

APPELLATE CIVIL

Before Bishan Narain, J.

NIHAL SINGH AND OTHERS,—Appellants.

versus

UJAGAR SINGH AND OTHERS,—Respondents.

Regular Second Appeal No. 1146 of 1954.

1959

 Oct., 22nd

Custom—Jats of Jullundur Tehsil—Appointed heir—Whether entitled to succeed collaterally in the adoptor's family—Evidence of Custom—Uncontested instances—Whether can be taken into consideration.

Held, that the general custom recorded in para 49 of the Rattigan's Digest to the effect that an appointed heir does not succeed collaterally as the relationship between him and the appointor is a purely personal one and does not amount to transplantation of the appointed person to the family of the appointor, does not prevail amongst Jats of Jullundur Tehsil, and that amongst them an appointed heir is entitled to succeed collaterally in the adoptor's family.

Held, that it is well-established that the best evidence of a custom is that it has been followed consistently without dispute in a number of instances. Even uncontested instances afford a good evidence of the custom.

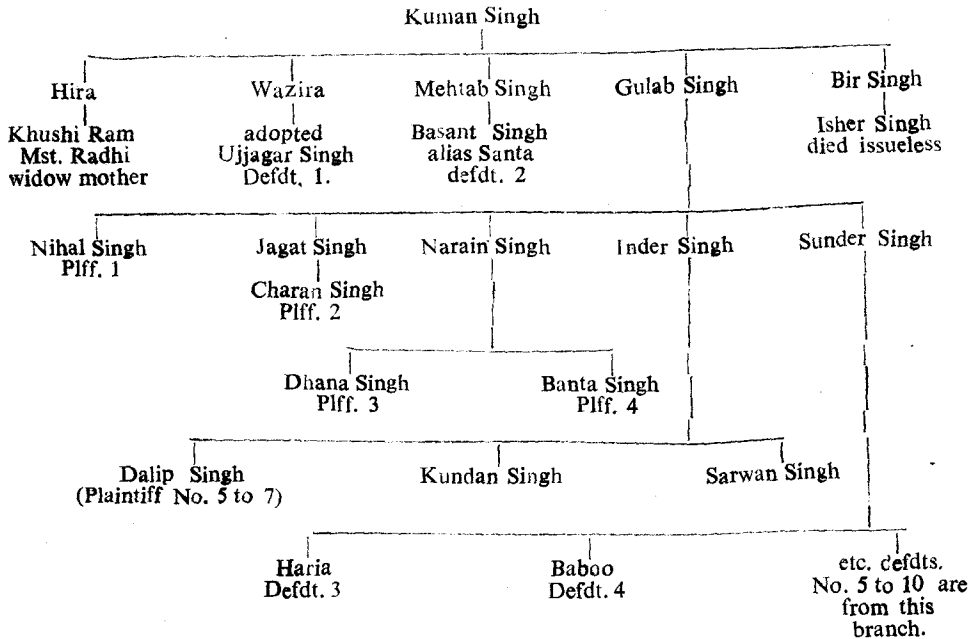
Second appeal from the decree of Shri H. S. Bhandari, Senior Sub-Judge, invested with enhanced appellate powers, Jullundur, dated the 29th November, 1954; reversing that of Shri Jasmer Singh; Sub-Judge, 1st Class, Jullundur, dated the 9th April, 1954; and dismissing the plaintiffs' suit with costs throughout.

S. D. BAHRI, B. D. MEHRA AND H. S. DOABIA, for Appellants.

SHAMAIR CHAND, PARKASH CHAND JAIN AND K. C. NAYAR, for Respondents.

JUDGMENT

BISHAN NARAIN, J.—The parties to this litigation are Jats of the Jullundur Tehsil. Their pedigree-table is as follows:—



Khushi Ram was the last male holder of the land in suit. On his death the land was mutated in the name of his widowed mother Mst. Radhi. She died some time in 1951. The question arose as to who was entitled to succeed to the estate and to what extent. Now Ujjagar Singh is the natural son of Basant Singh *alias* Santa (defendant No. 2) and is the adopted son of Wazira. Descendants of Gulab Singh claimed that Ujjagar Singh was not entitled to succeed as the son of Wazira because under custom he had no right to succeed collaterally. They accordingly claimed that they were entitled to succeed to half the property left by Khushi Ram and that Santa was entitled to the other half the revenue authorities, however, did not accept this contention and mutated the land in equal shares in favour of Ujjagar

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Singh, Santa and descendants of Gulab Singh. Thereupon some of the descendants of Gulab Singh filed the present suit for possession of the land in suit on the basis of Ujjagar Singh not being entitled to succeed to the property. The remaining descendants of Gulab Singh, who were impleaded as defendants, either supported the plaintiffs or remained absent from Court.

The suit was contested by Ujjagar Singh who pleaded that his adoption was a formal adoption under Hindu Law and he was transplanted in the family of Wazira and as such was entitled to succeed to the property left by Khushi Ram. In the alternative the defendants set up a family custom in favour of collateral succession by an appointed heir.

The trial Court held that the adoption of Ujjagar Singh was an appointment of an heir under custom and was not a formal adoption under Hindu Law. The learned Subordinate Judge further held that the defendants had failed to prove family custom and accordingly decreed the plaintiffs' suit. On appeal, however, the learned Senior Subordinate Judge, Jullundur, came to the conclusion that Ujjagar Singh had been formally adopted under Hindu Law and was, therefore, under custom entitled to succeed to one-third of the estate left by Khushi Ram and accordingly accepted the appeal and dismissed the suit. He gave no finding on the family custom set up by the defendants as that matter was not agitated before him.

The plaintiffs then filed the present second appeal in this Court. Kapur J. held that formal adoption under Hindu Law was not proved but allowed the defendants to amend their written statement to plead clearly that Ujjagar Singh was

entitled to succeed collaterally as an appointed heir of Wazira under the custom governing the Jats of the Jullundur Tehsil and remanded the case to the trial Court under Order 41, rule 25, Civil Procedure Code to examine fresh evidence and to send the report to this Court with its comments.

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The trial Court examined additional evidence and reported that the defendants had proved that under custom an appointed heir amongst Jats of the Jullundur Tehsil was entitled to succeed collaterally.

The second appeal has now come before me for decision and the only question that has been argued before me is whether or not an appointed heir can succeed collaterally amongst Jats of Jullundur Tehsil.

Admittedly under general custom an appointed heir does not succeed collaterally as the relationship between him and the appointee is a purely personal one and does not amount to transplantation of the appointed person to the family of the appointer (*vide* para 49 of the Rattigan's Digest and *Gainda and another v. Mt. Jai Devi and another* (1)). It is therefore, for Ujagar Singh to prove the custom set up by him.

Neither side before me relied on the oral evidence produced in the case except to the extent that it proved any instance evidenced by documents and it is not necessary to consider oral evidence in the present case.

Both parties have proved certain instances in the present case in support of their respective contentions. Before discussing these instances I may refer to the observations of Achhru Ram, J.

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in *Rattan Singh v. Nirmal Singh* (1), to the effect that an adoption amongst agriculturists in the Punjab amounts to appointment of an heir unless there is evidence that at the time of adoption the adopter manifested an intention to transplant the adoptee into the adopter's family. There is no such evidence in relation to instances proved in the present case. I, therefore, examine these instances on the assumption that whenever the word "*pissar mutbanna*" appears in the revenue papers, it is meant to convey the idea that the person concerned was appointed an heir under custom.

Shri Shamair Chand, the learned Counsel for Ujjagar Singh, conceded before me that it was for his client to prove this special custom set up by him as that custom is opposed to general custom. He discussed *in extenso* all the instances proved by Ujjagar Singh. I proceed to discuss each instance separately.

1. *Mutation (D. 9), dated 24th January, 1955.*

This is an instance of the parties' family. Sindhu son of Jaimal, died on 4th July, 1924. The plaintiff Nihal Singh and also Khushi Ram (whose estate is now involved in this appeal) and many other members of the family including Ujjagar Singh were present at the time of attestation. No objection was raised to Ujjagar Singh succeeding collaterally to the estate of Sindhu.

2. *Mutation (A. D. 3), dated 5th August, 1931.*

This mutation relates to Jats of Jullundur Tehsil. Puran was adopted by Ram Singh. He succeeded collaterally to

(1) A.I.R. 1949 E.P. 197

Hira's estate who had died without leaving an heir or a widow. The mutation was sanctioned at the instance of the collaterals who would have benefited by the exclusion of Puran from succession.

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3. *Mutation (D. 10), dated 14th February, 1945.*

This instance also relates to Jats of Jullundur Tehsil. Banta Singh, adopted son of Jagta, succeeded collaterally to the estate of Labh Singh on the death of Har Kaur (widow of Labh Singh). Members of the family were present. Some other objection was raised but no objection was raised to the succession of Santa Singh to the property.

4. *Mutations (D. 11 to D. 13).*

These instances also relate to Jats of Jullundur Tehsil but they are in respect of the same family.

Deva Singh died in 1946 and Daya Singh, adopted son of Ishar, succeeded collaterally to the estate left by Deva Singh. Members of the family were present but raised no objection to his succession (D. 11).

On the death of the widow of Waryam Singh in 1943, Daya Singh again succeeded collaterally to the estate left by Waryam Singh (D.12). When 21 years had elapsed since the disappearance of Sheru, his estate was mutated in favour of his collaterals and Daya Singh was also given his share. This mutation was sanctioned in 1943 (D.13).

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5. *Mutations D. 16 and D. 17.*

These mutations also relate to Jats of Jullundur Tehsil. One Cheta died in April, 1927. Two of his collaterals stated that the mutation should be effected to the exclusion of Jai Singh, adopted son of Jaimal Singh. The proceedings were then adjourned but later on the objection was not repeated and Jai Singh got his share on collateral succession in June, 1927.

6. *Mutation (A.D. 1), dated 1st August, 1931.*

This mutation relates to Jats of Nikodar Tehsil, district Jullundur. This tehsil adjoins the Jullundur Tehsil. Mst. Malan, widow of Gurdit Singh, died in 1931. Jaggu, adopted son of Mula, succeeded collaterally to the estate of Gurdit Singh on the statement of the other collateral Jagjit Singh.

The learned Counsel for Ujjagar Singh frankly conceded that instances evidenced by mutations, A.D.2 and A.D.4, relating to Nikodar Tehsil are not helpful. The judgment (A.D.5) of the High Court, dated 10th June, 1947, does not relate to a case of collateral succession and must be ignored. The judgment A.D.6 is a decision based on compromise and so is A.D.9. No evidence has been proved in this case to show that these cases were compromised in recognition of the adopted son's right to collateral succession and, therefore, these instances must also be ignored.

In rebuttal the plaintiffs have produced copies of six judgments.

1. *Judgment (A.P. 1), dated 12th December, 1955.*Nihal Singh
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It is a judgment of the District Judge, Jullundur, and relates to the estate of one Sunder, a Jat of Jullundur Tehsil. Karam Singh adopted son of Atma claimed to succeed collaterally to a portion of the estate of Sunder. He based his claim on his adoption under Hindu Law and did not claim on the basis of an appointed heir. This judgment does not discuss the custom set up in the present case and is of no value.

2. *Judgment (A.P. 2), dated 30th May, 1945.*

It is a judgment of the Additional District Judge, Jullundur. It relates to Jats of Jullundur Tehsil. It is, however, not a case of collateral succession by an appointed heir but relates to succession by an appointed heir to the estate of adoptor in the presence of adoptor's natural sons. This instance must, therefore, be ignored.

3. *Judgment (A.P. 3.), dated 7th June, 1920.*

It is a case where in the circumstances of the case, it was held that the adopted son was transplanted to the family of his adoptive father and, therefore, could not succeed collaterally in his natural family. This instance is, obviously, irrelevant for our present purposes.

4. *Judgment (A.P. 4), dated 9th January, 1912.*

It does not decide any question of custom and was not relied upon by the learned Counsel for the plaintiffs before me.

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5. *Judgment (A.P. 5), dated 31st January, 1946.*

It does not decide any question of custom. In this case it was not contended that under special custom the appointed heir is entitled to succeed collaterally in the adoptor's family. This case was ultimately compromised (*vide A.D.6* referred to above.)

6. *Judgment (A.P. 6), dated 31st January, 1912.*

This judgment merely follows the judgment A.P. 4 and on the same ground must be rejected.

I may state here that not one of these judgments is based on any instance relating to Jats of Jullundur Tehsil and, therefore, even if relevant, would not have been of any assistance in determining the present question *vide Mussammatt Subhani and others v. Nawab and others* (1).

It is clear that the judgments referred to above do not at all help the plaintiffs and it must, therefore, be taken that there is no rebuttal to the instances proved by Ujjagar Singh defendant-respondent.

Ujjagar Singh has proved seven instances excluding the instance relating to Nikodar in which the appointed heir succeeded collaterally in adoptor's family. The first instance belongs to the parties' family and is of utmost importance. Nihal Singh, the plaintiff, and Khushi Ram were present at the time of attestation of the mutation and did not object to the succession of Ujjagar Singh. The second instance is also important because collateral succession was

(1) 43 P.L.R. 318 P.C.

allowed at the instance of the other collaterals. Similarly in the third case mutation was sanctioned without objection in the presence of other collaterals. The fourth instance relates to the same family in which succession opened three times during 1943—46 but each time the appointee's right to collateral succession was recognised without any objection by the other collaterals who were interested in denying that right. In the last case an objection was raised but not relating to the custom under consideration in the present appeal.

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The learned Counsel for the plaintiffs argued that these instances are of no value because the person concerned may have been formally adopted effecting his transplantation to the adoptor's family. He further urged that these instances are too recent to furnish evidence of custom and that in any case the instances are uncontested and, therefore, are not sufficient to rebut the general custom recorded in para 49 of the Rattigan's Digest.

There is no substance in these contentions. I have already dealt with the first objection and have held that the expression "*pissar mutbanna*" mentioned in these mutations relates to appointment of an heir. It is true that the instances are uncontested but it is well established that the best evidence of a custom is that it has been followed consistently without dispute in a number of instances vide *saddan v. Khemi* (1). As I have already said in the present case mutations were effected at the instance or in the presence of persons who were interested in denying existence of this custom. These instances extend from 1927 to 1946. The plaintiffs have not been able to

(1) 15 P.R. 1906

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show that this custom was ever disputed nor could they show that in any case the adoptee was prevented from succeeding collaterally. In view of the evidence produced in the present case, I am of the opinion that Ujjagar Singh has succeeded in proving that the general custom recorded in para 49 of the Rattigan's Digest does not prevail amongst Jats of Jullundur Tehsil, and that amongst them an appointed heir is entitled to succeed collaterally in the adoptor's family.

In this view of the matter the plaintiffs' suit must be dismissed. Accordingly I dismiss this appeal. However, as the plea of custom which has now succeeded was not taken originally in the written statement, I leave the parties to bear their own costs throughout.

B.R.T.

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Before Dua, J.

NAROTA RAM,—Appellant.

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Execution Second Appeal No. 677 of 1959.

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Oct., 23rd

Pepsu Urban Rent Restriction Ordinance (VIII of 2006 Bk.)—Section 13—Order for eviction passed under—Acceptance of rent thereafter—Whether makes the order for eviction incapable of execution—New tenancy—If created—Transfer of Property Act (IV of 1882)—Section 116—Whether applicable to such cases.

Held, that unless the landlord and the tenant consciously agree to enter into a fresh lease and unless the landlord clearly gives up his rights under the eviction order, the mere acceptance of an amount, whether described as rent or damages for use and occupation, to which he would