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would have had. There not having been any litigation ending in a decree of Court passed after full contest, we are of opinion that in making that compromise the sisters exceeded their powers as limited owners, and that even if the compromise be regarded as a family settlement of doubtful claims, it was not within the sisters' power to enter into it so as to bind the reversioners. We, therefore, hold that the compromise is not binding on the plaintiffs.

For the above reasons we hold that the decree of the lower Court is wrong, and accordingly, reversing it, we allow this appeal and give a decree in favour of the plaintiffs appellants for recovery of possession of the village in suit. Appellants are entitled to their costs in both Courts. The objections filed under section 561 of the Code of Civil Procedure fall to the ground.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

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MANOHAR LAL, (PLAINTIFF) *v.* BANARSI DAS AND OTHERS (DEFENDANTS). *

Jains—Adoption—Custom—Authority of widow to adopt—Adoption of married man.

Held that according to the law and custom prevailing amongst the Jain community (1) a widow has power to adopt a son to her deceased husband without special authority to that effect, and (2) a married man may lawfully be adopted.

Maharaja Govind Nath Ray v. *Gulab Chand* (1), *Sheo Singh Rai* v. *Dakho* (2), *Lakhmi Chand* v. *Gatto Bai* (3), *Bhagwan Singh* v. *Bhagwan Singh* (4), *Raje Vyankatrav Anandram Nimbalkar* v. *Jyavantrav* (5), *Nathaji Krishnaji* v. *Hari Jagoji* (6), *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (7), *Lakshmappa* v. *Ramava* (8) and *Dharma Dagu* v. *Ramkrishna Chimnaji* (9) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the appellant.

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* First Appeal No. 31 of 1904, from a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 7th of November 1903.

(1) (1833) 5 S. D. A., 276.
(2) (1878) I. L. R., 1 All., 688.
(3) (1886) I. L. R., 8 All., 319.
(4) (1895) I. L. R., 17 All., 294 and (1898) 21 All, 419.
(5) (1867) 4 Bom., H. C., Rep. A. C. J., 191.
(6) (1871) 8 Bom., H. C., Rep. A. C. J., 67.
(7) (1874) 11 Bom., H. C., Rep., 190.
(8) (1875) 12 Bom., H. C., Rep., 364.
(9) (1885) I. L. R., 10 Bom., 80.

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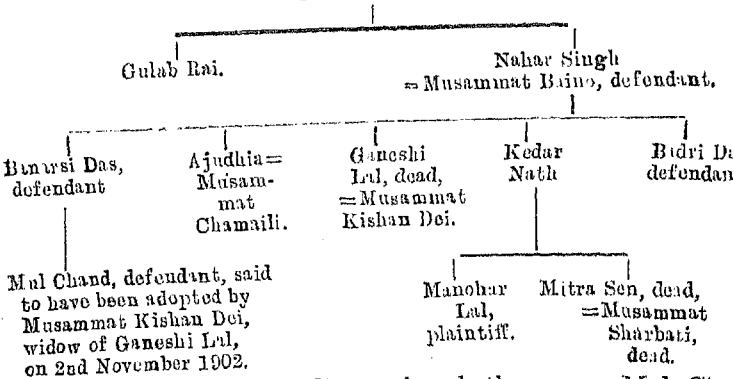
The Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, Mr. *R Malcomson* and Pandit *Bhagwan Din Dube*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal arises out of a suit for partition of the property of a joint Hindu family, the plaintiff claiming to be entitled upon partition to one-third of the property. One-fifth only was awarded to him and hence the appeal. The following genealogical tree will show the relationship of the parties:—



The main question in dispute is whether or not Mul Chand, the son of the defendant Banarsi Das, was validly adopted by his aunt Musammat Kishan Dei, the widow of Ganeshi Lal. Mul Chand at the time of his alleged adoption was a married man of the age of about 23 years. Manohar Lal disputes the fact of this adoption and also the validity of it.

When the appeal first came before this Court we found it necessary to remand an issue to the lower Court in regard to the validity of the adoption. A plea of adoption according to the law and custom prevailing among the Jain sect was set up by Mul Chand, but no issue was framed upon this plea. The only issue struck as to the alleged adoption was this, namely:—"Was Mul Chand adopted by Ganeshi Lal's widow for Ganeshi Lal and that in conformity with the desire of Ganeshi Lal?" We, therefore, referred the following issue for trial, namely:—"Is the adoption of a married man valid under the law and custom prevailing amongst the Jain community?" It is admitted that at the time of his adoption Mul Chand was a married man of the age

of about 23 years and had a daughter. The learned Subordinate Judge had decided the issue in the negative, holding that the alleged custom whereby a married man can be adopted amongst the Jains was not established. The validity of such an adoption is the main question for determination in this appeal; but there are a number of other matters which have been raised in the grounds of appeal and also in the objections filed by the respondents under section 561 of the Code of Civil Procedure which will require our attention.

The Court below found that Musammat Kishan Dei did in fact adopt Mul Chand, but against its findings, as also on the question of the validity of the adoption, if it took place, the appellant has preferred grounds of appeal. On the question of law the learned advocate for the appellant contended that the Jains are dissenters from Hinduism, but that they are governed by Hindu law unless in matters in which a custom in conflict with that law is established; that a married man, or in fact a man of the age of Mul Chand at the time of his alleged adoption could not have been validly adopted, whatever be the class of Hindus to which he belonged. In support of the adoption, it was argued that adoption amongst the Jains is secular and not religious, that all religious motive is wanting, that the Jains do not believe in the Hindu doctrine of the efficacy of initiatory ceremonies or the doctrine of the second birth and have distinct rules as regards adoption; as for example, the rule which admits of the adoption of a daughter's son or sister's son, and that no reason existed for any restriction in the matter of age or by reason of marriage. At the outset it may be well to consider the origin and history of the Jain sect.

A good summary of their early history is to be found in Dr. Hoernle's Presidential Address to the Asiatic Society of Bengal in 1898. From it we glean that the founder of Jainism was Mahavira, who was born of a good Kshatriya family in or about the year 599 B. C., about 40 years before the birth of Buddha, who was a younger contemporary. Both Mahavira and Buddha were founders of what we should describe as monastic orders rather than religious sects. But the institution of monasticism was not a new innovation, seeing that it formed an

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essential feature of Brahmanism. Dr. Hoernle writes :—" The old Brahmanic religion ordained man's life to be spent in four consecutive stages called *acramas*. A man was to commence life as a religious student, then to proceed to be a house-holder, next to go into retirement as an anchorite, and finally to spend the declining years of his life as a wandering sanyasi, or mendicant." He further observes that " in course of time a tendency arose in Brahmanism to limit the entry into the stage of a mendicant to persons of the Brahmanic caste, and that it was probably this circumstance which first led to the formation of non-Brahmanic orders, such as those of the Buddhists and Jains, which were chiefly and originally intended for persons of the Kshatriya caste." Then he points out how dissent and opposition to the Brahmanic ascetics arose amongst the Jains and Buddhists, and adds :—"The Buddhists and Jains were not only allowed to discard the performance of religious ceremonies, which was also done by the Brahmanic mendicants, but to go further and even discontinue the reading of the Vedas. It was this latter practice which really forced them outside the pale of Brahmanism. The still very prevalent notion that Buddhism and Jainism were reformatory movements and that more specially they represented a revolt against the tyranny of caste is quite erroneous. They were only a protest against the caste exclusiveness of the Brahmanic ascetics; caste as such and as existing outside their orders was fully acknowledged by them. Even inside their orders admission, though professedly open to all, was practically limited to the higher class. It is also significant of the attitude of these orders to the Brahmanic institutions of the country that, though in spiritual matters their so-called lay-adherents were bound to their guidance, yet with regard to ceremonies, such as those of birth, marriage and death, they had to look for service to their old Brahmanic priests. The Buddhist or Jain monk functionated as the spiritual director to their respective lay communities. But the Brahmans were their priests." We further gather from Dr. Hoernle that early in the history of his order Mahavira adopted stringent notions on the subject of dress and discarding clothes wandered about as a naked mendicant. In consequence of this there was soon a division in the order and the sect became

divided into two divisions, namely, the *Cvetambaras* or the clothed members of the order and the *Digambaras*, the unclothed. The latter refused to acknowledge the collection of the sacred books of the order known as the *Purvas* and *Angas*. Referring to the question of caste Dr. Hoernle says :—" A lay convert to Jainism does not lose his caste by his conversion. He may have to give up the exercise of the trade of his caste, but if he wants a wife for himself or his son or a husband for his daughter, he can only get them from his own caste."

Mr. Golap Chandra Sarkar in his Tagore Lectures for 1888 remarked of the Jains :—" The Jains, like the Buddhists, do not admit the authority of the Hindu Shastras, but admit the caste system and the superiority of the Brahmans, who are the priests in their temples. And although Jainism differs in many respects from Hinduism, yet on the whole the Jainas may be called Hindu dissenters." Later on, dealing with the question of adoption amongst the Jains, he writes :—" The usage of adoption obtains amongst the Jainas, although they do not perform the Shraddas or believe in the Hindu doctrine of spiritual efficacy of sons : adoptions amongst them want the spiritual element and are entirely secular in character." Again he observes :—" They are governed by the Hindu law of adoption, except in the following particulars, in which it has been proved that their usages are different." He then points out that a Jain widow is competent to adopt a son without having obtained authority to do so from her husband, and further observes :—" An adoption among the Jainas being a temporal institution, the religious ground of objection against the adoption of an only son must necessarily fail; such adoption would therefore be valid unless the extinction of the natural father's lineage in a temporal point of view be admitted to vitiate it. The rule of prohibited relations for adoption does not obtain amongst the Jainas, who may therefore adopt a daughter's or sister's son. Nor is the restriction based on the age of the adoptee applicable to the Jainas, among whom the rule is that a person within the age of 32 may be adopted." Then the learned author directs attention to the fact that no religious ceremonies are necessary for a valid adoption amongst the Jains in view of the fact that they do not believe in the efficacy

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of rites prescribed by the Hindu Shastras. Then he says :—"The gift and acceptance of the person adopted are the only requisite ceremonies for a lawful adoption amongst them."

Mr. Barth in his work on the Religions of India (at page 143 of the third edition) observes that "the Jainas like the Buddhists, reject the Veda of the Brahmans, which they pronounce apocryphal and corrupt, and to which they oppose their own *Angas* as constituting the true Vedas. They are quite as little disposed to tolerate the existence of the sacredotal caste, although at the present, the clergy in some of their communities at least are recruited from certain families in preference to others, and, it appears, from the Brahman caste itself. Besides, they observe the rules of caste among themselves as well as in their relations with others who dissent from them, but like several Hindu sects, however, without attaching any religious significance to it. Sir Monier Williams in his work on Modern India and Indians, 5th edition, page 159, says of the Jains that they "agree with the Buddhists in rejecting the Veda of the Brahmans."

Sir Guru Das Banerji in his work on the Hindu Law of Marriage remarks, at page 19:—"There are only three Indian sects of importance, the Buddhists, the Jains and the Sikhs, who have entirely repudiated Brahmanism, and who ought to be excluded from the category of Hindus, and judging from the language of certain enactments (*i. e.*, Act XVII of 1875, section 4, Act XXI of 1870) in which those three sects are mentioned as classes co-ordinate with the Hindus, it would follow that the Legislature intends such exclusion."

Treating of the law of adoption, Mr. Mayne observes that it has been successfully appropriated by the Brahmans, and that "in this instance they have almost succeeded in blotting out all trace of an usage existing previous to their own," and then he says:—"The inhabitants of the Punjab and the North-Western Provinces, whether Hindus proper, Jains, Jats, Sikhs or even Muhamamadans, practise adoption without religious rites or the slightest reference to religious purposes," and later on he writes:—"Little is to be found on the subject in the works of any but of the most modern writers, and the majority of the ancient authors rank the adopted son very low among the subsidiary sons.

The series of elaborate rules which now limit the choice of a boy are all the offspring of a metaphor that he must be the reflection of a son. These rules may be appropriate enough to a system which requires the fiction of actual sonship for the proper performance of religious rites; but they have no bearing whatever upon affiliation which has not this object in view, and as we shall find they are disregarded in many parts of India where the practice of adpotion is strongly rooted" (pages 8 and 9 of the 6th edition).

Apart from the religious aspect of the question there would appear to be no good reason why a married man should not be eligible for adoption. The respondents' case is that the Jains being emancipated from religious rules governing orthodox Hindus are in the matter of adoption relieved from the restrictions imposed by the Brahman priest from religious motives and that while retaining the practice of adoption they pay no heed to the restrictions imposed by the Brahmans. Nanda Pandita lays it down as an absolute rule that a child must not be adpoted whose age exceeds five years, or upon whom the ceremony of tonsure has been performed in the natural family (*Dattaka Mimansa*, section 4, para. 22). In doing so he relies upon a passage from the *Kalika Purana* which is of doubtful authenticity and which is treated as spurious by the author of the *Dattaka Chandrika*. According to the authority of the *Dattaka Chandrika* age is only material as determining the term at which the ceremony of investiture of the sacred thread may be performed, and so long as this rite in the case of the three higher classes, and marriage in the case of Sudras, can be performed in the family of the adopter, there is no limit of any particular time (*Dattaka Chandrika*, section 2, paras. 20—38) law.

Mr. *Sundar Lal* argued that the Hindu law permitted the adoption of a married man, provided that he belonged to the same gotra as the adoptive father, as is the case here; but that if it did not do so, there was a recognized and binding custom among the Jains whereby the adoption of married men is legal and that this custom is established by the evidence.

We may here mention that the number of Jains in this Province according to the last census is only 84,801, the total number

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in India being 1,334,148. According to the custom which is set up by the defendants respondents married men as well as unmarried boys are eligible for adoption, but in the majority of cases unmarried men would ordinarily be selected. We cannot, therefore, in the case of so small a community expect to find many instances of the adoption of married men. Few indeed would be the adoptions in the sect. We agree in the view taken by the Court below that the evidence amply proved the fact of adoption of Mul Chand. We have carefully considered the evidence adduced in support of this part of the case and we see no reason to distrust it. It is unnecessary, we think, to refer particularly to this evidence. So far, therefore, as regards the fact of the adoption we have no hesitation in affirming the decision of the Court below.

We come at once to the evidence adduced in support of the alleged custom amongst the Jains whereby it is permissible to adopt married boys or men. Evidence of such adoptions within the last forty years in Meerut, Muzaffarnagar, Saharanpur, in these Provinces and a few instances in Delhi, which formerly belonged to the North-Western Provinces, was given, namely 5 in Meerut, 11 in Muzaffarnagar, 7 in Saharanpur and 3 in Delhi. We shall first take the Meerut cases. The first is that of Mithan Lal. He deposed that Nand Lal adopted him 16 or 17 years ago, when he was a married man, and that he is in possession of Nand Lal's property. His natural father was Umrao Singh, a resident of Baraut. He stated that his natural father Umrao Singh celebrated his marriage when he was 14 years of age and that he was adopted when he was 16 years old. His evidence is corroborated by Munshi Lal, who was not present at the adoption but heard of it from the members of the brotherhood, and also by Jugul Kishore, a resident of Baraut, who stated that a married boy can be adopted by the Jains, and gave us illustrations of such adoptions, the cases of Hazari Lal and Mithan Lal and also of Anup Singh. The next instances are those of Sangam Lal and Sanai Lal which may be taken together. One Murlidhar deposed that he adopted Sangam Lal 18 or 20 years ago and that his marriage had taken place before the adoption. He also deposed to the adoption of Sanai Lal by his own brother Bansidhar after Sanai Lal's marriage

had taken place. In cross-examination he stated that Sangam Lal was 15 or 16 years old when he was adopted and that he (the witness) celebrated his second marriage after his adoption and after the death of his first wife. Bansidhar, he stated, adopted Sanai Lal, who was his sister's son, 32 years ago, and Sanai Lal was adopted two years after his first marriage. Bansidhar, the adoptive father of Sanai Lal, also gave evidence to the same effect. Wills executed by Bansidhar and Murlidhar respectively in favour of their adopted sons, and bearing date respectively the 14th of February 1900 and 24th of July 1901, were adduced in evidence showing that these adoptions were acknowledged before the institution of the present suit. The next case is that of Amman Singh. He was examined and deposed that Jaisukh adopted him after his marriage and that his wife is still alive; that Kallu Mal was his natural father and that Kallu Mal's property is in the possession of his brothers while he (the witness) is in possession of the property of Jaisukh.

The Court below held that the evidence of the adoption of Mithan Lal was not clear. The learned Subordinate Judge states that "Mithan Lal spoke of his being adopted by his mother's brother," but he is in error as to this. Mithan Lal did not say that he was adopted by his mother's brother but by his father's maternal uncle. Again, the Subordinate Judge makes this comment that Mithan Lal stated that he was in possession of his maternal uncle's estate but did not state that he was not in possession of his natural father's estate. The answer to this is that he was not asked whether or not he was in possession of his natural father's estate. Then of the case of Sangam Lal and Sanai Lal, the Subordinate Judge held that they were not satisfactorily proved, remarking that in both cases no particulars were given as to the parents of the girls to whom these adopted sons were married but no questions were put to them as to the parentage of the girls. The learned Judge might himself have inquired as to this if he considered the information a matter of importance. We see no reason for distrusting the evidence given in proof of the adoptions of Mithan Lal, Sangam Lal and Sanai Lal. We do not believe that the witnesses told deliberate falsehoods in regard to these adoptions and they were bound to know the true facts. As regards

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Amman Singh, the learned Subordinate Judge accepted the proof of his adoption after marriage as being free from suspicion, though he thinks that the fact that Amman Singh was unable to mention any other instances of similar adoptions, deprived his case of any "great weight."

We now come to the Saharanpur cases. The first is the case of Sikri Prasad. He keeps a draper's shop and is also a "contractor." He deposed that he is the adopted son of Mithan Lal, his own father Murlidhar having been brother of Mithan Lal. He says that he was adopted 18 or 19 years ago, that his first wife was Bhim Singh's daughter, and his second wife is Nehal Chand's daughter. His marriage, he said, had taken place when his paternal uncle adopted him. It was customary, he said, amongst the Jains to adopt a boy after marriage, and he gave two other instances of such adoptions, namely, those of Jhambu Das, who was adopted by Musammat Asharfi, and Dip Chand, who was adopted by Musammat Gumti Kunwar. In cross-examination he stated that he was 19 or 20 years old when he was adopted, and that his marriage had taken place 8 or 9 years before when he was 11 years of age. A witness for the plaintiff, Munshi Govind Rai, whilst admitting that Sikri Prasad was adopted by Mithan Lal, alleged that he was unmarried at the time of his adoption. It is apparent, however, from his cross-examination that he had no personal knowledge of the facts. He was not present at the adoption ceremony and did not remember the year in which the adoption took place. He could not even say whether or not Sikri Prasad was married twice. We have no hesitation in accepting the evidence of Sikri Prasad, given as it was with so much detail. There appears to us no reason for discrediting it. We are unable to appreciate the reasons given by the learned Subordinate Judge for his rejection of the evidence of this witness.

We next come to the cases of Chhotu Mal, Prabhu Lal and Naurangi Mal. Chhotu Mal was examined and deposed that Ganesh Lal adopted him after his first marriage, which was celebrated by his natural father Surjan Lal; that Ganeshi Lal was his paternal uncle and celebrated his second marriage after the death of his first wife. In his examination-in-chief this witness stated that his marriage took place after his adoption,

but immediately corrected himself and stated that his first marriage took place before his adoption, and that it was his second marriage to which he had at first referred. The learned Subordinate Judge was of opinion that the first statement was true and rejected his evidence. We do not agree with the learned Subordinate Judge. We think that when in the first instance the witness referred to his marriage as having taken place after his adoption, he referred to his second marriage. Sangam Lal deposed that Jains adopted married boys, that he had not merely heard this from his elders but that married boys were adopted to his own knowledge. As instances he mentioned the case of Chhotu Mal, also of Prabhu Lal, who was adopted, he said, by Shibba Mal, and Naurangi Mal, who was adopted by Shibba Mal's wife. He was present, he stated, at the adoption of these three persons, and they were all adopted after their marriages had taken place. In cross-examination he stated that Chhotu Mal's first marriage took place about 30 years ago, that his marriage procession went to Talsara and that he was 14 or 15 years old at the time of his marriage, and that his wife died four or five years thereafter. He stated that Chhajjan Mal was the father of Chhotu Mal and that he was adopted five or six years after his first marriage. The learned Subordinate Judge accepted the evidence of this witness in the case of Prabhu Lal, but rejected it in the case of Naurangi Mal, saying that no particulars as to the parentage and home of his first wife were given and that therefore he thought this marriage was a myth. As a matter of fact the home of his first wife is mentioned, as it is stated that his marriage procession went to Talsara. We see no good reason for rejecting this evidence.

The next two instances are those of Ajit Prasad and Janki Singh. Duli Chand, a resident of their village, deposed that it was valid amongst the Jains to adopt a married boy, and as illustration of such adoptions he mentioned the case of Ajit Prasad who was adopted by Gurdayal Singh, and of Janki Singh by Musammat Mulo, the widow of Chhajju Singh. He stated that he attended at the adoption ceremonies of these two persons. The learned Subordinate Judge accepted his evidence in the case of Janki Singh, but refused to accept it in the case of Ajit

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Prasad. In the latter case he improperly referred to and relied on a judgment delivered by the Subordinate Judge of Saharanpur in another case, which was not admissible in evidence, and said that it appeared from this judgment that Ajit Prasad had after his alleged adoption given out in Court, referring to his parentage, the name of his natural father. We do not think that the learned Subordinate Judge ought to have referred to a judgment which was not in evidence in the case before him; and in any case the learned Subordinate Judge was wrong, we think, in attaching so much importance to the mention of his natural father's name, which may have been accidental.

The last of the Saharanpur cases is that of Nidha Mal. His adoption after his marriage was proved by Hardhian Singh, who stated that his (witnesses') mother-in-law adopted Nidha Mal in Deoband, 30 or 32 years ago. Nidha Mal's marriage, he said, took place before his adoption and his wife died two years after his adoption. A married boy, he said, can be adopted by Jains.

We now come to the Muzaffarnagar instances. The adoption of Piare Lal after his marriage by Sik Chand is deposed to by his natural father Sangam Lal, a shopkeeper in the village of Khatauli. Sangam Lal deposed that he gave his son Piare Lal in adoption to Sik Chand 25 or 26 years ago; that he had him married 27 or 28 years ago, and that Piare Lal is in possession of Sik Chand's property. This witness also deposed to the adoption of Bul Chand and Makund Lal. Bul Chand was adopted, he said, by Bahal Singh, and Makund Lal by Banarsi Das, both residents of Khatauli. These two adopted sons, he said, were then in possession of the property of their adoptive fathers. In cross-examination he gave particulars as to the adoptions of Bul Chand and Makund Lal, saying: — "I went over when Bul Chand and Makund Lal were adopted. Bul Chand was given in adoption by the *Sardhanawali*. I do not know her name. She was Bahal Singh's sister. Bul Chand was a resident of Daghat. I do not know his father's name. He was adopted by the *Daghatwali*. The *Daghatwali* took him in adoption from Makhu Mal. When Makhu Mal died, his wife gave Bul Chand in adoption, after his marriage, to Bahal Singh." Later on he stated that the name of Makund Lal's natural father was Bansi

Lal. Kallu Mal, a witness for the plaintiff, corroborated the last witness as regards the adoption of Piare Lal, but said that the adoption preceded his marriage and that Piare Lal was not married before his adoption. As regards Bul Chand, he said that he was adopted by some one at Sardhana but did not know by whom. In cross-examination he admitted that he was not present at the adoption of Piare Lal and he was unable to say how many years ago the adoption had taken place. He evidently has no personal knowledge of the matter. The learned Subordinate Judge did not consider that sufficient proof of these instances was given; but we are unable to agree with him in this.

The next instance is that of Gyan Chand. His adoption is deposed to by Umrao Singh, who deposed that adoption after marriage is customary amongst the Jains and that he himself was adopted by Jamna Das, 20 or 21 years ago, after his first marriage. His first wife having died, he married, he said, a second wife 11 or 12 years ago. The property of Jamna Das is in his possession, while the property of his own father Lachman Das is in his brother's possession. The adoption of Ranji Ram is deposed to by himself. He stated that he was Fakir Chand's son and that Fakir Chand had him married when he was 14 or 15 years old and afterwards gave him in adoption to Shadi Ram, whose property he got. In cross-examination he stated that his adoption took place about four years after his marriage. The learned Subordinate Judge rejected this evidence owing to the statement of the witness that he was adopted eight or nine years after the Mutiny and that during the Mutiny he was one or two years old and therefore his marriage must have taken place when he was only a child of five years. We cannot appreciate the reason so assigned for rejecting his evidence. A mistake in the matter of dates is readily made. Allowance must, we think, be made for defects of memory which in such matters are inevitable after the lapse of so many years. Munshi Lal deposed to his own adoption and also to that of Chitra Mal. This witness is a zamindar. He stated that he was adopted by his aunt, the wife of Buddhu Mal, 16 or 17 years ago, that he was married to a member of Kallu Mal's family in Pur 18 or 19 years ago, and that his own father Chandan Mal gave him in adoption. He also

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mentioned the adoption of Mithan Lal by Kundan Lal, 13 or 14 years ago, after his marriage had taken place, and also the adoption of Chitra Mal in Soran, four years ago, by Shadi Mal. In cross-examination he stated that he was not present at the adoption of Mithan Lal, but heard of it from the members of the brotherhood. The adoption of Banwari Lal by Bansi Lal is proved by Jai Dayal. Jai Dayal is a zamindar, paying Rs. 2,500 per annum as revenue and Rs. 35 as income tax. He deposed that a married boy is adopted amongst the Jains and that his father's own brother adopted his nephew Banwari Lal who was then a married man. This adoption is supported by a *khewat* on the record of mauza Tavli for the year 1296 *Fasli*, in which Banwari Lal is mentioned as the adopted son of Bansi Lal. The last of the Muzaffarnagar cases is that of Piare Lal, the adopted son of Har Chand Rai. He deposed that it was customary amongst the Jains to adopt a son after marriage, and that he was adopted by Har Chand Rai after his marriage, about 22 or 23 years ago. Har Chand's property consisting of hypothecation bonds of the value of two to four thousand rupees was, he said, in his possession. With the exception of the case of Chitra Mal, the Subordinate Judge did not accept the evidence as satisfactorily establishing the adoption after marriage in the instances to which we have last referred. We are unable to agree with him in his estimate of the evidence. We cannot ascribe to the witnesses the wholesale perjury which the rejection of their evidence implies.

Evidence was also given in support of the adoptions after marriage, in Delhi, of three persons, namely, Samman Singh, Umrao Singh and Juggi Mal. Umrao Singh deposed that he was adopted by Karnali Mal, his natural father's name being Kure Mal. He stated that his first marriage took place about 19 years ago, his second 14 years ago, and third seven or eight years ago, and that Musammat Patho, wife of Karnali Mal, adopted him a few years after his first marriage had taken place. He further deposed that the property of his own father Kure Mal was in the possession of his brother Sultan Singh and that Karnali Mal's property was in his possession. "Among us," he said," a boy can be adopted after his marriage. It is a Jain custom." In cross-examination he stated that his own father had instituted a

suit in respect of Karnali Mal's outstandings, but that he was not aware whether he had done so on his (the witnesses') behalf or on behalf of Musammat Patho. Jawahir Mal, a cashier in the National Bank at Delhi, deposed that he was a *panch* of the Jain Agarwal brotherhood of Delhi and that it was not customary to adopt a boy whose marriage had taken place: but he admitted in cross-examination that Lala Mohar Chand adopted Juggi Mal after his marriage and celebrated Juggi Mal's second marriage after adopting him. Referring to Lala Mohar Chand the witness said :—"He is a great and good man." Asked as to what the objection of the brotherhood was to the adoption of Juggi Mal, he stated :—"The members of the brotherhood had only this objection to Juggi Mal's adoption. Juggi Mal was of advanced age and Mohar Chand's wife was young. There was no other objection." It thus appears that the whole objection to Juggi Mal's adoption was not that he was a married man, but that he was older than his adoptive mother. Another witness, Kanhai Lal, also proved the adoption of Juggi Mal, and he stated that all the members of the brotherhood attended Juggi Mal's second marriage which took place after his adoption. It is clear from the evidence of these witnesses that Juggi Mal was adopted although he had been previously married.

A number of witnesses were examined on behalf of the appellants who deposed that it was not customary amongst the Jains to adopt a married boy. Amongst these are Khairati Ram, Mitter Sen, Kabul Singh and Nihal Singh, Mangal Sen, Lakhpat Rai and Tota Ram as also Munshi Lal to whose evidence we have already referred. These witnesses simply say that amongst the Jains a married boy is not adopted, that the custom is to adopt unmarried boys. It is apparent that their views were based on the fact that they had no knowledge of the adoption of married boys. We have not the slightest doubt that married boys were and are adopted, and that the evidence in support of these adoptions is truthful. If it be, we have 23 cases established, namely, nine in Muzaffarnagar, seven in Saharanpur, three in Delhi and four in Meerut. Considering that the Jain population is not large and is scattered about, and that ordinarily unmarried boys would be selected for adoption, the number of cases of the

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adoption of married youths or boys which has been proved, is striking.

Does this evidence satisfactorily establish the alleged custom? It is to be borne in mind that the Jains are mostly engaged as traders and shopkeepers. They are not landowners, and therefore we cannot expect to find any records of adoptions such as are to be met with in conveyances and transfers of land, or in *khewats* and other land records. Even if any such documents were forthcoming they would not show whether the adoptees were married or single. Proof by instances is the only class of proof which they could ordinarily adduce, and this is the proof which we are asked to accept.

It is admitted on the part of the plaintiff appellant that Jains can adopt a boy at any age, provided that he be not married; that the ceremonies of tonsure and investiture with the sacred thread not being observed by the Jain community, the rule of Hindu law, which prohibits the adoption of a boy after the performance of the ceremonies, does not pervail; but it is said that marriage is a ceremony which among the Jains as well as among orthodox Hindus fixes a boy in his own family so that he cannot thereafter be adopted. The contention is not that the custom amongst the Jains is similar to that recognized by the Hindus of the twice-born classes, but is a custom akin to that which is binding among the *Sudras* whereby it is said marriage is a bar to adoption. On the part of the appellant, on the other hand, it is contended that with the Jains adoption is purely a secular matter; that they have no belief in the doctrine of the efficacy of initiatory ceremonies and do not perform *sradhs* and that no reason exists for imposing any limit of time or circumstance in the matter of adoption.

There is not much case law on the subject before us. In the case of *Maharaja Govind Nath Ray* v. *Gulab Chand* (1) it was held, accepting the authority of the Pandits, that amongst the Jains a widow was competent to adopt without the sanction of her husband, and that the qualifying age of the adoptee extended to the 32nd year. If the qualifying age is extended to the 32nd year the presumption is that marriage furnished no ba

(1) (1833) 5 S. D. A., 276.

to adoption, seeing that in every class of Hindus boys are usually married before they attain puberty. In *Sheo Singh Rai* v. *Dakho* (1) it was held that a sonless widow can adopt a son without the authority of her husband. On appeal from the decision of this Court in this case, their Lordships of the Privy Council at page 704 of the Report quoted and concurred in the following passage, contained in the judgment of the High Court:—"It appears to us that, so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a *Saraogi Agarwala* takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus; that she takes an absolute interest at least in the self-acquired property of her husband and as we have said it is not necessary for us to go further in this, for the property in suit was purchased by the widow out of self-acquired property of her husband; that she enjoys the right of adoption without the permission of her husband, or the consent of his heirs, that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the more reliable evidence that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family." We may observe that the parties to the appeal before us are *Saraogi Agarwalas*. In the case of *Lakhmi Chand* v. *Gatto Bai* (2) it was held that a Jain widow had power to make a second adoption on the death of the child first adopted. Petheram, C.J., and Straight, J., in their judgment say:—"It is true that the powers of a Jain widow in the matter of adoption are of an exceptional character, namely, that she can make an adoption without the permission of her husband, or the consent of his heirs, and that she may adopt a daughter's son; and, further, that no ceremonies or forms are necessary." But they go on to say:—"Except that in these respects it is not controlled by the Hindu law of Adoption, we think that in all others its principles and rules are applicable, and that the *kritrima* form of

(1) (1878) I. L. R., 1 All., 688. (2) (1886) I. L. R., 8 All., 319.

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adoption not being recognized in the Jain community, or among the Hindus of these Provinces, it must be assumed that she had the power to make a second adoption, and that such adoption was to her husband."

Mr. Golap Chandar Sarkar in his work on the Hindu Law of Adoption, at page 359, states that "neither in the *Smritis*, nor in the commentaries on general law is there any restriction as to the age of a person which limits his capacity of being adopted. On the contrary, an obvious inference may be drawn from the definitions of the *kritrima* and the self-given sons, that there was no limitation of age for affiliation. The Vedik story of *Sunah Sepah's* adoption proves that such restriction did not exist; for, according to the story, he took a prominent part in the performance of the ceremony which could be done by a person whose *Upanayana* rite had been performed. "It is no doubt desirable," he adds, "that the boy should be adopted at a tender age so that he might be thoroughly assimilated to the family into which he is adopted and being bred up from his infancy amidst its members looked upon as a natural relation. The matter, however, was, as it properly should be, left to the discretion of the parties concerned by the sages, who did not lay down any rule on the point." Then he refers to the restrictions introduced by Nanda Pandita and other modern writers upon the authority of a passage of the *Kalika Purana*, the authenticity of which is doubted, and he says that "if you leave aside the passage of the *Kalika Purana*, the authenticity of which is doubted, then there is no authority in Hindu law for the proposition that any of the initiatory ceremonies must be performed in the adopter's family in order to cause filial relation: in other words, that if all or any of the initiatory rites for a person have been performed in the family of his birth, he becomes incapable of being adopted in any other family;" and later on, referring to the *Sudras*, he states:— "Nor is there any passage of law declaring that in the case of *Sudras* marriage is a bar to adoption." He subsequently refers to the relaxations of the rule in Madras, Bombay and the Punjab, noting the fact that the Bombay High Court ruled that among all classes even a married man may be adopted, whether he belongs to the same *gotra* with the adopter or not. *Raje Vyankatrav*

Anandram Nimbalkar v. *Jayantrav* (1); *Nathaji Krishnaji* v. *Hari Jagoji* (2); *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (3); *Lakshmappa* v. *Ramava* (4); *Dharma Dagu* v. *Ramkrishna Chimnaji* (5).

According to the cases last cited it appears that in Bombay a married Brahman may be lawfully adopted, whether or not he belongs to the same *gotra* as the adopter. As, however, the law of the *Mayukha* prevails in Bombay, the authorities in that Province do not afford us much assistance. At the same time they are instructive and suggestive. There is no restriction in the matter of age to be found in Manu or in the *Smritis*. The adoption of a married man of whatever age is not forbidden by the *Mitakshara*. Mr. Ghose in his work on Hindu Law says that "the authentic *Smritis* are very reticent about the qualifications of the boy to be adopted. The complicated rules laid down by our Courts are based only on certain texts of *Saunaka*, the *Vridha Gautama*, and the *Kalika Purana*, not cited in the older books like the *Mitakshara* or the *Smriti Chandrika*, the *Parasara Madeva* or even in the *Dayabhaga* or by the *Mithila* writers. No Hindu lawyers who had critically examined the *Smritis* would have placed any reliance on these texts and on the rules of the *Dattaka Mimansa* and the *Dattaka Chandrika*" (2nd Edition, at p. 598). A majority of a Full Bench of this Court held that the *Dattaka Mimansa* was not an infallible guide in questions of adoption, in the case of *Bhagwan Singh* v. *Bhagwan Singh* (6) and refused to follow it: but their decision in that case was set aside by their Lordships of the Privy Council, who observed in their judgment, referring to the *Dattaka Mimansa* and *Dattaka Chandrika* as follows:—"To call it infallible is too strong an expression, and the estimates of Sutherland and West and Buhler seem nearer to the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become imbedded in the general law" (7). In view of the ruling of their Lordships we should not be justified in disregarding the rules laid down in these

(1) (1867) 4 Bom., H. C. R., A. C. J., 191.
(2) (1871) 8 Bom., H. C. R., A. C. J., 67.
(3) (1874) 11 Bom., H. C. Rep., 190.
(4) (1875) 12 Bom., H. C. R., 364.
(5) (1885) I. L. R., 10 Bom., 80.
(6) (1895) I. L. R., 17 All., 294.
(7) (1898) I. L. R., 21 All., 419.

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works. But it is admitted that these rules cannot and do not apply to the Jains, unless it be that the Jains are to be treated as ranking with *Sudras*, and are governed by the rule laid down in the *Dattaka Chandrika* which renders marriage a bar to adoption in the case of *Sudras*. The contention put forward on behalf of the appellant is not that the rule of law prevailing amongst the twice-born castes as regards adoption governs the Jains, for this is not the appellant's case, but that the Jains are prohibited like the *Sudras* from adopting a boy after marriage. It is difficult to see why this should be so. The Jains are mostly Vaishyas, one of the three twice-born classes, and the exceptional rules laid down for *Sudras* therefore can have no place in matters relating to them. The ordinary Hindu law is that of the three superior castes, and if that law in matter of adoption admittedly does not apply to the Jains, we are compelled to see what rule or custom of adoption does prevail amongst them. That their custom is at variance with that prevailing amongst orthodox Hindus is admitted; but it is said that among them, as with *Sudras* marriage is a bar to the eligibility of a boy for adoption. It is difficult to find any reason for this restriction. Adoption being a secular and not a religious matter with the Jains renders it improbable that any such bar should exist. The custom set up is one which merely extends the area of choice by the rejection of restrictions, probably of recent growth, which in the order of things are inapplicable. The restrictive rules as regards adoption, according to Mr. Mayne, as we have already pointed out, are of Brahmanical origin. "The Brahmans," he writes, have almost succeeded in blotting out all trace of a usage existing previous to their own" and "the series of elaborate rules which now limit the choice of a boy, are all the offspring of a metaphor; that he must be the reflection of a son." Many of these restrictions no doubt were imposed long after the Jains had parted company from Hinduism upwards of 2,500 years ago. After a careful consideration of the case we have come to the conclusion that the evidence satisfactorily shows that the Jains in these parts do not regard marriage as a bar to the eligibility of a youth for adoption; that married as well as unmarried boys are amongst them eligible. The reasonable inference to be drawn, we think, from the

authorities and from the evidence given in proof of instances of the adoptions of married boys for the last 40 years is that at the time when Jains dissented from Hinduism, the restrictions imposed in the matter of adoption on orthodox Hindus did not exist; that these restrictions were imposed by the Brahmanical priests of later years and only apply in the case of orthodox Hindus, and that the custom which allows of the choice of married and unmarried youths alike prevails among the Jains and is one of antiquity. We, therefore, decide this question in favour of the respondents. It is unnecessary to determine the further point raised by Mr. *Sundar Lal*, namely, that the Hindu law permitted the adoption of a married man provided that he belonged to the same *gotra* as that of the adoptive father.

There are several minor matters to which the appellant has taken exception in the decree of the Court below. He complains that the Court has erred in holding that a bungalow described as No. 115, and the decree obtained in a suit brought by him against Rana Prithi Singh and Kartar Singh formed part of the joint family property. We think that the appellant has not established his right to either the bungalow or the decree. From the evidence of Banarsi Das we find that the appellant purchased the *kothi* in question in his own name, but that the purchase money was defrayed out of the moneys of the Meerut shop, which belonged to the joint family. Appellant did not out of his own funds pay any portion of the purchase money. As to the decree Banarsi Das states that Rs. 15,000 were lent to Rana Prithi Singh during the life time of Ganeshi Lal on the security of a bond executed in favour of Kedar Nath. The plaintiff brought a suit upon this bond and the expenses of the suit are entered in Kedar Nath's account in the account books of the Meerut shop. The money advanced to Prithi Singh was, he stated, given by Lala Ganeshi Lal to Kedar Nath. The appellant has failed to satisfy us that these items of property were incorrectly regarded by the Court below as joint family property.

The respondents have filed objections under section 561 of the Code of Civil Procedure. Of these the following have been pressed. It is alleged that the sum of Rs. 40,000 was paid to Musammat Kishen Dei, and Rs. 5,000 to Musammat Baino, and that the

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Court below has not allowed credit for these payments. The only evidence in support of these statements is the following. Badri Das in his evidence stated that Banarsi Das paid Rs. 5,000 to Musammat Baino, and Rs. 40,000 to Ganeshi Lal's widow and that Manohar Lal gave his consent to these payments. Banarsi Das in his evidence corroborates that of Badri Das. He stated that Rs. 40,000 were given to Musammat Kishen Dei about 2½ years ago after pressing demands made by her. He said that Badri Das, Manohar Lal and he consulted together about the matter and decided that it was necessary to appease Musammat Kishen Dei and that Rs. 40,000 should be given to her, and that Rs. 40,000 were given to her. Manohar Lal in his evidence denies all knowledge of this transaction. He says that Rs. 40,000 were not given to Musammat Kishen Dei in his presence, nor was Rs. 5,000 given to Musammat Baino, nor was he consulted regarding the payment of either of these sums. It is remarkable that no receipt for or acknowledgment of the payment of these large sums, if it was ever made, was obtained from either of these ladies. We agree with the Court below that the payment of these sums has not been satisfactorily proved.

The next objections are that a *rukka* for Rs. 300 and a mortgage deed for Rs. 3,200 in favour of Badri Das, and *rukkas* for Rs. 5,000 and Rs. 500 in favour of Banarsi Das, together with several ornaments pledged with Banarsi Das for Rs. 2,500, are the separate properties of Badri Das and Banarsi Das and that certain moveables claimed by the respondents as their exclusive property were their joint property. In support of these objections the respondents relied on the evidence of Banarsi Das. He stated that he got a *rukka* for Rs. 300 from Shahzad Rai and also a hypothecation bond for Rs. 3,200 executed by Haidar Shah and others. Badri Das admits in his evidence that he received Rs. 30,000 from the joint family funds for expenses and that this sum was debited to him in the accounts of the *kothi*. Banarsi Das also in his evidence stated that Ganeshi Lal and he decided to pay Rs. 30,000 to Badri Das and to have that item entered in the expense account. There appears to be little doubt that the moneys lent to Shahzad Rai and Haidar Shah by Banarsi Das formed part of money which he had received from

the joint family funds, and that in any case he would be bound to account for the Rs. 30,000 which he had received and which was debited to him in the account books before he can establish a claim to the two sums of Rs. 300 and Rs. 3,200. The property of each individual member is presumed to belong to the common stock, and no evidence has been laid before us which would lead us to think that these two sums should be excluded from the division of the joint family property as being the exclusive property of Banarsi Das. The same observation applies to the house described as house No. 13, which undoubtedly belonged to the family, but upon which Badri Das would appear to have expended sums amounting to Rs. 9,000 or Rs. 10,000. This house is the subject of objection No. 8, which is that the Court below should have allowed to the respondent Badri Das Rs. 10,000 spent by him on improvements to house No. 13 or should have directed that house to be allotted to him at its original value. In view of all the circumstances, we hold that this house formed part of the joint family property and that the money spent upon it formed part of the joint funds.

The only other matter remaining to be considered is the form of the decree passed by the Court below. The decree is that the plaintiff be put in absolute and separate possession of one-fifth share in the immovable and movable property mentioned in the lists appended to the decree, and that Musammat Baino, Banarsi Das, Badri Das and Mul Chand are each entitled to a one-fifth share in the same property. This is clearly an improper decree. What is desired by the plaintiff appellant is that the joint immovable and movable property should be partitioned. The Court below should therefore after ascertaining of what the joint property consisted and the rights of the various parties therein, have issued a commission to such persons as it thought fit to make a partition according to such rights as provided by section 396 of the Code of Civil Procedure.

We, therefore, dismiss the appeal with costs, to be paid by the appellant. We remand the case to the Court below with directions that the partition proceedings be carried out in accordance with the directions given above, and in the course of the

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partition we direct in accordance with this agreement of the parties that a sufficient portion of the family property be exclusively charged with the maintenence allowance for Musammat Chameli as already fixed in exoneration of the residue of the property.

We dismiss the objections with costs.

Appeal dismissed.