais but his evidence has been criticized by the learned District Judge on the ground that the witness admitted that the land allotted to Sawaisingh was still jointly held by his descendants, and in the family of Sawaisingh this was the first adoption. The custom in issue was not restricted to the descendants of Sawaisingh but was said to exist among all the Chhutbhais of Thikana Makrama. The fact that among the descendants of Sawaisingh this was the first adoption is of no great consequence. It is possible that no necessity may have arisen. Similarly, the joint possession of the descendants of Sawaisingh in the land allotted to their said ancestor was also irrelevant to the matter in issue. The third ground of criticism of the evidence of this witness relates to disposal of property of certain persons in the family dying issueless but that matter is entirely irrelevant on the question of a right of adoption. The evidence of Balsingh D. W. 2, Ugamsing D. W. 3, Shivjisingh D. W. 4, Bakhatsingh D. W. 5, who merely assert the existence of the right of adoption is certainly not of much weight. But in the case of D. W. 2

and D. W. 3 they are also Chhutbhais of Thikana Makrana and their denial of the alleged custom has some value. The criticism of the evidence of Sawaisingh D. W. 7 made by the learned District Judge does not appear to be correct. He stated that he was the natural son of Chandrasingh but was adopted by Himmat singh and was in possession of the latter's property, and that this adoption took place 14 years ago. The learned District Judge had disbelieved the witness on account of his admission that the property of his adoptive grandfather Kesareingh was still joint between himself and his real brothers who were descendants of the real brother of Kesarsingh. If the property which belonged to Kesarsingh and his brother was undivided, it was nothing unusual if even after adoption of the witness in the line of Kesarsingh the property remained joint among the descendants of the two brothers.

8. As observed above the burden of proof of the existence of custom lay heavily on the plaintiffs and they have signally failed to discharge that burden.

9. The appeal is therefore accepted, the judgment and decree of the lower Court is set aside and the suit is dismissed with costs both in this Court and the Court below.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com