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continuous period of four months without reasonable cause, and now it is argued that the tenant of a scheduled building cannot merely be evicted because the landlord wants the premises for his own use.

It cannot be denied that both these arguments have a certain amount of plausibility and it is not easy to choose between them. On the whole, however, I am of the opinion that the argument advanced on behalf of the tenant must prevail. The omission of the words "or a scheduled building" in the amendment Act was evidently deliberate, and if the Legislature intended to abolish scheduled buildings as a classification altogether, the definition would surely have been omitted from section 2 and it must have been made clear in the Act that there was no longer any distinction between residential buildings in general and residential buildings partly used for residential purposes and partly for professional purposes, and along with the definition the Schedule would also have been omitted. The conclusion must, therefore, be that *bona fide* requirement by the landlord for his own use is not a ground of eviction from a scheduled building and a tenant of such a building can be only evicted under the grounds contained in section 13(2) applicable to buildings and rented land of all kinds. I accordingly dismiss the petition but leave the parties to bear their own costs.

B.R.T.

APPELLATE CIVIL

Before A. N. Grover and D. K. Mahajan, JJ.

HARDEV SINGH AND OTHERS,—*Appellants.*

versus

GURDIAL SINGH,—*Respondent.*

Regular econd Appeil No. 757 of 1955

Custom—Adoption held invalid—Adoptee—Whether can succeed to the non-ancestral property of adoptive father—Adoptive father's collaterals—Whether can sue for

such property after his death—Punjab Custom (Power to Contest) Act (II of 1920)—Section 7—Effect of.

1960

October, 18th

Held, that where a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son.

Held, that section 7 of the Punjab Custom (Power to Contest) Act, 1920, constitutes a bar to contesting appointment of an heir to non-ancestral immovable property by a male proprietor among the parties, who are governed by custom and such a suit by the collaterals after the death of the adoptive father is not competent.

Case referred by Hon'ble Mr. Justice Daya Krishan Mahajan, on 16th May, 1960, to a larger Bench for decision of important questions of Law involved in the case. The division Bench consisting of Hon'ble Mr. Justice A. N. Grover, and Hon'ble Mr. Justice Daya Krishan Mahajan finally decided the case on 18th October, 1960.

Regular Second Appeal from the decree of the Court of Shri Tirath Dass Sehgal, Additional District Judge, Ferozepore, dated the 31st day of May, 1955, affirming with costs that of Shri Balwant Singh Sekhon, Additional Sub-Judge, 3rd Class, Moga, dated the 31st December, 1954, dismissing the plaintiffs' suit with costs.

N. N. GOSWAMY, ADVOCATE, for the Apppellants.

H. R. SODHI, ADVOCATE, for the Respondent.

JUDGMENT

Grover, J.

GROVER, J.—This appeal has been referred to a Division Bench by a learned Single Judge of this Court for decision because fairly important questions are involved, namely, whether where parties

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are governed by custom a person whose adoption has been held not to have been proved can still succeed to the non-ancestral property of the adoptive father and whether the latter's collaterals can successfully sue with regard to it after his death.

Inder Singh, a jat of village Chotian Thoba in Tehsil Moga of Ferozepore District, was the last male-holder of the land in dispute. He died in the year 1953 but before his death he had executed on 10th February, 1953, and got registered a document, Exhibit D. 1, which has been called the adoption deed. It was recited therein that Gurdial Singh who was one of his collaterals and was his nephew had been taken into adoption by him from the days of Gurdial Singh's infancy. It was further stated that he had been residing for most part of his life in Malaya and he had called Gurdial Singh also to Malaya in 1931 where the latter stayed with him for about 5 to 6 years and then he was sent to India for getting married, all the marriage expenses having been defrayed by the adoptive father. After some years the adoptive father returned to India and continued paying all the expenses for maintenance, etc., of Gurdial Singh and treating him like a son. In order that the line of the adoptive father might be maintained after his death, the adopted son was to carry out all such duties as were enjoined by the religious usages so that the former's soul might have peace. As no document in this respect had been executed uptil then and apprehending that after the death of the adoptive father some dispute might arise with regard to succession, the aforesaid document was being executed and it was being declared that Gurdial Singh was the validly adopted son (of Inder Singh) and that after his death he would be his lawful heir.

Only after three months of the death of Inder Singh a suit was filed in December 1953, by the appellants who claim to be his collaterals within the fifth degree on the groud that they were entitled to succeed to his estate and not Gurdial Singh respondent who was giving out that he was the adopted son. It was alleged that the property was ancestral. The validity and factum of adoption were challenged under the law and custom governing the parties. It was pleaded that the so-called adoption deed of 10th February, 1953, was a mere paper transaction which had not been acted upon. A decree for possession was claimed as also a declaration that the appellants were entitled to succeed o the estate of Inder Singh and that the respondent was not his adopted son and did not have any rights to the land in suit. The respondent contested the suit *inter-alia* on the grounds that the appellants were not the collaterals of the deceased and that he was his validly adopted son and further that the land was non-ancestral and the appellants had no right to it. After framing and trying the issues which arose on the pleadings of the parties, the trial Court found that the appellants were the reversioners of Inder Singh but that the land was non-ancestral and although the factum of adoption of the respondent had not been proved, Inder Singh had nominated him as his successor and, thus the appellants were not entitled to succeed.

On appeal, the findings with regard to the non-ancestral nature of the property and the factum of adoption of the respondent were affirmed by the learned Additional District Judge. The decree of dismissal of the suit was maintained on the ground that in respect of non-ancestral land

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the collaterals had no right to succeed in the presence of a person who had been nominated as an heir even if his adoption had not been established.

The learned counsel for the appellants has relied on the well-known rule which has been laid down by their Lordships of the Privy Council in *Fanindra Deb* v. *Rajeswar Das* (1), and *Lali* v. *Murlidhar* (2), and which may be stated in the language of Sir Shadi Lal, C.J., in *Ishar Singh and others* v. *Surat Singh and another* (3),—

> "Now, it has been repeatedly held,—*vide inter alia, Fanindra Deb* v. *Rajeswar Das*, (1), and *Lali* v. *Murlidhar* (2), that, where a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. The Court has to decide in each case, after considering the language of the document and the surrounding circumstances, whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid. This is the law with respect to cases where there is an express gift or bequest in favour of an alleged adopted son."

(1) I.L.R. 11 Cal. 463.
(2) I.L.R. 28 All. 488.
(3) I.L.R. 4 Lah. 356.

It is strenuously contended that aperusal of the deed of adoption, Exhibit D. 1, in the present case shows that it was the assumed fact of adpotion which was the reason and motive for making the gift or bequest by Inder Singh in favour of the respondent. The concurrent finding of the Courts below being that the factum of adoption had not been proved, the gift or the bequest in favour of the respondent must fail.

In the first case decided by the Privy Council in *Fanindra Deb* v. *Rajeswar Das* (1), the dispute related to adoption in a family in Bengal, affecting to be Hindu, but not Hindu by decent. Their Lordships had to determine the effect of the disposition made in a document called *angikar-patro*. After setting out its relevant part and considering its language and surrounding circumstances, it was held that it was Jogendra's intention to give his property to Rajeswar as his adopted son, capable of inheriting by virtue of the adoption. As the adoption was contrary to the customs of the family and gave no right to inherit, the *angikar-patro* had no effect on the property. In the second case in *Lali* v. *Murlidhar*, the property in suit belonged to one Dhan Raj (2), a Bohra Brahman. Dhan Raj had made a declaration or a will which had been recorded in the *wajib-ul-arz* of the village to the effect that on his death Murli Dhar was to be his heir. It had been stated in the *wajib-ul-arz* that he had adopted the aforesaid Murli Dhar who was his sister's son and who was to be the heir and the owner. Applying the test laid down in the previous case, their Lordships came to the conclusion that it was the intention of Dhan Raj to give his property to Murli Dhar as his adopted son capable of inheriting by virtue of the adoption and that as the adoption was invalid according to the General

(1) I.L.R. 11 cal. 463.
(2) I.L.R. 28 All. 488.

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Hindu Law and not warranted by family custom, it gave no right to inherit and the gift had, therefore, no effect on the property. In *AL. PR. Ranganathan Chettiar and another* v. *Al. PR. AL. Periakaruppan Chettiar and others,* (1), their Lordships of the Supreme Court had occasion to examine a disposition in favour of a person who had been referred to in the will as the adopted son and it has been laid down that the question in such cases is whether the disposition is to the person intended therein as a *persona designata* or by reason of his filling a particular legal status which turns out to be invalid. The matter was certainly of some difficulty but the question that arises in individual cases must depend on its own facts and the terms of the particular document containing the disposition. After referring to the Privy Council decisions mentioned above, their Lordships came to the conclusion that in view of the overall picture of the provisions in the will and the background of the previous history the validity of the adoption was not contemplated as the condition on which the validity of disposition was to depend. It is noteworthy that in all these cases, the effect of failure to prove a formal adoption which would have conferred the right to inherit both the ancestral and the non-ancestral immovable property was the subject-matter of consideration. Moreover, it had to be decided whether a gift or testamentary disposition would survive the failure of adoption. The present case is essentially of a different nature.

It has now to be determined what principles would govern the decision of a suit by the collaterals of the deceased challenging the factum and validity of the adoption of the respondent and

(1) A.I.R. 1957 S.C. 815.

his right to succeed under law and custom, and whether the failure of an adoption would affect the nomination of an heir which is well-recognised under the Customary Law governing the parties to the suit and which is quite different from a formal adoption having the effect of conferring the same status as a real son. A case very similar to the present came before a Division Bench of this Court consisting of Khosla, J. (as he then was) and Soni, J. in *Mehr Singh* v. *Kundan Singh and others*, Regular Second Appeal No. 383 of 1952, which was decided on 13th May, 1953. One Gopala had died in October, 1947, and a few months before his death he had executed a deed by which he had appointed Mehr Singh as his adopted son and had made him his heir. After the death of Gopala, his 5th degree collaterals instituted a suit claiming that the property was ancestral and that Mehr Singh had never been validly adopted by Gopala and praying for possession of Gopala's property. The Courts below found that the property was non-ancestral and that the deed of adoption had been properly executed, but came to the conclusion that the allegation that Mehr Singh had been adopted some twenty years previously had not been proved and the suit was decreed. The Bench referred to the provisions contained in the Punjab Custom (Power to Contest) Act II of 1920, in which an appointment of an heir had been defined as including any adoption made or purporting to be made according to custom. By section 7 of that Act it is enacted that no person shall contest any alienation of non-ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment was contrary to custom. My learned brother who was the counsel for the respondents in that case raised a similar contention

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as has been advanced on behalf of the appellants here. The learned Judges considered that the deed was merely descriptive of Mehr Singh and there was a clear intention on the part of Gopala of appointing him as his heir. The suit of the collaterals was consequently dismissed. It is noteworthy that the deed of adoption in that case contained recitals very similar to the recitals which are to be found in this case. Although section 7 of Punjab Act II of 1920 was pressed, the Bench did not appear to base its decision and non-suit the plaintiffs under that section alone. It decided the matter with reference to the intention which had been expressed by Gopala in the deed itself. In *Nand Singh* v. *Tilku etc.*, *Regular Second Appeal* No. 366 of 1950, decided on 17th March, 1955, by Dulat J., a similar situation obtained, the finding of the lower appellate Court being that though the deed of adoption had been executed, it had neither been preceded nor followed by actual treatment as an adopted son and, therefore, no valid adoption had been proved. The following observations in that case may be perused with advantage :—

> "As far as the adoption is concerned, the deed is proved to have been executed by Rulia, and the finding thus is that Rulia did solemnly say that he had appointed Nand Singh as his successor in respect of the property in dispute. It is not necessary for the appellant really to establish in this case that he was validly adopted as his son by Rulia and it is quite sufficient to show that Rulia had named him as his successor to the property. The question of treatment as his son is relevant only to an adoption such as would

> entitle the adopted son to succeed to every kind of property, ancestral and non-ancestral. It is, as I have said, unnecessary for the present appellant to go to that length and if he can show that the last male owner, i.e., Rulia had voluntarily and consciously named him as his successor and thus left the property to him, the plaintiff's-respondents cannot in any manner challenge that as the property is not shown to be ancestral *qua* them."

In another unreported decision in *Mala Singh* v. *Harchand Singh and others,* Regular Second Appeal No. 614 of 1953, decided by Gosain, J., on 7th August, 1958, the execution of the deed of adoption had been proved but it had been found that it merely remained a paper transaction. The learned Judge expressed the view that the property being non-ancestral and there being a deed of adoption stating that Baggu had appointed Harchand Singh as his heir and that the latter would be entitled to the former's movable and immovable property, the plaintiff Harchand Singh must be held entitled to the property. This was a case which was slightly different because the suit was not by the collaterals but by the person who had been nominated as an heir by the last male holder. All these unreported decisions of our own Court are not based on any bar created with respect to such suits by the collaterals under section 7 of the Punjab Custom (Power to Contest) Act of 1920. The decisions proceeded more on the intention of the last male holder to constitute or appoint some person as his successor or heir. However, a Bench of the Lahore High Court considered the scope of the provisions in the aforesaid

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Act in *Muhammad Asghar* v. *Mst. Ghulam Fatima and others* (1), in which Tek Chand and Abdul Rashid, JJ., laid down in clear terms that notwithstanding anything to the contrary in the *riwaj-i-am* no person was competent to contest any alienation by a male proprietor of his non-ancestral immovable property on the ground that such alienation was contrary to custom. They went to the extent of saying that it was immaterial whether the contest to the alienation was raised by the descendants, collaterals or relations of the alienor in a suit instituted by them, or by way of defence to a claim brought by the alienee. There again, the suit was not by the collaterals but it was held that even in defence the collaterals could not set up any claim, the effect of which would be to control or challenge the alienation of the self-acquired or non ancestral property of the male holder, The ratio of that dicision obviously is that with regard to non-ancestral property there was a complete bar set up by section 7 of that Act to any contest being raised by the collaterals to any gift or bequest or other disposition made by the male proprietor.

The learned counsel for the appellants has sought to raise a distinction by submitting that under section 7 of the Punjab Custom (Power to Contest) Act II of 1920, the bar is confined only to contesting an alienation of non-ancestral immovable property or appointment of an heir as being contrary to custom which would involve a challenge on the ground of invalidity alone. It is argued that if the suit of the collaterals rests on an allegation that the adoption was never made or that the document appointing an heir was a mere paper transaction, setion 7 will not apply. There is some

(1) I.L.R. 16 Lah. 604.

Support for this view in *Richpal and others* v. *Mula* (1), and *Samman* v. *Daljit Singh and another,* (2). Now, the Punjab Limitation (Custom) Act, 1920 and the Punjab Custom (Power to Contest) Act, 1920, have to be read together and it is noteworthy that in the Schedule to the first Act in Article 3 the limitation prescribed is six years for a suit for a declaration "that an alleged appointment of an heir is invalid as being opposed to custom or in fact never took place". Limitation was, therefore, prescribed not only for suits in which the validity of an appointment of an heir was challenged but also where that appointment was assailed on the ground that in fact it never took place. This would, therefore, embrace even those suits in which the factum of appointment is challenged. It is true that the language of section 7 of the Punjab Custom (Power to Contest) Act employs phraseology which is indicative of only the validity of appointment being attacked but the provisions of the Punjab Limitation (Custom) Act cannot be ignored and reading both the enactments together it is not possible to say that section 7 would not constitute a bar to contesting appointment of an heir to non-ancestral immovable property by a male proprietor among the parties who are governed by custom which was also the ratio of the decision in *Muhammad Asghar* v. *Mst. Ghulam Fatima and others* (3). In the present case the frame of the suit was such that it would fall within section 7 of the second Act. The plaintiffs came to the Court on the allegation that the property was ancestral and both the validity and factum of adoption were challenged under custom as well. The further allegation that the need of adoption was a mere paper transaction

(1) 78 I.C. 123.
(2) A.I.R. 1934 Lah. 1,002.
(3) I.L.R. 16 Lah. 604.

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which had not been acted upon was merely meant to reinforce the assertion that the respondent was not the adopted son of Inder Singh. I am, consequently, inclined to hold that the present suit was barred under the provisions of section 7 of the aforesaid Act.

Even before the enactment of Punjab Act II of 1920 Robertson and Shah Din, JJ., in a very considered decision in *Sant Singh and others* v. *Sadda and others* (1), laid it down that under customary law a childless proprietor has the power of alienating his property if non-ancestral *qua* his collaterals in any way he pleases and the collaterals are not entitled to obtain possession of such land to which a person adopted by him has succeeded by virtue of his adoption, even though *per se* the validity of the adoption may be open to objection. The following passage at page 238 may be cited with advantage :—

> "In the present case it is unnecessary to decide whether the deed of adoption executed by Musaddi in favour of Dial Singh is or is not a deed of gift or a will, as in our opinion the property in dispute being the non-ancestral property of Musaddi as regards the plaintiffs, he had every power to transfer it in any way he pleased to Dial Singh; and this he has done by adopting him, or in other words, by appointing him as his heir so as to enable him to succeed to the property in suit after his death."

After referring to certain passages in *Fazal Ali* v. *Queen-Empress* (2), from the judgment of Sir Meredyth Plowden who knew a great

(2) 63 P.R. 1912.
(1) 50 P.R. 1893.

deal about the Punjab Customs, the learned Judges proceeded to state that customary adoption was only one mode by which the normal devolution of a sonless proprietor's property according to ordinary rules of inheritance was altered; it operated in fact as a transfer of his land but a transfer taking effect after his death instead of in his lifetime. If then, the nature of the property so transferred by adoption in favour of the adopted son was such that the agnatic relations of the adopter could not object to an alienation of it by him, they should have no right to impugn the adoption, by means of which the adoptor effectually transferred his property to the adopted son. It would certainly be anomalous if the collaterals were competent by custom to impugn the adoption and to recover from the adpoted son the porperty so transferred to him, though, if a gift of the property *inter vivos* or by will had been made by the sonless proprietor concerned in favour of a perfect stranger, they would be unable to prevent the transfer of the property taking full effect to the detriment of their own right of succession.

In *Shib Singh* v. *Suba Singh and others* (1), Tek Chand and Abdul Rashid, JJ., had to decide a case where one Sardha had executed and got registered a deed declaring that he had adopted Shib Singh as his son many years ago while the latter was an infant and that on his death Shib Singh would succeed to his property as his heir. About three months after the execution of the deed, Sardha died and his collaterals in the 5th degree brought a suit to contest the adoption claiming a declaration that they were the owners of his property which was already in their

(1) A.I.R. 1935 Lah. 658.

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possession and praying for recovery of possession of the remaining property from Shib Singh. The defence aken by Shib Singh was that the property was non-ancestral and that he had been validly adopted by Sardha. It was found by the Courts below that the alleged adoption was a mere paper transaction which was neither followed nor preceded by treatment of Shib Singh as son and was, therefore, invalid. It was also found that the property was ancestral. In appeal the High Court reversed the decision with regard to the nature of the property and came to the conclusion that the property left by Sardha had not been proved to be ancestral. The learned Judges proceeded to observe that that being so, there could be no question that Sardha had full power to nominate his heir to succeed to it. The execution of such a document had been duly proved in which it was stated by Sardha that on his death his property would pass to Shib Singh and there was no reason why effect should not be given to it. Although the matter was not discussed at length but it is clear that the aforesaid decision was based on the accepted principles which apply to persons governed by customary law that once the property of the last male owner had been proved to be non-ancestral, there was no bar to his giving it to anybody he liked and if from a so-called deed of adoption it could be established that he had named someone as his heir or successor, the Courts would give effect to that intention notwithstanding the fact that the adoption at a prior stage or at the time when the deed of adoption is executed has not been proved to have been made.

The learned counsel for the appellants had relied a great deal on another decision of the Lahore High Court in *Ishar Singh and others* v. *Surat*

Singh and another (1), to which reference has already been made. In that case a deed of adoption had been executed in favour of the defendant. The plaintiffs who were the collaterals of the executant brought a suit for a declaration that the deed would not affect their rights of succession to the estate. It was found as a fact that the adoption had never taken place but the Courts below treating the deed of adoption as a deed of gift gave a declaration in favour of the defendant's right to succeed. Sir Shadi Lal, C.J., who delivered the judgment of the Bench expressed the view following the principles laid down by the Privy Council that the instrument did not mention any gift *inter vivos or any* testamentary disposition but contained merely a declaration of adoption which declaration had been found to be incorrect. Such a deed could not be treated as a deed of gift. There was nothing in the deed which could by any stretch of reasoning be treated as a gift or a testamentary disposition in favour of Surat Singh. It does not appear that section 7 of Punjab Act II of 1920 was pressed as a bar to the suit of the collaterals in the Lahore case which was essentially decided more on the interpretation of the document which had been executed and which merely contained a declaration of adoption which had simply been found to be incorrect. From the report it cannot be ascertained whether any such words appeared in the deed in that case from which a clear inention to designate or nominate Surat Singh as an heir could be gathered.

Finally it must be held in the present case that any challenge to the adoption of the respondent by Inder Singh that the property in dispute was non-ancestral was barred under section 7 of

(1) 4 I.L.R. Lah. 356.

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Punjab Act II of 1920. At any rate, even if the adoption had not been proved, Inder Singh had expressed a clear and unequivocal intention to designate or nominate the respondent as his heir and consequently on both these grounds the suit of the collaterals was bound to fail. The appeal is, therefore, dismissed, but owing to the nature of the points involved, the parties will be left to bear their own costs.

D. K. Mahajan, J.

DAYA KRISHAN MAHAJAN, J.—I agree.

B.R.T.

APPELLATE CIVIL

Before Shamsher Bahadur, J.

BHAGWAN SINGH,—*Appellant.*

versus

AMAR KAUR AND ANOTHER,—*Respondents.*

First Appeal From Order No. 39(M) of 1959

Hindu Marriage Act (XXV of 1955)—Sections 10 and 13—Adultery—When constitutes a ground for divorce for and when for judicial separation—Proof of adultery—Nature of—Condonation of adultery—When takes place.

1960

Oct., 19th

Held, that in order to entitle a spouse to obtain divorce on the ground of the adultery of the other spouse, it has to be proved that the offending spouse is living in the matrimonial offence of adultery about the time the petition for divorce is filed. It is not enough to prove that the other spouse was living in adultery some time in the past. To obtain a decree for dissolution of marriage a wider and more expansive adultery has to be proved than what is required for a decree for judicial separation. A single act of adultery would suffice for a decree for judicial separation whereas a continuous course of adultery is an essential prerequisite for a decree for dissolution of marriage on this ground. A decree for judicial separation can be passed on the ground of a single act of adultery