

(1922) 01 PAT CK 0011
In the Patna High Court
Case No : A. No. 25 of 1919

Chandrama Kuer and another

APPELLANT

Vs

Ram Gayan and others

RESPONDENT

Date of Decision : 24-01-1922

Acts Referred:

Citation : (1922) 01 PAT CK 0011

Final Decision : Allowed

Judgement

Das, J.

This appeal raises the question whether any authority was given to Musammat Chandrama Kuer, one of the defendants-appellants by her deceased husband, Brij Nandan Singh, to adopt a son to him and whether Musammat Chandrama Kuer did in fact adopt defendant No. 2, the other appellant before us, as a son to her deceased husband. The plaintiffs, who are the respondents before us, claim to be the reversioners of Brij Nandan Singh, and their case is that Brij Nandan Singh died suddenly on the 24th Baisak 1308 corresponding with 27th April, 1901 and that he gave no authority to his widow to make any adoption to him.

Their case further is that there was in fact no adoption and that they are entitled to a declaration to the effect that the widow was neither entitled to, nor did she in fact, make an adoption to her deceased husband. The defendants resist the plaintiffs' action and they contend that Brij Nandan was ill for about twenty-four days and that on the 21st Baisak 1308 corresponding with the 24th April 1901, that is to say, three days before his death, he gave authority to Musammat Chandrama Kuer to adopt a son to him and that Musammat Chandrama Kuer did in fact, in pursuance of the authority given to her by her deceased husband, adopt the second defendant as a son to him on the 17th May 1916.

On the pleadings, the learned Subordinate Judge framed the following issues :-

1. Is the suit as framed tenable ?

2. Have the plaintiffs right to sue Are they reversionary heirs to Brij Nandan Singh ?

3. Whether defendant No. 2 has been adopted as alleged by defendant No. 1 ?

4. Did Brij Nandan Singh give defendant No. 1 authority to adopt ?

5. Is the suit barred u/s 42 of the Specific Relief Act ?

6. Is the adoption of defendant No. 2 illegal and invalid and without the permission of Brij Nandan Singh ?

7. Is the suit tenable against the principle of factum valet ?

8. Are the plaintiffs entitled to any relief ?

9. The learned Subordinate Judge has found that plaintiff No. 1 was the reversionary heir of Brij Nandan Singh and was entitled to maintain the action. He thought that Section 42 of the Specific Relief Act did not bar the suit and accordingly answered issue No. 5 in the negative and issue No. 1 in the affirmative. He considered issues Nos. 4 and 6 together as in fact they raised the same question and answered those issues in favour of the plaintiffs.

10. On a review of all the evidence in the case he came to the conclusion that Brij Nandan Singh did not give any authority to his widow to adopt a son to him and he also came to the conclusion that the widow did not in fact make any adoption. In the result he decreed the plaintiffs' suit and made the declarations in favour of plaintiff No. 1 substantially as claimed by him in the plaint.

11. The questions raised in this appeal are questions of facts and I entirely agree with the learned Vakil for the respondents that we ought not to differ from the trial Court, unless there are strong and weighty reasons for doing so. We have, however, certain responsibilities as an appellate Court and we are bound to examine the evidence with a view to see whether, in giving judgment in favour of the plaintiff No. 1, the learned Judge did not misdirect himself.

12. Now the way in which the learned Judge dealt with the whole case has been severely criticised by Mr. Kulwant Sahay on behalf of the appellants. It was pointed out that although the learned Judge refused to consider the evidence of Musammat Chandrama Kuer, and Musammat Jagatraj Kuer, the sister-in-law of Musammat Chandrama Kuer, on the ground that they were interested witnesses, he strongly relied upon the evidence of Ram Gavan Singh plaintiff No. 1 and Keshwar Singh another of the plaintiffs although they were far more interested in the result of the suit than the witnesses whose names I have just mentioned.

13. Now in supporting the case of adoption Musammat Chandrama Kuer was really asserting that she had divested herself of any proprietary interest in the estate of her deceased husband. There is therefore no prima facie ground for rejecting her evidence which was really against her pecuniary interest. On the other hand, the result of the suit would have serious effect on the fortunes of the

reversioners. This was the first argument of Mr. Kulwant Sahay on the judgment itself.

14. Next he argued that the witnesses examined on behalf of the defendants deserved some consideration, whereas the learned Subordinate Judge dismissed them with the remark that some of them were relatives of Brij Nandan Singh, whereas others were partisans of Gokhula Prasad Singh, the father of defendant No. 2. It was pointed out that there is absolutely no evidence in the record to establish that any of the witnesses examined on behalf of the defendants is a partisan of Gokhula Singh and that to be a relative of Brij Nandan Singh is no disqualification whatever, since a relative of Brij Nandan Singh is likely to know the facts of the case.

15. But as a matter of fact, out of 17 witnesses examined on behalf of the defendants only 4 are relatives of Brij Nandan Singh defendant No. 4 who is the brother of Musammat Chandrama Kuer; defendant 12 who says that he is a relative of Brij Nandan Singh, but does not say what the relationship is; Gokhula Prasad Singh, the nephew of Brij Nandan Singh and the father of defendant No. 2, and Jagatraj Kuer, the widow of his brother. In my opinion, the learned Subordinate Judge has not dealt fairly with the evidence which was adduced on behalf of the defendants.

16. But it is remarkable that although he rejected the testimony of witnesses examined on behalf of the defendants on the ground that they were relatives of Brij Nandan Singh, still he made it a matter of comment that the defendants did not examine any of the gotias of Brij Nandan Singh residing in the village. The failure to examine the gotias who resided in the village is capable of a very simple explanation. It is not likely that the gotias could contemplate with equanimity the prospect of the property passing out of the family to the family of the sister's son of Brij Nandan Singh.

17. It is not unreasonable to assume that they would have a great deal of sympathy with the reversioners. In regard to the witnesses examined on behalf of the defendants, it may be pointed out that they were mostly men of wealth, position and respectability and were not in the slightest degree interested in the result of the suit.

18. Here the learned Judge examined the correctness of an entry in the diary of a deceased illiterate Chowkidar sought to be used as documentary evidence by the plaintiffs.]

19. In the next place I have very grave doubt whether the entry was at all admissible in evidence. It was argued by the learned Vakil for the respondents that it was admissible u/s 32 (2) of the Evidence Act, but that clause is clearly not applicable. It was held by the late Chief Justice of this Court and Roe, J. in the case of *M. Naina Koer v. Gobarakan Singh* (1919) 2 P. L. J. 42=37 I. C. 424= (1919) P.H. C. C. 352, that entries made in the diary of a deceased illiterate Chowkidar, not by the Chowkider himself but by other persons at his instance,

are not admissible u/s 32 (2) of the Evidence Act.

20. Had the entry in this case been made by Bilat Ahir, then no doubt it would be admissible u/s 32 (2); but it was not; and it has not been established that it was the duty of Ramlagan in the ordinary course of business to record these matters. But in the view which I take of the entry, the question of law does not arise.

21. The learned Judge then examined the oral evidence of some of the witnesses to find out the cause of the death of Brij Nandan.]

22. It is unnecessary to go through all the evidence adduced on behalf of the defendants. It is sufficient to say that it appears to us to be reliable and of a class superior to that to which the witnesses called on behalf of the plaintiffs belong. Their evidence receives strong corroboration from the account book which has; been adduced in the case and there is no reason whatever why it should not be acted upon, I ought to mention that the evidence of the ladies who were examined on commission have made a deep impression on me. They seem to have given their evidence in a straightforward manner and there is no prima facie reason to reject their testimony. I quite concede that if Chandrama Kuer had attempted by adoption to benefit her father's family her evidence might be open to very grave suspicion; but the adoption which she sets up is that of the son of a nephew of her husband. The adoption was a natural one and against her pecuniary interest.

23. There is no suggestion in the case that there was any enmity between her and the plaintiffs and there is no reason at all why she should have divested herself of her proprietary interest in the estate in favour of one who did not belong to her father's family, but was a relation of her husband; specially as there is no suggestion that there was any enmity between her and the plaintiffs.

24. The learned Subordinate Judge thought that the surrounding circumstances stood against the case of an adoption. The learned Subordinate Judge accepted the following facts for his decision on the point. Brij Nandan had no issue by his first wife though he had lived with her for 12 years from the time of the marriage. He then married defendant No 1 and his married life with Chandrama Kuer did not last more than 6 or 7 years.

25. In the opinion of the learned Subordinate Judge it is improbable that Brij Nandan should have given an authority to his wife to adopt a son as there was no reason why he should not have a child by her before his death. If the case of the plaintiff s that Brij Nandan died suddenly be accepted, then there may be something in the view which has been taken by the learned Subordinate Judge; but in my opinion the plaintiffs have entirely failed to establish that Brij Nandan died suddenly.

26. I accept the case of the defendants that Brij Nandan had a protracted illness lasting for 24 days. If that be so, then what are the facts ? first, that Brij Nandan married Chandrama Kuer obviously with the intention of having a son by her,

secondly he was seriously ill and it may be that he took the view that he will not recover. It is not possible to say what was in the mind of Brij Nandan as he lay ill for 24 days; but in my opinion, there is nothing improbable in the story set up by Chandrama Kuer that after an illness lasting for 24 days Brij Nandan gave authority to adopt a son to him. The learned Subordinate Judge thought that, as on the evidence of defendants, the condition of Brij Nandan had not materially changed on that critical day, namely, the 21st Baisak it is improbable that he could have given her permission that day. That is the first line of attack adopted by the learned Subordinate Judge. The question in my opinion is not what view the defendants and their witnesses took of the illness of Brij Nandan, but what view Brij Nandan himself took of it. As to that there can of course be no evidence.

27. The learned Subordinate Judge, then changing his line of attack, thought that Brij Nandan must have had brain complications on the 21st Baisak, and therefore he was not in a proper state of mind to give any authority to his wife to adopt a son. The foundation for this opinion is that there are entries in the book of account showing that Kasturi and Attar were purchased on the 20th and 21st Baisak. The learned Subordinate Judge says that everybody knows that Kasturi and Attar are given to patient when there are brain complications and that accordingly if the defendants' account book be genuine, Brij Nandan was suffering from brain complications on the 21st Baisak.

28. In my opinion the reasoning is far too speculative to merit any examination. It may be that these articles were purchased for future use, if occasion arose for them; but no conclusion can be founded on the sole fact that Kasturi and Attar were purchased on the 20th and 21st Baisak: In my opinion having regard to the fact that Brij Nandan had lived through at least 18 years of married life without having a son the story told, by the defendants becomes inherently probable. I hold that Brij Nandan did give authority to Chandrama Kuer to adopt a son to him.

29. The next question is, did Chandrama Kuer adopt a son in pursuance the authority which was given to her ? Now, on this point the evidence is all one way but the learned Subordinate Judge has come to the extraordinary conclusion that there was no adoption by the widow. Now it may be pointed out that, if in fact Chandrama Kuer wanted to set up defendant No. 2 as her husband's adopted son, there is no reason at all why she should not have gone through the ceremony of adoption. The question would have stood on a different footing had it been raised after the death of Chandrama Kuer. There is absolutely no reason to hold that there was in fact no adoption when it was in the power of Chandrama to go through the ceremony of adoption. The evidence in my opinion is conclusive on the point.

30. It appears that before the adoption, Chandrama Kuer took the precaution for asking for police help as she thought that the plaintiffs might create disturbances. Exhibit A is a personal diary of Sub-Inspector B. K. Roy and his report shows that he " left the police station for Burdiha with constables Suleman

and Sukhdeo Missir to see that no breach of the peace takes place at the time of adoption of a son to Chandrama as ordered by the Magistrate."

31. The Sub-Inspector has given evidence in the case and he says that he did go to Burdiha in order to preserve peace. The learned Vakil for the respondents has argued that his evidence is not evidence of adoption for he does not say that he was present at the ceremony of adoption. This is true but the evidence of the Sub-Inspector proves that Chandrama Kuer had made preparations for the adoption. In my opinion, it is impossible to say that no adoption in fact took place if Chandrama Kuer had in fact asked for police and was prepared to go through the ceremony of adoption, With what object, it may be asked, would Chandrama Kuer not go through that ceremony if it was her desire to do so ?

32. There is no evidence on the other side worth considering. They were admittedly not present at the adoption and their Evidence cannot possibly establish anything. In my opinion there is abundant evidence to establish that defendant No. 2 was in fact adopted by defendant No. 1 on the 17th May, 1916.

33. I would allow this appeal, set aside the judgment and decree passed by the learned Subordinate Judge and dismiss the plaintiffs' suit with costs in this Court and in the Court below.

34. Adami, J.

35. I agree.