

Privy Council Appeal No. 50 of 1930.
Allahabad Appeal No. 49 of 1928.

Banarsi Das and others - - - - - *Appellants*

v.

Sagar Mal - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1931.

Present at the Hearing :

LORD MACMILLAN.

SIR JOHN WALLIS.

SIR DINSHAH MULLA.

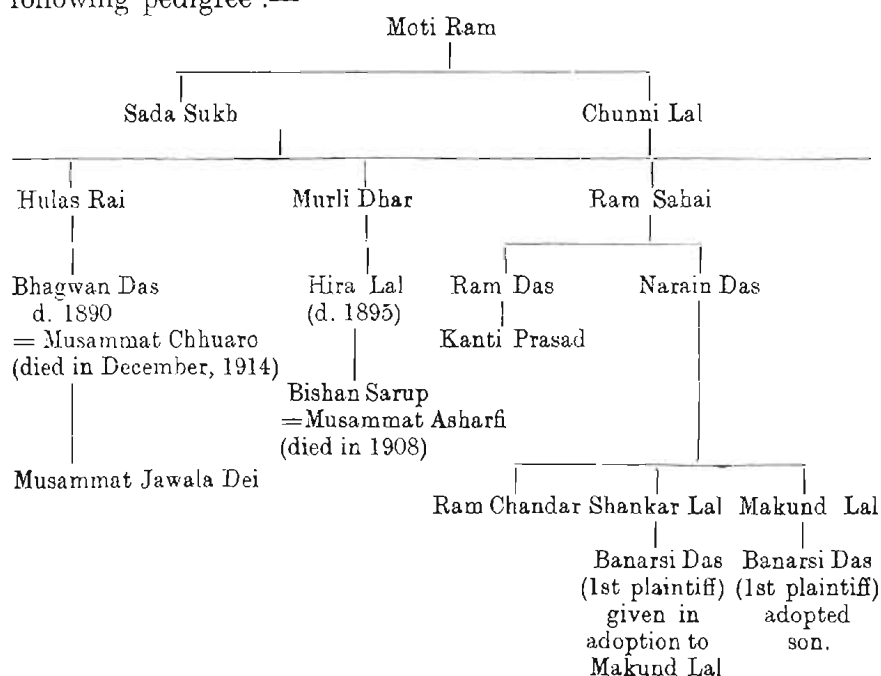
[*Delivered by* SIR DINSHAH MULLA.]

On the 15th May, 1912, Chhuaro, widow of Bhagwan Das, a Vysia by caste, executed a *tamliknama* whereby, after reciting that she had been authorised by her husband to adopt a son to him and that she had adopted the respondent, and that the respondent having attained the age of 18 years it was desirable that the properties should be transferred into his name, she assigned to the respondent as her adopted son the properties described in the document and valued at Rs. 72,000. This was followed by mutation of names in the revenue records, and the respondent has since then been in possession of the properties. The respondent is a grandson of a brother of Chhuaro.

Bhagwan Das was a resident of the village of Dehra, in the Meerut District. He died on the 5th February, 1890, leaving him surviving his widow and a daughter who was then an infant. The authority to adopt is alleged to have been given two or three days before his death, and the adoption is alleged to have taken place on the 28th April, 1908, after the death of the daughter and her sons, the last of them having died in 1907. Chhuaro died in December, 1914.

About 10 years after the death of Chhuaro, Banarsi Das, the first appellant, claiming to be the nearest reversionary heir of Bhagwan Das, instituted the present suit on the 15th May, 1924, in the Court of the Subordinate Judge of Meerut, against Sagar Mal, the respondent, for a declaration that Sagar Mal was not the adopted son of Bhagwan Das, that the *tambiknama* was obtained by him by fraud and undue influence, and for possession of the estate of Bhagwan Das. The second and third appellants were joined as plaintiffs in the suit. They are transferees from the first appellant of a two-thirds share of the estate, and they have been financing the present litigation. The first appellant will for convenience be referred to as the appellant.

The appellant founded his claim as reversionary heir on the following pedigree :—



The respondent put in a defence denying that the appellant was in any way connected with the family, and claiming that he was the validly adopted son of Bhagwan Das. The Subordinate Judge found that the pedigree was proved, and that neither the authority to adopt nor the adoption was proved, and he decreed the appellant's suit. As to the *tambiknama* he held that it was not obtained by fraud or undue influence, and that it was executed by Chhuaro with full knowledge of its contents, but that it was void and inoperative as against the appellant. On appeal, the High Court at Allahabad found that the pedigree was not proved, and that both the adoption and the authority to adopt were proved, and they reversed the decree of the Subordinate Judge. From this decree of the High Court the present appeal has been brought.

The questions for determination on this appeal are whether the appellant is the next reversionary heir of Bhagwan Das, whether Chhuaro had authority from her husband to adopt, and whether she did, in fact, adopt the respondent.

The estate of Bhagwan Das had been the subject of litigation in a previous suit. That was a suit instituted in 1912

in the Court of the Subordinate Judge of Meerut, immediately after the execution of the *tamliknama*, by Ramjas Dass and others, alleging that they were the grandsons of Budh Singh, the eldest son of Moti Ram, and claiming as such to be the nearest reversionary heirs of Bhagwan Das, against Chhuaro and the respondent, for a declaration that the respondent was not the validly adopted son of Bhagwan Das, and that the *tamliknama* was void except for Chhuaro's life. In that case the Subordinate Judge found that the pedigree set up by the plaintiffs was fictitious. He also found that the respondent was validly adopted by Chhuaro to her husband. On appeal the High Court, agreeing with the Subordinate Judge, held that the pedigree was not proved, and they dismissed the appeal. The High Court did not express any opinion as to the adoption. In that case Mukund Lal, the adoptive father of the appellant, gave evidence for the plaintiffs. Chhuaro also, as one of the defendants, gave evidence in the suit. Some of the witnesses in the present case who have deposed to the adoption were also witnesses in that suit. The finding, however, of the Subordinate Judge in that case as to the adoption cannot operate as *res judicata* in the present suit.

There was also a revenue case of a date anterior to the last-mentioned suit which has been the subject of much discussion in both the Courts in India. That case, their Lordships understand, involved a question as to the ownership of a temple at Dehra and lands appertaining to the temple. In that case evidence was given by Sedh Mal, who managed the estate of Chhuaro, before the Revenue Court on the 23rd May, 1908, which would be about 25 days after the date of the alleged adoption. In his evidence Sedh Mal said that the temple was built by Chhuaro, and that the *pratishta* ceremony of the temple was performed on the 11th May, 1908. He also stated that on the same day "sansakar ceremony was performed," but whose ceremony it was does not appear from the record of his evidence. Later on he was asked, "Who is this Sagar Mal whose *sansakar* you have performed?" to which he is reported to have answered, "I will not give a reply to the question as it concerns a Civil Court."

Sedh Mal was dead when the present suit was heard, and his deposition was taken on the file by the Subordinate Judge on the application of both the parties to this suit. This deposition fixes the date of the *pratishta* ceremony at the 11th May, 1908, that is, about 13 days after the date of the alleged adoption.

After the pleadings in the present suit had been filed, the appellant delivered several interrogatories to the respondent for his examination, one of them being as to the date of the *pratishta* ceremony. In answer to the interrogatory the respondent stated that the ceremony was performed on the 1st May, 1909, which would be a little over a year after the date of the alleged adoption. At the hearing of the suit some of the witnesses for the respondent gave evidence also to the same effect. The respondent himself

did not give evidence in the suit. Their Lordships will revert to this presently.

The answer given by Sedh Mal to the question about the *sansakar* ceremony of Sagar Mal seems to have considerably exercised both the Courts in India. The Subordinate Judge inferred from the answer that it completely negatived the adoption. The High Court, on the other hand, inferred from the same answer and the other evidence of Sedh Mal that it clearly established the adoption. Their Lordships have perused the deposition of Sedh Mal, and they think that even if it were admissible in evidence under the Indian Evidence Act, as to which they express no opinion, no inference could be drawn from it either for or against the adoption.

The witnesses for the respondent, about ten in number, came almost all from the village of Dehra. They all deposed to the adoption, and said that they were present at the adoption ceremony. The ceremony was attended by about 300 persons, and it was followed the next day by a feast. The respondent, who had come to live with Chhuaro some time before the adoption, lived with her continuously until her death. Chhuaro got him married about two years after the adoption, and on her death her funeral ceremonies were performed by the respondent and not by the appellant as they would ordinarily have been had he been the nearest heir. The Subordinate Judge disbelieved the evidence of all these witnesses. His reasons may be stated in his own words :—

“The oral evidence of adoption in the case is by no means reliable. There is so much difference between the witnesses about the time of the giving and the taking of the boy in adoption that no reliance can be placed on any one of them. Prohit Ramji Lal (D.W. 12) says that the giving and taking ceremony was over by 7 o'clock in the morning, while the other witnesses put it anywhere between 10 and 12 o'clock. Such oral evidence can easily be procured when a large property is at stake.”

Their Lordships think that this discrepancy in the evidence as to the exact hour of the ceremony is not sufficient in itself for discrediting the testimony of witnesses who were speaking to an event alleged to have occurred about seventeen years ago.

The finding of the Subordinate Judge that there was no adoption seems to have been influenced to some extent by the fact that the respondent had failed to produce Chhuaro's books of account, and that he had also failed himself to go into the witness-box to explain how he fixed the date of the *pratishtha* ceremony at 1st May, 1909. Their Lordships fully recognise that these are material, and very material factors to consider in determining the issue as to adoption ; but there is a considerable body of evidence in the present case, which their Lordships see no reason to discredit, to establish the adoption, and they agree with the High Court that the respondent was, in fact, taken in adoption by Chhuaro.

Next, as to the authority to adopt, three witnesses were called on behalf of the respondent, of whom two had given

evidence in the suit of 1912. They all deposed that two or three days before his death Bhagwan Das gave authority to his wife in their presence to adopt a son to him. The absence, however, of any document evidencing the authority to adopt and the long delay in exercising the authority seem to have weighed considerably with the Subordinate Judge; but, as observed by the High Court, it would be too much to expect an authority to adopt in writing from persons living in a village like Dehra so far back as 1890, and that there was nothing unusual in Chhuaro delaying the adoption until after the death of her daughter and the daughter's sons. The learned Judges of the High Court held that the authority to adopt was proved, and their Lordships are unable to say that the conclusion reached by them is erroneous.

Such being their Lordships' view it is unnecessary to consider whether the appellant has established his relationship to Bhagwan Das. The respondent as the adopted son of Bhagwan Das would be entitled to his estate in preference to the appellant even if the latter were proved to be the next reversionary heir of Bhagwan Das.

For the above reasons their Lordships are of opinion that this appeal fails, and that it should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondent's costs of this appeal.

In the Privy Council.

BANARSI DAS AND OTHERS

v.

SAGAR MAL.

DELIVERED BY SIR DINSHAH MULLA.

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