

(1929) 01 AHC CK 0070
In the Allahabad High Court

Kunwar Brij Raj Saran Singh

APPELLANT

Vs

Kunwar Basant Singh and Others

RESPONDENT

Date of Decision : 16-01-1929

Acts Referred:

Citation : (1929) 01 AHC CK 0070

Final Decision : Allowed

Judgement

1. This appeal arises from a suit filed in the Court of the Additional Subordinate Judge of Meerut in which the first five plaintiffs, Kumar Basant Singh and others, claimed to be the reversioners to the estate left by one Khushal Singh on his death in 1879, and as such to be entitled to possession of the estate on the death of his widow. The other plaintiffs are speculators who have purchased part of the plaintiffs' claim. Khushal Singh left a widow, Rani Raghubir Kunwar, who succeeded to the estate on her husband's death and in 1903 she adopted Brijraj Saran Singh, the principal defendant, who is the appellant in this appeal. Other appeals have been filed by various transferees of parts of the disputed property from Rani Raghubir Kunwar or from Brijraj Saran Singh or from both. The decision in the suit depended on the validity of the adoption of Brijraj Saran Singh by Rani Raghubir Kunwar in 1903. The plaintiffs claimed that there had been no adoption, and that even if the ceremony of adoption had been gone through it was invalid, because Rani Raghubir Kunwar being a Hindu widow had no power to adopt without the express permission of her husband. They claimed that no such permission had ever been given, and in para. 9 of the plaint they definitely set up the theory that; a Will had been forged by one Rao Umrao Singh the father of Rani Raghubir Kunwar and that in this so-called Will alleged to have been executed by Khushal Singh it was made to appear that Rani Raghubir Kunwar had been granted permission to adopt a son. They further claimed that the adoption. was invalid because Brijraj Saran Singh, who was 19 years of age at the time of his adoption, was an orphan. The defendants alleged that the Will was genuine and that the adoption was valid. It has not been suggested before us that the adoption would be valid under the Hindu Law, but it has been argued

that under the Customary Law applying to the parties an orphan can be adopted, and further that a widow can adopt a son without the permission of the husband when the husband's property is non-ancestral. The defendants also claimed that the first five plaintiffs were not entitled to sue as the reversioners to the estate of Khushal Singh. The lower Court decided all these points except that of the factum of adoption in favour of the plaintiffs and gave them a decree.

2. It is necessary at the outset to give a brief history of the events that led up to this suit. Khushal Singh the last male owner of the estate, was the adopted son of Raja Naher Singh, Raja of Ballabgarh, a dependant of the old Delhi Emperor. Ballabgarh was then in the district of Delhi, which was part of the North Western Provinces. During the mutiny Raja Naher Singh rebelled against the Government; he was hanged, and his estate was forfeited, and his dependants were granted allowances on condition that they left their home. Khushal Singh migrated to Kuchesar, a large estate lying in the Bulandshahr and Meerut districts and married a daughter of the last male owner of that estate, Gulab Singh. This daughter was named Bhup Kunwar, and on her death Khushal Singh managed to obtain possession of the whole Kuchesar estate, which was a very large one. Litigation followed with some of the other claimants, and in 1868 there was a compromise under which a 5 anna share was carved out of the whole estate and was allotted to Khushal Singh. Of the other claimants Umrao Singh whose name figures to a certain extent in the present suit, got a 6 anna share, and one Partab Singh got the other 5 annas. Umrao's six anna share continued to be called the Kuchesar estate. Partab Singh's share was named the Mohi Uddinpur estate, and Khushal Singh's share, which is the property now in dispute, was called the Sahanpur estate. Some years before the compromise was arrived at, Bhup Kunwar had died, and very shortly after the compromise Khushal Singh married Rani Raghubir Kunwar, the daughter of Umrao Singh.

3. There was no issue of either marriage of Khushal Singh, and he died at the age of about 38 on the 6th of August, 1879. It is claimed by the plaintiffs that the defendants have not proved that he left a Will. A document in the form of Will alleged to have been executed by Khushal Singh at Meerut on July the 26th 1879, was produced in the Court of the Settlement Officer in 1897, but that document has not been produced in evidence in this suit. The document that has been produced is a copy of the original document which was shown in the Settlement Officer. The defendants claim that this copy should be admitted as secondary evidence of the original Will; and they further claim that other secondary evidence should be admitted to prove the contents of the original, and also to prove the fact that it was executed by Khushal Singh. The most important and perhaps the most difficult question in this appeal is that of whether this copy is to be admitted in evidence. If it can be admitted, then the further question arises of whether having the copy before it the Court can presume the original, which is said to have been executed in 1879 to be genuine; and, if this presumption ought not to be made, of whether the other secondary evidence adduced by the defendants to prove the execution and contents of the alleged

Will is sufficient to establish their case. Clearly then, the first question to be decided is whether the copy is to be admitted in evidence, that is to say whether the defendants have proved that secondary evidence is admissible under any of the clauses of Section 65 of the Evidence Act. The only clause that has been referred to in argument is Clause (c) of that section, viz.,

When the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

4. The defendants have tried to prove that the original Will has been destroyed or lost, but the evidence on the point is so involved with that of the other question of whether a Will was actually executed by Khushal Singh or not that we find it impossible to decide the one question without reviewing the evidence relating to the other. It may be stated at the outset that while the plaintiffs alleged in their plaint that a Will had been forged by Umrao Singh they have never suggested at any stage that this forged Will was a substitute for a genuine Will executed by Khushal Singh. Their case throughout has been that Khushal Singh executed no Will, and that the Will produced in the settlement proceedings of 1897 had been forged shortly before that date for a specific purpose, viz., to support an adoption that was then being contemplated. But it has been pressed upon us, and we think rightly pressed, that the plaintiffs' case does not depend on their proving that there was a forgery. The defendants are in possession of the disputed property, but their title depends upon an adoption that is invalid unless the Will can be proved, and it is. therefore, for the defendants to prove the Will if they are not to be dispossessed of the estate.

5. The alleged Will is printed on pages 801 to 803 of the printed book, and after a few preliminary remarks of no special importance it sets forth:

(2) In case the disease from which I am at present suffering is cured and I get any issue, or I adopt a boy during my life-time, then he shall be my successor, but in case there is no issue or adopted son, my wife, Musammat Raghubir Kunwar, shall be the owner in possession of my property.

(3) I have willed and permitted to my wife Musammat Raghubir Kunwar and now I give it in writing that in case no issue is born to me in my life-time or in case one is born and does not survive or in case I do not adopt a son in my life-time, she should for the sake of spiritual benefit and in order to perpetuate my name, adopt a boy, in accordance with the custom prevailing among the Jats in the first place from the family of the present rais of Kuchesar, in the second place a descendant of Rao Maharaj Singh, resident of Mohiuddinpur, and in the event of this being impossible, in the third place, any boy belonging to the brotherhood. She should bring up the boy, educate him and perform his marriage. From the time of adoption that son shall be like the begotten son of my wife and me. But when a boy of one family has been adopted a boy of another family shall not have any right to urge his claim for being adopted; nor shall a relative urge (?)

sic) Musammat Raghubir Kunwar shall be the owner in proprietary possession of my property till she makes an adoption. After the adoption she shall, as an elder and a patron, be the protector and trustee of the rights of the adopted son. She shall allow her name to stand in the public papers so long as she remains alive. Even during the minority of the adopted son she shall have the powers set forth in para, 4 of this Will.

(4) At present a very large debt is due against me, the executant. If it is not paid up during my life-time, then after my death it shall be incumbent on Musammat Raghubir Kunwar my wife to pay off the entire debt from the income of the "riayasat" (estate). In case the income does not suffice for the purpose she should sell some zamindari property to the extent of the amount of the debt and thus satisfy the debt. She shall like myself have a permanent power to transfer property for this purpose.

(5) My deceased mother-in-law, the wife of Rao Umrao Singh, in her life-time purchased from me a 5 biswa zamindari share belonging to me and situate in Mauza Puth, District Meerut, for a fixed price of Rs. 3,000 and made a charitable gift of the same in favour of the temple of Sri Gangaji. The income from the said property has been from the day of the purchase spent over the expenses of the temple. Out of the said price I have already received Rs. 2,700 and Rs. 300 remain due against Rao Umrao Singh. My successor shall unhesitatingly get the mutation of names in respect of the said property effected in favour of the temple of Sri Gangaji when the remaining amount is paid up or without its payment when the aforesaid Rao Sahab desires.

My mother often lives at Chandauli. In addition to the pension of Rs. 100 which she receives from the Government I pay her Rs. 300 a month. She shall continue to get this for her life-time out of the income from my property. After the death of my mother my sister Musammat Bibi Atar Dei who is a childless widow shall receive Rs. 15 a month for her life-time. My widow or son shall not be competent to stop the same.

Musammat Lachhmi Bai is in my keeping. I want to do something for her. If she keeps a good character it shall be incumbent on Musammat Raghubir Kunwar to give her (Lachhmi Bai) some property yielding a profit of Rs. 400 a month for her maintenance Musammat Lachhmi Bai shall have power to ultimately make a gift of and give" away out of that property a portion yielding a profit of not more than Rs. 50 a month to anyone (she likes). No one shall have any power to interfere in that.

8. If, when the adopted son attains majority and takes up the work and becomes competent my wife Musammat Raghubir Kunwar wants of her own accord to give up the management of the estate for the sake of freedom, she shall have power to make over the management of the pargana to the adopted son and free herself. In that case she shall for her life-time take Rs. 1,000 a month or in case she so desires, retain in her possession any villages which she likes and which

yield an income of Rs. 1,000 a month. She shall be at liberty to spend the income from those villages according to her own choice and without any interference on the part of the adopted son. Out of the aforesaid property she shall be at liberty to sell, mortgage, to give to any relation or to make a charitable gift of according to her choice, property yielding a profit of Rs. 500 a month. The adopted son shall not have any objection to that. She shall have absolute power. I have therefore executed the Will so that it may stand as authority.

6. The document purports to be signed by Kunwar Khushal Singh, by two Pleaders, and by no less than 10 other witnesses of apparent respectability. As the Will purports to have been executed in 1879, however, and the defendants have not been called upon to prove it until the present suit was filed on 1st May, 1923, nearly 44 years later, it has happened, not unnaturally, that all these witnesses have died. It has been urged very strongly on behalf of the defendants that the delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would have been available for instance, in 1903 and the following years, and this is an argument to which constant reference has been made whenever the evidence of the defendants has been criticised. It has been shown to us from the pedigree, and indeed it is not disputed, that the present plaintiffs were the nearest reversioners in 1903 as they are now, and that they alone would have been in a position to file a declaratory suit. We may remark here that the defendants did contest their legitimacy in the Court below, and have raised the question in appeal here, but we are convinced as the lower Court was that there is no force in the objection, and that the first five plaintiffs are now, as they were in 1903, the nearest reversioners to the late Khushal Singh. The learned Sub-Judge at an early stage in his judgment referred to the remarks of their Lordships of the Privy Council in the case of *Rajendro Nath Holdar v. Jogendro Nath Banerjee* 14 M.I.A. 67 : 15 W.R.P.C. 41 : 7 B.L.R. 216 : 2 S. P.C.J. 422 : 2 S. P.C.J. 666 : 20 E.R. 711. In that case the Will had been acted upon and recognised for 27 years by the whole of the family of the testator, and their Lordships remarked " If the document had been a fabrication, and if there were persons who might have intervened and have contested the Will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting respondent, might have come forward in one way or another and contested the Will. Therefore, there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the Will. No doubt these circumstances as the law stands, are not conclusive against the first respondent. He has the right to call upon the appellant, the defendant in the suit to prove his title; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by the death or otherwise--every allowance which can account for any imperfection in the evidence--ought to be made; and, on the other hand, that in testing the credibility of the evidence which is actually given,

great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the Will and to the acts done by them under the Will.... In such a case the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindu claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights--he may lose them altogether--which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the status which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title". Again in the case of *Kalyandappa bin Ayappa Desai v. Chaubasappa bin Dadappa Desai* 79 Ind. Cas. 971 : 22 A.L.J. 508 : 46 M.L.J. 598 : 28 C.W.N. 666 : 26 Bom. L.R. 509. AIR 1924 P.C. 137 : (1924) M.W.N. 414 : 34 M.L.T. 111 : 20 L.W. 109 : 11 C.L.J. 182 : 48 B. 411 : 10 A.L.R. 1114 : 51 I.A. 220 : L.R. 5 A.(P.C.) 97 : 1. C.W.N. 553 (P.C.) their Lordships remarked. " But if a claimant chooses to run the risk that an adoption which he has, not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued...."

7. In the present case we know that the plaintiffs might have sued for a declaration when the adoption was made in 1903. It has been pointed out for reasons which will be given later that if they had done so they would have had to fight against the resources not only of the Sahanpur estate but also of the Kuchesar estate as well, and that it would, therefore, have been very difficult for them to sue. But on the other hand it would be unfair to make the defendants suffer because the plaintiffs were not in a position to sue, and we think that in weighing the evidence we must give full force to the observations of their Lordships in these cases. They do not, however, go so far as to say that if there has been a long delay on the part of the plaintiffs, every presumption, both of law and fact, must necessarily be made against them though the tendency of the Court must invariably be to make such presumption unless good cause is shown against them.

8. The first and the most important presumption that we have been asked to make on behalf of the defendant-appellants is that u/s 90 of the Evidence Act,

Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested". If the original document which was produced in the settlement proceedings of 1897, had been produced in evidence in the Court

below that Court might have presumed that the document was genuine. The original document not being forthcoming, however, there has been some considerable argument in this Court as to whether the presumption referred to in the section can be applied to a copy. To avoid any confusion we may say at once that we are in no doubt but that the copy on the file is a true copy of the document produced in the Settlement Court. It was made by the Qanungo from the original and, therefore, fulfils the conditions of Clause (iii) of Section 63 of the Evidence Act. This is proved by the statement of the Patwari. Moreover, the order of the Settlement Officer shows that he saw the original and compared it with the copy. The debatable question is whether the genuineness of the original can be presumed from the copy. If we were to be guided by the wording of the section alone we might have some difficulty in holding that such a presumption might be made. There is, however, a preponderance of authority in favour of the proposition. In the case of *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno* 5 C. 886 : 6 C.L.R. 199 such secondary evidence was admitted u/s 65 (c). and Section 90 of the Evidence Act when the original was proved to have been lost from proper custody. In a case reported as *Ishri Prasad Singh v. Lelli Jas Kunwar* 22 A. 294 : A.W.N. (1900) 82 it was held that Section 90 should be applied when the original has been destroyed, a Bench of two Judges of this Court following the decision of the Calcutta High Court quoted above. In the case of *Dwarka Singh v. Rama Nand Upadhyaya* 51 Ind. Cas. 275 : 41 A. 592 : 17 A.L.J. 711 : 1 U.P.L.R. (A.) 81 a similar view was taken. Moreover in the case of *Lachman Singh v. Puna* 16 C. 753 : 16 I.A. 125 : 13 Ind. Jur. 169 : 5 Sar. P.C.J. 370 (P.C.) their Lordships of the Privy Council appear to have accepted the principle. That case has been strongly relied on by the appellants. The relevant evidence in that case was that of one witness who stated that he was present at the signing of the deed which he said was stated to be a deed of gift from Kali Babu to Ram Chander, and that of another witness that Kali Babu told him that there had been such a deed of gift. Their Lordships remarked, "Whether that evidence would of itself prove the deed of gift need not now be discussed, but that it formed good ground for holding that there was a deed capable of being proved by secondary evidence cannot be doubted". Their Lordships then go on to accept the opinion of the Courts below that the copy produced is a true copy of the original and conclude "When the copy is looked at it establishes the deed of gift on which the respondents rely". In order to connect the copy with the deed of gift which was proved to have been executed the Courts must, we think, have made use of Section 90 of the Evidence Act. There is similar evidence in the present case, that is to say there is evidence that a Will was executed and a copy produced which it is sought to connect with the Will by the [operation of Section 90. There is, however, this distinction to be made between the two cases. Their Lordships had before them certain findings of fact by which they were bound. They were satisfied from the evidence that a deed of gift had been executed, and that being so, they were prepared to accept the decisions of the lower Courts in making use of Section 90 of the Evidence Act. In the present case we are at this stage faced with the position that the trial Court has not found it proved that a

Will was executed, and has refused to exercise the option of making use of Section 90. The plaintiff-respondents have not been able to show us any authority for holding that the presumption cannot in any circumstances be applied to a copy. In fact it is obvious that there must be cases in which the presumption would be proper, as for instance in the case of a registered document.

9. It is certain, however, that such a presumption in the case of a copy of an unregistered document should only be made after a careful review of all the circumstances of the case, and we think it well, therefore, to consider all the circumstances in detail before pronouncing our decision on this point.

10. In any case, however, it was necessary for the defendant-appellants to prove that the original document had been lost or destroyed before they can ask the Court to admit the copy in evidence, and this, as we have already remarked, is the most difficult question in the case. There is some evidence of actual loss, but the plaintiffs allege that the original has not been lost but has been suppressed and the lower Court has found in their favour. We may allow that it would have been difficult for the plaintiffs to file a declaratory suit shortly after the adoption for they are men of restricted means and it would have been by no means as easy for them to find speculators to advance money to them for a declaratory suit, as it was later, when their possession would be decreed in the event of their establishing their case. They may have been in an unfortunate position, but there is no reason why the defendants should be made to suffer for that, and we think that all reasonable presumptions ought to be made in favour of the defendants on account of the delay in bringing the suit. The difficulty of establishing the loss of the Will or the reverse has arisen largely on account of this delay, and we think, therefore, that we ought to decide the point in favour of the defendants, and hold that the loss of the original document has been established and that secondary evidence may be admitted. The defendant appellants in trying to prove the loss of the alleged Will have led evidence to show that a Will existed, and it will be necessary to discuss this evidence at some length. Some of the evidence is directed to proving the contents of the Will, and this part of their statements need only be referred to if the copy filed in this case is not held to be genuine u/s 90 of the Evidence Act.

[Their Lordships discussed the evidence and found that the Will was genuine and proceeded as follows.]

11. We have already remarked that we consider that secondary evidence of the document produced in the settlement proceedings of 1897 ought to be admitted and we have also shown that there is authority for applying the presumption allowed u/s 90 of the Evidence Act to a copy of the original document, when the original document, itself is not available. We have now to consider whether that presumption ought to be applied in the present case. It has been argued by Sir Tej Bahadur Sapru for the respondents that if there are considerations favouring the application of that section which are however in themselves not sufficient to

justify the Court in applying it, the Court should not allow those considerations to be supported by other secondary evidence of the execution and contents of the original document. The point is a somewhat subtle one, but we think that it may be put fairly in this way. The circumstances of the case may or may not be sufficient to justify the application of Section 90. If they are definitely insufficient, we ought to ignore that section altogether, and not to regard it with a benignant eye while we scrutinise any other secondary evidence of the contents of the document. In deciding whether the section ought to be applied however, we are bound to take into consideration all the circumstances, including the evidence showing that a genuine Will existed, and that it was acted on.

12. We have already described what the direct evidence in favour of the existence of the Will is, and we are particularly impressed with the importance of the statement made by Bhagwan Singh to the effect that he saw a Will a few months after the death of Khushal Singh, and that he identified the signature of his brother Sheoba-ran Singh on the document. The trial Judge's reason for discarding this evidence seems to us to be insufficient. If his statement is believed not only is the existence of the Will proved but also the signature of one of the witnesses on it. We think further that the other witnesses in favour of the Will have not been rated at their true value by the Judge. In each case some reason is found for doubting the credibility of the witness or the probability of his statement, but we think that the remarks we have made in regard to the evidence relating to the loss of the Will must also apply here. If a suit had been brought in 1903 or thereabouts, there would almost certainly have been a greater mass of evidence to prove the existence of the Will, and that evidence would have been more precise in character. Moreover, as we have stated before, some of the witnesses to the Will were still alive, and their evidence too would have set at rest the question of whether such a Will had been executed or not we do not forget that there are several circumstances which appear to tell against the existence of the Will prior to 1897, and the most important of these is the absence of any mention of the Will in the deed of gift to Lachhmi Bai, in her agreement connected therewith and in the power-of-attorney in favour of Umrao Singh. It has to be admitted and in fact it has been admitted on behalf of the defendants that this absence of any mention of the Will is a remarkable circumstance that needs explanation. It is not, however conclusive against the existence of the Will. If no such Will existed, the gift of such a large property to Musammat Lachhmi Bai was unnecessary. On the other hand if a smaller property was to be given to her and a relinquishment of all further claim was to be obtained from her, it may have been considered politic to keep the Will concealed from her at the time. All this in fact, might have been explained and of the three people who could have provided the explanation, two were alive in 1903 when the plaintiffs might have filed the declaratory suit and set these matters at rest.

13. A document which purported to be the Will was produced in Court in 1897, was referred to in the registered deed of gift in 1902, was made the basis of the

public adoption in 1903 and was referred to in the deed of adoption. It was admitted to be genuine in litigation in 1901 and in other litigation from 1903 to 1909, and mutation of names was made in the Revenue Court on the basis of the adoption in 1910. Yet since 1879 when Khushal Singh died until 1923 when this suit was filed, no suggestion was made by anyone that a Will had been forged or that the Will produced in 1897 was a forged document. It was only when 44 speculators combined to take 192 shares of half the estate that the suit was launched. The combination of such a large number of speculators shows the extent of the risk which each was prepared to run, and also gives a fair idea of the resources which they had for procuring oral evidence.

14. We think after a careful consideration of the whole of the evidence that we ought to accept as proved the fact that a Will was executed by Khushal Singh. We have already referred to the case of Luchman Singh v. Puna 16 C. 753 : 16 I.A. 125 : 13 Ind. Jur. 169 : 5 Sar. P.C.J. 370 (P.C.) and we propose to follow the process of reasoning which we believe to have been adopted by their Lordships of the Privy Council in that case and to accept the copy of the Will as genuine, and we find that the Rani was empowered under the Will to make an adoption in accordance with it.

15. There is one more point that has to be settled in connection with the Will. It has been argued on behalf of the plaintiffs that even if the Will be held to be proved, the adoption is invalid because it does not comply with the terms of the Will. In para. 3 provision is made for adoption in the following order:

She should...adopt a boy in accordance with the custom prevailing among the Jats in the first place from the family of the present rais of Kuchesar: in the second place a descendant of Rao Maharaj Singh, rais of Mohiuddinpur, and in the event of this being impossible, in the third place any boy belonging to the brotherhood". In interpreting this passage the lower Court remarks that there is a clear provision in the Will that when once an adoption has taken place out of a particular family, the members of the other two categories would have no right to urge it. This has reference to a later passage in para. 3 of the Will to the following effect:

But when a boy of one family has been adopted, a boy of another family shall not have any right to urge his claim for being adopted.

16. The conclusion of the lower Court apparently was that when an adoption has been made it could not be questioned on the ground that the order mentioned in the Will has not been observed. But we do not think that this is the proper interpretation of the Will. The later passage appears to us to refer to the possible case of a boy in one of the two preferred families being born after an adoption had been made outside those families, in which case he was to have no power to contest the adoption. We think it is clear that the Will intended that no boy outside the two families should be adopted while there was in existence a boy belonging to one of those families. We know as a matter of fact that Inderjit

Singh, who is a grandson of Umrao Singh, and, therefore, a boy of the Kuchesar family, was in existence when the present principal defendant was adopted. Nevertheless we are satisfied that the adoption of Brijraj Saran Singh was valid under the Will. He is a son of a sister of the Rani and a grandson of Umrao Singh. The mere fact that he was a daughter's son and not a son's son of the rais of Kuchesar does not place him outside the khandan or the family, and we think therefore that he must be held, to come into the first category mentioned in the Will.

17. Our conclusion is therefore that the Will has been proved, and that under it the Rani had power to adopt. It has been found by the lower Court that she did actually adopt Brijraj Saran Singh, and this finding has not been assailed before us. We have just found that this adoption was in accordance with the Will.

18. It has been argued, however, that in any case the adoption of Brijraj Saran Singh is invalid because he was an orphan. The defendants have pleaded that Khushal Singh was subject to the Customary Law of the Jats of Ballabgarh under which the adoption of an orphan is valid. It has not been denied that when Khushal Singh migrated from Ballabgarh to Kuchesar he must have continued to be governed by the Customary Law if any such Customary Law prevailed in Ballabgarh. Ballabgarh was at the time of Khushal Singh's migration in the Delhi district, though it has since been transferred to Gurgaon. The district of Delhi was at the time part of the North-West Provinces, and the district of Gurgaon in which Ballabgarh now lies is part of the Punjab. But although something has been said about these administrative changes we do not think that they can have any effect on the question, which is the Customary Law of the Jats of Ballabgarh. The principal documentary evidence that has been referred to is that of the *riwaj-i-am* which differs from the *wajib-ul-arz* in being a record of the customs prevailing in districts as distinguished from villages. There are two copies of the *riwaj-i-am* of the Delhi district the authenticity of which is, of course, not denied that of 1880 and that of 1912 and the customs are recorded in the latter copy in the form of question and answer. Question 83 on page 41 of the official copy is "may a man give in adoption (i) his only son (ii) his eldest son, (iii) his brother" and the answer to the last question is: a brother can be given in adoption by his own brother, but cannot be adopted by his own brother", and this custom is stated to relate to "all tribes". In the introduction the Jats are shown as one of the divisions of the Kshatriya caste. There can be no doubt, therefore, that this record related to the Jats in the Delhi district in 1912. It is denied, however, that the custom recorded shows that an orphan can be adopted. It does not do so in so many words, but it is argued for the appellant that the custom is a necessary inference from the record custom that a man may give his brother in adoption. The argument proceeds on these lines: the words "to give in adoption" may have one of two meanings, (i) to give permission for the adoption and (ii) to officiate at the ceremony of adoption as the person who gives in adoption. The second of these functions may be delegated to another, but the first cannot. The answer to question No. 87 of the same record shows

that the only formalities necessary to constitute a valid adoption are the beating of drums and the distribution of sweets, and for the adopter to say before the relations assembled "I have adopted such and such person as son", the adopted person being present at that time. There is, therefore, no necessity for anyone to officiate at the ceremony as the person who gives in adoption. If, therefore, a man may "give in adoption" his brother, the meaning must be, not that he performs the ceremony of giving, but that he gives the permission. The necessity for a brother to give his brother in adoption can only arise if the parents are dead, and it, therefore, follows that an orphan may be given in adoption. It was argued for the plaintiffs that the recorded custom may merely mean that the father may be alive, but away, and in this case the brother might officiate at the ceremony. But this argument has no force if we accept the explanation given on behalf of the defendants, which we think we must do. The adoption of an orphan is, therefore, quite consistent with this entry in the "riwaj-i-am"; and the appellants wish us to go still further and hold that it is a necessary inference from it. The plaintiffs have pointed to a decision of the Privy Council reported as *Mir Abdul Hussein Khan v. Bibi Sana Dero* 43 Ind. Cas. 306 : 45 C. 450 : 16 A.L.J. 17 : 4 P.L.W. 27 : 34 M.L.J. 48 : 22 C.W.N. 353 : 23 M.L.T. 117 : 27 C.L.J. 240 : 1 P.L.R. 1918 : 20 Bom.L.R. 528 : 12 S.L.R. 104 : 45 I.A. 10 (P.C.). They were there dealing with a case from Sind, but they quoted with approval some remarks made by the Punjab High Court in regard to custom in the Punjab to the effect that even in the Punjab there was no presumption in favour of custom as opposed to the personal law. In the present case however, there is no need to fall back on any presumption, because the defendants not only have brought forward the evidence of the riwaj-i-am, but they have also produced a number of witnesses both to testify to the existence of the custom and to prove instances of it. The importance of the entry in the riwaj-i-am is emphasized in a number of recent decisions, for instance, in the case of *Ram Kishore v. Jainarayan* 64 Ind. Cas. 782 : 20 A.L.J. 857 : 17 N.L.R. 163 : 15 L.W. 144 : (1922) M.W.N. 125 : 30 M.L.T. 144 : 42 M.L.J. 80 : AIR 1922 P.C. 2 : 49 C. 120 : 26 C.W.N. 881 : 48 I.A. 405 (P.C.). Their Lordships of the Privy Council remarked that the trial Judge had been much influenced by the riwaj-i-am of the Gurgaon district in upholding an adoption, and they maintained his decision which was to the effect that the adoption of an orphan among the Dhusars in the district of Gurgaon was valid. In the case of *Musammatt Vaishoo Ditti v. Rameshri* 113 Ind. Cas. 1 : 29 P.L.R. 654 : AIR 1928 P.C. 294 : 55 M.L.J. 746 : 28 L.W. 908 : 49 C.L.J. 38 : 55 I.A. 407 : (1929) M.W.N. 5 : 10 Lah. 86 their Lordships remarked "it has been held by this Board that the riwaj-i-am is a public record prepared by a public officer in discharge of his duties and under Government rules; that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal; and that the statements therein may be accepted even if unsupported by instance *Beg v. Allah Ditta* 38 Ind. Cas. 354 : 44 I.A. 89 : 12 P.W.R. 1917 : 21 M.L.T. 310 : 32 M.L.J. 615 : 19 Bom. L.R. 388 : 45 P.R. 1917 : 15 A.L.J. 525 : 21 C.W.N. 842 : 44 C. 749 : 26 C.L.J. 175 (P.C.)" and AIR 1925 267 (Privy Council) and they go on to remark that even if there be no evidence of instances, if the custom spoken to by

the party's witnesses is in accordance with the custom applicable to his community according to the manual of the Customary Law of the district, there is sufficient prima facie evidence of the existence of the custom; and they did in fact uphold an adoption under a custom that was not supported by any instances, on the ground that it was in accordance with what is laid down in the *riwaj-i-am*.

19. In the present case however, as we have already remarked there is a considerable body of evidence. The defendants produced 20 witnesses to testify to the existence of the custom, and 10 of these spoke to definite instances. It is true that the learned Subordinate Judge has not been satisfied that any of these instances has been satisfactorily proved except one. At the end of the judgment he has given in Appendix 1 a list of the instances of orphans' adoptions which the defendants tried to prove, and in our opinion he has rejected the evidence somewhat summarily. For instance he took the case of Mukh Ram, No. 1 in the appendix. One witness came forward to state that an orphan could be adopted in the Jat community, and gave as an instance that Mukh Ram was adopted by Musammat Jasso, and later on Mukh Ram's son Molhar came forward to testify to the same effect. The lower Court has accepted the rebutting evidence to the effect that Molhar's "sons and parents were alive when he was adopted", but there is nothing to rebut the statement that Mukh Ram, the father was an orphan when he was adopted. Again in the case of Mamraj No. 2 on the list the statement made by Mamraj him self in a former suit in 1881 was produced in evidence. In that former suit Mamraj's adoption was being attacked, though not on the ground that he was an orphan. He was unlikely to say any thing that could reflect on the legitimacy of his adoption, yet he came forward and said "I was a year old when Har Chand my maternal uncle, took me in adoption.... My father and mother both had died at the time of my adoption". The Judge has accepted the statement of one witness on the other side who deposed that Mamraj was adopted on the very day when he was born, both his parents being then alive. It has been suggested that the statement of Mamraj is not admissible u/s 13 of the Evidence Act in proof of the allegation that he was an orphan when he was adopted. We think however, that it ought to be admitted. u/s 13 of the Evidence Act where the question is as to the existence of any right or custom Clause (b) "particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from" are relevant facts. It is true that the question being adjudicated when Mamraj made his statement in 1881 was not that of whether an orphan could be adopted, and it may be said that his assertion was not one of the custom that was then in question. It was, however, an assertion that he was adopted and the question was whether he had been adopted, and it is clear that the assertion that he was an orphan at the time was not due to any indirect intention and may even have been against his own interests. We think that the lower Court was right in not accepting those cases where the adopted person was still alive but was not produced as a witness. But in the case of Kallu No. 4 in

the appendix, a witness Jaisi Ram came forward and stated that he had been present, when Kallu was adopted and that Kallu's parents were then dead. The witness was then subjected to a long cross-examination as to dates and ages in which he sometimes seems to have found a difficulty in answering. The Judge remarked at the end of the examination "it was very difficult to get answers from the witness in cross-examination" and in his judgment he remarks Jaisi Ram is an unreliable witness as he did not give clear answers in cross-examination.

20. After reading the statement and the cross-examination, however, we feel no surprise that Jaisi Ram had to hesitate before replying to some of the questions, and we do not think that this alone was a good reason for holding him to be an unreliable witness. If his statement is accepted the adoption is proved as there is no rebuttal. In the case of Gordhan, No. 6 in the appendix the Judge has held that the adoption of an orphan has been proved. It is now admitted on behalf of the plaintiffs that Gordhan was adopted; but it is denied that the evidence proves that he was an orphan at the time. The evidence consists of the statements of two witnesses which were admitted by the lower Court u/s 13 of the Evidence Act, and as they do not contain assertions that Gordhan was adopted when he was an orphan we do not think the evidence should be excluded on the ground that it is not clear whether that question was being agitated in those proceedings. It must be remembered that instances of the adoption of an orphan cannot in the ordinary course of events have been very frequent within living memory, and yet the defendants produced evidence as the above instances show.

21. In the case of Umrao No. 9, two witnesses have deposed to his adoption when he was an orphan. Against this the plaintiffs produced one witness who denied that Umrao had been adopted by the alleged adoptive father Kure, and stated that on Kure's death certain persons got his property; but in cross-examination he contradicted this and said that Umrao got Kure's property. In these circumstances it seems to us to have been quite unfair to accept the plaintiffs evidence rather than the defendant's. It is not necessary to go through all the other instances. Those given above appear to us to have been sufficient to establish the custom especially when we find that the custom is in accordance with that recorded in *riwaj-i-am*. The form of adoption described in the *riwaj-i-am* is the "Kriti" form and not the "dattah" form which is prescribed by the Benares School. The ceremony of giving and taking is not necessary under the "Kriti" form, and it is precisely this ceremony that makes the adoption of an orphan inconsistent with the "dattah" form, because, there is no one to give an orphan. Moreover, the adoption of Brijraj Saran Singh undoubtedly took place; it was public and there was no concealment about it. A large number of the brotherhood assembled to take part in it, priests from the ancestral village came to join it, and it was well known that Brijraj Saran was an orphan. It was recognised by the family for a number of years and the adopted son enjoyed the possession of the estate, and yet no one protested, until the present suit was filed, that the adoption was contrary to custom. It is true that the plaintiffs produced a large number of witnesses to testify that the Jats were not governed

by Customary Law but by the ordinary Mitakshara Law. The Subordinate Judge has however, remarked. "It is not far-fetched to find out that a host of witnesses produced on behalf of the plaintiffs are more tutored than otherwise. They have no idea of Hindu Law, and do not know the principles on which Hindu Law forbids the adoption of daughter's son or sister's son.... No reliance can be placed on these witnesses and there is no doubt in my mind that so far as the Punjab is concerned including the Delhi and Gurgaon districts the agricultural population to a great extent follow the Customary Law." We may add that whereas it may be easy to produce numerous witnesses to affirm generally that they are governed by the Mitakshara Law, it is by no means easy to manufacture specific instances of a particular custom, and to produce witnesses who shall testify to them satisfactorily, and stand the test of cross-examination on every detail. We accept the conclusion of the Judge and hold that the Customary Law does prevail in the Delhi and Gurgaon districts; but we differ from him when he says that the custom of adopting an orphan has not been proved to exist in the Jat community of Ballabgarh tahsil. It has been suggested that even if this custom exists it does not follow that Khushal Singh was governed by it when he left Ballabgarh in 1858. We do not think that we can accept this contention. If the custom of the adoption of an orphan prevailed in 1912, it follows that it had the ordinary attributes of a custom, that is to say that it was ancient and unless there is evidence to the contrary, that it existed in 1858.

22. There is one more circumstance in favour of the custom of adopting an orphan that is worthy of mention. The suit brought on behalf of Inderjit in 1903 was intended not only to establish Inderjit's adoption but to get the defendant's adoption invalidated. If there was no custom allowing the adoption of an orphan, Girraj was likely to have made it a point of attack that the defendant was an orphan. This was not done. The inference is almost irresistible that the custom of adopting an orphan was too well-known to be attacked.

23. In the course of arguments the respondents tried to show that the adoption of Brijraj Saran Singh must be invalid because he was not of the same "gotra" as Khushal Singh. We need only say that in the riwaj-i-am of 1880 it is recorded that a sister's son may be adopted, and that is the relation in which Brijraj Saran Singh stood to his adoptive mother. The wording of this riwaj-i-am makes it clear that the question for consideration is the relationship to the person adopting and not to the deceased person. There is no such restriction in the riwaj-i am of 1912. The fact is that the plaintiffs are trying to set up a special custom under which Brijraj Saran Singh could not be adopted and they have failed to prove it. It is admitted that under the Hindu Law the alleged restriction in regard to the "gotra" does not exist, and it follows that as the plaintiffs have failed to prove a special custom of this kind, the objection to the adoption on this ground must fail.

24. Our view of the whole case, which is obviously a difficult one, is that the learned Subordinate Judge though he has written what is in many ways a careful and able judgment, has been too much inclined to discard positive evidence in

favour of an ingenious theory. The final result is that we allow the appeal, set aside the decree and order of the lower Court and direct that the plaintiffs' suit be dismissed with costs in both Courts.