

(1869) 03 CAL CK 0018

Calcutta High Court

Case No: None

Chowdry Padam Sing

APPELLANT

Vs

Koer Udaya Sing

RESPONDENT

Date of Decision: March 12, 1869

Final Decision: Dismissed

Judgement

1. This is an appeal from a decree of the late Sudder Dewanny Adawlut at Agra, reversing a decree of the Principal Sudder Ameen of Zilla Meerut, made in favour of the appellant. The suit was instituted by Chowdry Mahur Sing, the father of the respondent (who died while the suit was pending), to recover possession from the appellant of the whole of the movable and immovable property formerly belonging to Chowdry Hem Sing, deceased, a cousin of the plaintiff, consisting of ancestral property and of property acquired and amassed by Chowdry Hem Sing and by his widow Khusal Koer, out of the proceeds of his ancestral estate.

2. The suit was instituted after the death of the widow Khusal Koer, the plaintiff's claim being founded on his right of heirship to Hem Sing. It appears by the plaint and a genealogical table annexed to it, that there were other persons descended from the same common ancestor as the plaintiff, who would have an equal right with him to a share in the succession of Hem Sing. The plaintiff, in his plaint, assigns as a reason for not including them among the defendants, that "they had not possession of the property in suit, and that if they thought they had any right or interest in the matter, they could proceed against the plaintiff at their option."

3. The plaint states that after the death of Khusal Koer the managers of the estate presented a spurious will to the Collector, setting forth the defendant as her adopted son, and by that means he contrived to get possession of the estate. And it alleges that the defendant is not the adopted son of the deceased widow Khusal Koer, and that she had no power to adopt a son as long as the plaintiff was alive. That the defendant does not belong to the family of which Khusal Koer and plaintiff are members, and that he is merely the foster son of Suhej Koer. That it is not true

that Khusal Koer ever executed a will, and, had she done so, a will made on the point of death would not be legal.

4. The defendant, by his answer to the plaint, states that the villages and properties claimed belonged to Hem Sing, the sole and absolute proprietor, though some of the properties were purchased after his death by his widow Khusal Koer. That Hem Sing had no issue, and therefore he selected the defendant, who was of the same family and sect as himself, and was then but twelve months old and the youngest child of his parents, with their consent, to be his adopted son. That he received defendant into his arms and brought him up as his own son, and authorized his wife, in case the rites of adoption were not performed during his own lifetime, to perform them after his death, declaring that he had constituted defendant proprietor of his entire estate, as though defendant were his own son. That accordingly, when Hem Sing died, Khusal Koer carried out his injunctions, and performed the ceremony of adoption of the defendant.

5. The defendant further states in his answer that the property left by Suhej Koer, aunt of Hem Sing, also came into his possession in consequence of his being Hem Singh's adopted son. And that although being the rightful heir and successor to the estate, he did not need the support of a will, yet that as a matter of precaution, Khusal Koer executed a will in his favour. That he does not rest his title upon that will, but bases his claim as lawful and absolute proprietor of the estate on his hereditary rights.

6. Issues were framed by the Zilla Court which were calculated to raise various questions, but the Sudder Court, in their judgment upon appeal from the Zilla Court, after observing that the issues were very badly drawn, said, "the pleadings show that the only point for determination was whether the widow, Khusal Koer, adopted the defendant, Padam Sing, by desire of her husband, Hem Sing."

7. This single question appears to have been the one to which the greater part of the evidence in the suit was directed, and upon which alone the judgment in the Zilla Court, and also in the Sudder Court, proceeded. The Principal Sudder Ameen dismissed the plaintiff's claim with costs, being of opinion that it was clearly proved by the testimony of the defendant's witnesses,--most of whom, he said, were respectable and trustworthy persons,--that Hem Sing adopted the defendant, Padam Sing, when he was twelve months old, and gave authority to his wife, Khusal Koer, to complete the formal ceremony of adoption, and that it was further proved by the testimony of the same witnesses that after Hem Singh's death, Khusal Koer went through the ceremonies of adoption in respect to the defendant.

8. Upon appeal from this decree to the Sudder Court, that Court upon the documentary evidence in the cause, arrived at a conclusion directly opposed to that of the lower Court, considering that it entirely excluded the presumption of the truth of the defendant's story, that the widow adopted him at the end of 1836 by desire

of her husband. They therefore held that the plaintiff was entitled to succeed to a share in the property in suit as one of the next of kin of Hem Sing, and decreed in favour of the appeal and of the plaintiffs' claim, and reversed the decision of the lower Court with costs. The decree, which was drawn up in conformity with this judgment, embraced the whole of the property included in the plaint, although the Court held that the plaintiff was entitled only to a share in the succession as one of the next of kin of Hem Sing. The decree, therefore, cannot be maintained, and the evidence furnishes no materials to enable their Lordships to vary it so as to limit it to the share of the property to which the plaintiff has established a right. It is possible, also, that some portion of the property claimed may have belonged to Khusal Koer in her own right, and may have passed to the defendant by her will, the validity of which, as to such property, the plaintiff can have no right to question.

9. But although the decree in favour of the respondent for the whole of the property claimed by him cannot stand, yet as he would not be entitled even to a share in the succession to Hem Sing, if there were a valid adoption of the appellant, their Lordships have felt it their duty to determine that question (the most important if not the sole question dealt with by the Courts below), in order to prevent further litigation respecting it.

10. The question as to the adoption of the appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a widow under an authority conferred upon her for that purpose by her husband. Of course, such authority must be strictly proved, and as the adoption is for the husband's benefit, so the child must be adopted to him and not to the widow alone. Nor would an adoption by the widow alone, for any purpose required by the Hindu law give to the adopted child, even after her death, any right to the property inherited by her from her husband. In order, therefore, to establish the validity of the adoption in this case it was necessary for the appellant to prove:--

1st. The authority given by Hem Sing to his wife to make the adoption; and

2nd. The actual adoption by Khusal Koer of the appellant as the son of Hem Sing.

11. The appellant proved, by several witnesses to whom the Principal Sudder Ameen gave credit, but upon whom the Sudder Court placed no reliance, that the appellant was the younger son of Zalim Sing; that Hem Sing asked, and obtained permission of Zalim Sing and his wife, to adopt the appellant; that Hem Sing took away the appellant, then a child of twelve months old, and carried him to his house, and placing him on the lap of Khusal Koer, said, "I have brought you this child to adopt as our son." That a year after, Hem Sing said to Khusal Koer: "If I live long enough, I shall go through the ceremony of adopting the child myself; if not, I authorize you to perform the ceremonies of adoption as soon as he is five years old;" and that Hem Sing died a year after giving this authority. The witnesses also proved, that when the appellant had attained the age of five years, Khusal Koer went through all the

ceremonies of adoption which they minutely described. It does not appear by the evidence of any of the witnesses that Khusal Koer declared at the time that the ceremonies were performed for the purpose of the adoption of the appellant as the son of Hem Sing, in pursuance of the authority which he had given her. One of them, on the contrary, says that "Khusal Koer adopted Padam Sing as her own son, at the request of Hem Sing."

12. If the adoption of the appellant as the son of Hem Sing had really been completed by Khusal Koer, his name ought to have been substituted for hers in the books of the Revenue Collector, as the property of Hem Sing would, by the act of adoption, have been divested from Khusal Koer, and would have vested in the appellant as his son and heir. Some of the witnesses say, that after performing the ceremonies, Khusal Koer ordered her dewan to give notice of the adoption to the Collector. Either this order was never given, or it was not obeyed, for it does not appear that any change was made in the entry in the Collector's books; and Hem Singh's property continued to be registered in Khusal Koer's name down to the time of her death, which took place at least ten years after the appellant had attained his majority. But Khusal Koer caused herself to be entered in the books of the Qanoongoe or Record-keeper of the village of Koorja, as the guardian and protector of Padam Sing, the appellant.

13. Now if this were intended as the record of the fact of an adoption which had divested the property of Hem Sing from his widow, and made her merely guardian of the minor adopted son, it seems extraordinary, after such a complete lawful adoption, as the witnesses represent, that Khusal Koer did not take the most effectual mode of recording it, by pursuing the regular course of substituting the appellant's name for her own in the Revenue Collector's books. In the absence of any such record, the instances of the occasional description of the appellant as the son of Hem Sing are of no value. The Principal Sudder Ameen laid great stress upon a supposed entry of the defendant's name as under the guardianship of Khusal Koer in the Khewat for proprietary Register of 1256 Fusli, which he said would not have been made if the appellant were not the adopted son of Hem Sing. Upon turning, however, to the only Khewat printed in the proceedings of the date named, it will be seen that there is no entry at all as to guardianship, but under a column headed "Name of patidar" the appellant is entered as "Padam Sing, son of Hem Sing." In a statement of mutation of names lumberdars and pattidars however, in which Padam Singh's name is entered in the column of pattidars, but not as the son of Hem Sing, there is the signature of Khusal Koer, with the addition of the words "guardian of Padam Sing;" and it is probable that the Principal Sudder Ameen mixed up the Khewat and this document together in his mind. It is the only one of similar documents in evidence which is signed by Khusal Koer, and there is nothing upon the face of it to show that it relates to Hem Singh's property.

14. The description of Padam Sing, as the son of Hem Sing, in the first power of attorney executed by him and Khusal Koer, is of little importance, as the parties were at liberty to describe themselves as they pleased in this private instrument; and the same observation applies to the entry of Hem Singh's name as the father of the appellant in the income tax receipts, as most of the particulars inserted in the different columns could only be known to and filled in by the party by whom the tax was to be paid. The appellant, in support of the evidence of an adoption, relied upon a proceeding by Khusal Koer on the 25th March, 1836, when she presented a petition at the office of the Deputy Collector of Revenue, describing herself as the widow of Hem Sing, and praying that the name of Padam Sing might be added to her own in the Zamindari registers of certain villages. The Sudder Court observed upon this proceeding "that the joint entry of the widow's and Padam Singh's names was in some respects inconsistent with the averment of his adoption, which would have placed the two in the position of parent and child, or guardian and heir." And, they added, "We find that the application referred to property acquired by the widow after her husband's (Hem Singh's) death, and which is not in suit in the present case."

15. There is some doubt as to the accuracy of the statement that the villages named in the petition of Khusal Koer are not in suit in this case, as it was pointed out in the course of the argument that most of them are included in the plaint. But there still remains an objection to the use of this proceeding in proof of the adoption of the appellant, which was slightly adverted to by the Court. It must have preceded the alleged ceremony of adoption. The appellant was twelve months old at the time of the commencement of the intended adoption. Hem Sing lived a year afterwards, and died on the 22nd October, 1834. The ceremonies of adoption are stated to have been performed by Khusal Koer when the appellant was of the age of five years, which, according to the dates, he could not have been on the 25th March, 1836, when the petition of Khusal Koer was presented.

16. All the acts of Khusal Koer, with respect to Hem Singh's property, appear to have been dictated by a desire to continue to be zemindar during her life, and to secure the succession to it after her death to the appellant. She may have attempted, at the same time to reconcile her continued possession with the alleged wishes of her husband in favour of the appellant.

17. The documentary evidence produced on the part of the respondent tends much more strongly to throw suspicion upon the veracity or the accuracy of the witnesses who speak to the fact of the adoption by Khusal Koer, as it is wholly inconsistent with the idea of any such adoption having taken place.

18. It must always be borne in mind that Khusal Koer remained the registered owner of Hem Singh's property for the whole of her life. In addition to this circumstance, there are acts and declarations of Khusal Koer which cannot be reconciled with the fact of an adoption of the appellant. Stress was laid by the

Counsel for the respondent on a statement made by Khusal Koer in a suit instituted by her against Tara Sing, claiming the succession as heir to the whole of her husband's property, that "Hem Sing died without leaving any issue, male or female." It was observed that this action, which was brought on the 23rd of March, 1836, was contemporaneous with the above-mentioned petition of Khusal Koer to have the appellant's name added to her own as the proprietor of certain villages, which was presented on the 25th of March, 1836. According to what has been already remarked, this must have been prior to the time at which the alleged adoption took place, and therefore it was then strictly true that Hem Sing had died without leaving issue. But yet it is extraordinary, if Khusal Koer had any intention of carrying out her husband's wishes with regard to the appellant, that no mention whatever should have been made of the authority to adopt, and of her purpose to adopt the appellant when the proper period arrived, in a suit which seemed peculiarly to require a true and full account of the destination of Hem Singh's property. Again, in 1841, long after the alleged adoption, Hem Sing and Tara Sing, his brother, having been joint proprietors of a village, and upon the death of Hem Sing, Khusal Koer's name having been entered in the register instead of his, and upon the death of Tara Sing the name of his widow, Meha Koer, having been substituted, upon the death of Meha Koer, Khusal Koer caused her name to be recorded as proprietor of the village, which, if there had been an adoption of the appellant as heir of Hem Sing, he would have been.

19. Although the appellant does not rest his title to Hem Singh's property upon the will of Khusal Koer, yet it is impossible to pass over the fact of her having made this will or to omit all notice of the contents of it. Although, according to the case of the appellant, Khusal Koer had failed in her duty by not divesting herself of Hem Singh's property upon the completion of her adoption, yet as that act made him heir to his adopting father, no strength could be added to his title by the will of the widow. In consequence, however, of her remaining in possession of Hem Singh's property, doubt would probably be cast upon the fact of the appellant's adoption, and therefore her declaration of her having performed the ceremonies in pursuance of her husband's authority would have been useful as evidence; but instead of describing the appellant as the adopted son of Hem Sing, the will of Khusal Koer is in these terms:--"As Koer Padam Sing, the adopted son of your petitioner, has been in possession of your petitioner's estates for a long period, and as petitioner has no other heir or successor but him, and as petitioner has retained him in possession during her lifetime, and he carries on all the business of managing the villages and Zamindaries, &c., therefore petitioner prays that the name of Padam Sing be substituted for her own name as proprietor of all the Zamindari and malgoozari villages and maifi lands of her estate, and Padam Sing may be recognized as the owner of all her real and personal property."

20. Upon the death of Khusal Koer reports were made of the facts connected with her death by the Kanungos of the different mauzas in which Khusal Koer was styled

either zemindar, or zemindar and lamberdar, and all of them stated the conditions of settlement of mauzas in these terms:--"Whomsoever Khusal Koer may constitute her heir in her lifetime, the same shall be entitled to the office of malgoozar after her death."

21. The patwari's memorandum on the death of Khusal Koer is as follows: "The said Mussumat departed this life by the will of God on the 17th December, 1861, &c., and left Koer Padam Sing, her adopted son, aged 31 years, as the heir and successor to all her property." Padam Sing, being of the age above-mentioned at the time of Khusal Koer's death, it is not likely that he had never heard of his having been adopted as the son of Hem Sing, if such a ceremony had taken place. And if he had been informed of the fact, it was to be expected that, although he had patiently submitted to Khusal Koer's usurpation of his property during her life, he would have seized the earliest opportunity of asserting his rights as the heir of Hem Sing. But it appears that this was not the course which he pursued, nor the title by which he claimed the succession. The report of the Tahsildar of Koorja on the succession to Khusal Koer, states "that the patwari and Kanungo, in their respective reports of the death in question, have mentioned Koer Padam Sing, her adopted son, as the heir to the property of the deceased Mussumat. And that Padam Sing had put in a petition, praying that his name might be recorded as lumberdar and pattidar in place of that of Khusal Koer, deceased, as there was no other heir but himself."

22. The Counsel for the appellant endeavoured to explain away the effect of this claim as heir of Khusal Koer, by the suggestion that, in thus claiming, the appellant had been misled by the reports of the Kanungos as to the right of succession to the property held by Khusal Koer. But (as already observed) if the appellant really had a title to the property as the heir of Hem Sing, it is impossible to believe that he could have been ignorant of it; and his claim to the succession in a different character is almost conclusive against the attempted proof of a lawful adoption of the appellant as the son of Hem Sing by Khusal Koer, and consequently against the truth of the story told by the witnesses upon the subject.

23. Their Lordships, therefore, agree with the Sudder Court, that the appellant has failed to prove that he was lawfully adopted as the son of Hem Sing by Khusal Koer, in pursuance of authority conferred upon her for that purpose by her husband; and that he has, therefore, no answer to the claim of the respondent to a share of the succession to Hem Singh's property. But as the Court has made a decree which gives the respondent the whole of Hem Singh's property, when he is entitled only to a part, that decree must be set aside. Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare that it has been established between the parties to the suit, that the appellant is not the duly adopted son of Hem Sing, and that on the death of Khusal Koer, Mohar Sing, the father of the respondent, and the other heirs in equal degree then living became entitled to inherit the estate of Hem Sing, of which his widow

died possessed. And they will recommend to Her Majesty that with this declaration the cause be remitted to the High Court of Agra to make such inquiries as shall be necessary to ascertain what share of the estate of Hem Sing the said Mohar Sing was entitled to, and what part of the property claimed by the plaintiff was the estate of Hem Sing. And as the appellant has succeeded in proving the invalidity of the decree, although he has failed in his opposition to the plaintiff's title, their Lordships will further recommend that each party bear his own costs of the appeal.