Privy Council Appeal No. 105 *of* 1928.

Allahabad Appeals Nos. 21 *and* 22 *of* 1927.

Dal Bahadur Singh and others - - - - - *Appellants*

v.

Bijai Bahadur Singh and others - - - - - *Respondents*

Same - - - - - - - - - - *Appellants*

v.

Amar Bahadur Singh and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST OCTOBER, 1929.

Present at the Hearing:

LORD BUCKMASTER.
VISCOUNT DUNEDIN.
LORD TOMLIN.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*Delivered by* LORD BUCKMASTER.]

Their Lordships do not desire to hear the appellants further, for, in their opinion, this appeal must succeed. It is brought against two decrees of the High Court of Judicature at Allahabad, dated the 23rd December, 1926, both of which involve the only point that is now open for consideration, namely, whether or not power was conferred upon Musammat Sultan Kunwar by her husband Ajit Singh, to make an adoption to him.

The facts of the case are these: Ajit Singh died in 1860, leaving Musammat Sultan Kunwar his widow. It is stated that he had anxiously hoped for heirs, but that hope had been disappointed, and his widow was left without any son or daughter to comfort her. She continued in her loneliness until 1914, and on the 6th October of that year she purported to adopt to her husband one Amar Bahadur Singh. It is that adoption that is in dispute. So far as the documents and ceremonies are concerned it is not now impeached, the challenge is against the power to adopt and not the process by which the adoption was carried out. Consequent on the adoption the widow proceeded to obtain a mutation of names in the register, and for that purpose, of course, the fact of the adoption was a necessary piece of evidence. These proceedings were opposed by the reversioners, but the officer before whom they took place had to decide the dispute on the basis of possession and if he was unable to satisfy himself on this point then he was under an obligation to ascertain by *summary enquiry* as to which of the parties was best entitled to the property.

Musammat Sultan Kunwar died in or about October, 1915, and litigation ensued. Finally, the present suit was instituted by the reversioners against, among others, the adopted son in the Court of the Subordinate Judge of Allahabad. The Subordinate Judge on the 7th July, 1923, decided against the adoption; that decision was reversed by the High Court of Judicature at Allahabad, from which Court the present appeal proceeds.

The only point now left for consideration is as to the nature and value of the evidence that has been put forward in support of the power of adoption. It consists of two elements, and two elements alone: one is contained in a statement made by Musammut Sultan Kunwar on the mutation proceedings, and the other is a statement by an old man properly given and received in evidence. The learned Subordinate Judge thought that the evidence of the lady was not admissible, and the High Court have taken a different view upon that point.

Now, there are two sections, and two sections alone, of the Indian Act, by virtue of which the respondents claim that the widow's statement could be properly received. The first is Section 32, cl. 3. Under that section a statement of a dead person can be admitted when it is against the pecuniary or proprietary interest of the person making it. The principle upon which such statements are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true. But this sanction is manifestly wanting in the case of a Hindu widow who, after a lifelong enjoyment of her husband's property, desires at the end to pass it on to her own relations, and for this purpose goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege authority from her husband.

Section 33 is of a different character. It provides that—

> "Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead" —as is the case here— "or cannot be found; . . . Provided that the proceeding was between the same parties or their representatives in interest, that the adverse party in the first proceeding had the right and opportunity to cross-examine, and that the questions in issue were substantially the same in the first as in the second proceeding."

It is suggested that there is some change in the language of the first of those provisions that have been read, and that the words should be "that the adverse party in the first proceeding had the right or opportunity to cross-examine." Their Lordships are not prepared to accept that modification. They think that the true reading of the section is that the party had both the right and the opportunity of cross-examining. In this particular case the reversioners sought to cross-examine with regard to the creation of the power, and objection was promptly taken that it was not the real issue in the mutation proceedings at all, and that, therefore, the cross-examination was irrelevant. That objection was sustained, but, in spite of this, the cross-examination appeared still to filter through the objection, as it not infrequently does in some cases here. In the end there was no doubt that the Commissioner definitely ruled, and it is not disputed that his ruling was right, that the question as to the power to adopt was not in issue. The party therefore never had the opportunity or the right to cross-examine upon it. Therefore, under Section 33 again the evidence is not admissible.

It further follows from what has been said that the issue in the mutation proceedings was not substantially the same as in the present case, and accordingly under neither of these sections was the evidence properly admitted. That throws us back on the evidence of a person who is said to have been present when the power to adopt was conferred. He is an old man. No one knows quite how old he is, and there is no exact reason given as to why he should have recollected except the circumstances that he gives, viz., that he found Musammat Sultan Kunwar unhappy and weeping, because she was to be left utterly helpless, and that she was consequently told to adopt. It is, of course, possible that the unhappiness from which she then suffered through her sense of loneliness might swiftly have passed away, but it is certainly remarkable that if she was given power to adopt as some solace for her sense of desolation, that she did not attempt to exercise that power, or, as far as one can see, refer to or act upon it in any way until some fifty years had elapsed.

Their Lordships' Board think it would be impossible to rely on this piece of evidence and this piece of evidence alone for the purpose of satisfying the very grave and serious onus that rests upon any person who seeks to displace the natural succession of

property by the act of an adoption. In such a case the proof requires strict and almost severe scrutiny, and the longer the time goes back from the date when the power was given to the time when it comes to be examined, the more necessary it is having regard to the fallibility of human memory and the uncertainty of evidence given after the lapse of such time, to see that the evidence is sufficient and strong.

Their Lordships are unable to find that the evidence of this old man alone can be relied upon as evidence sufficient for that purpose. It is at least important to notice that when a similar issue had arisen in which the guardian of the adopted son compromised a dispute on his behalf, the guardian states in plain terms that Ajit Singh " had given no permission in writing to his widow to make any adoption." That is not in dispute. " There is no witness of that time except an old man, and even he is not in his proper senses. I cannot say whether or not Ajit Singh had given any permission before the said witness. But the said witness is of that time. There is no evidence as regards verbal permission or permission in writing." It is perfectly true that there is nothing to identify the witness referred to as this particular witness ; but it certainly is remarkable that if there were other witnesses they were not produced, and if this is the witness, there is at least some indication given by the guardian of the minor that he was a witness whose evidence was not sufficiently firm to be relied upon for this purpose.

It must be remembered in that case that the statement was being made on behalf of the adopted son, and that the guardian was compromising a claim made against him in respect of precisely the same matter.

There is no reason to support the suggestion that the guardian dishonestly gave away the rights of his ward, and, in the face of such a warning, their Lordships think it would be impossible to place that reliance upon the evidence of the old man which it is essential should be placed upon it if the respondents' contention in this case were to prevail.

The High Court has undoubtedly based its judgment upon a view of the Act which their Lordships are unable to accept. They will accordingly humbly advise His Majesty that this appeal must be allowed and the decree of the Subordinate Judge restored, with costs here and below.

In the Privy Council.

DAL BAHADUR SINGH AND OTHERS

v.

BIJAI BAHADUR SINGH AND OTHERS.

SAME

v.

AMAR BAHADUR SINGH AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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