RUP CHAND (PLAINTIFF) *v.* JAMBU PRASAD (DEFENDANT)

[On appeal from the High Court of Judicature at Allahabad.]

P. C. 1909 *December* 2, 10, 14–18. 1910 *March* 9.

Hindu law—Adoption—Custom—Custom of adoption among Jains in United Provinces—Adoption of married man—Proof of custom.

Held (affirming the decision of the High Court) that a custom set up that "among the Jains adoption is no religious ceremony, and that under the law or custom there is no restriction of age or marriage among them," was established by the evidence.

In this case the adopted son was a married man and was of the same gotra as his adoptive father.

APPEAL from a decree (5th March 1908) of the High Court at Allahabad, which reversed the judgment and decree (8th November 1905) of the Subordinate Judge of Saharanpur, and dismissed the appellant's suit.

The parties to the litigation were Jains, and the principal question for determination on this appeal was whether, among Jains, the adoption of a married man was valid or not. In this case the adopted son, the respondent Jambu Prasad, was of the same gotra as his adoptive father.

The Subordinate Judge held that the Jains were governed, in the absence of any custom to the contrary, by the Hindu law of the Mitakshara School, which did not allow the adoption of a married man, whether of the same gotra or not, and that a custom set up to the effect that such an adoption was valid was not proved.

The High Court (SIR J. STANLEY, C. J. and SIR W. BURKITT, J.) reversed that decision and held that, adoption being amongst the Jains a secular, and not a religious, institution, the adoption of a married man was not illegal.

The facts are sufficiently stated in the report of the hearing before the High Court, which will be found in I. L. R., 30 All., 197 (*s. v. Asharfi Kunwar* v. *Rup Chand*), where also a pedigree is given showing the relationship of the parties to the litigation. The recent case of *Manohar Lal* v. *Banarsi Das* (1) which was decided by the same Judges as that now under appeal, was followed by the High Court in the present case, and in the judgement now appealed from the historical account of the Jain sect given in the earlier case is treated by the High Court as incorporated into

Present :—Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and Mr. AMEER ALI.

(1) (1907) I. L. R., 29 All., 495.

1910

RUP CHAND v. JAMBU PRASAD.

their judgement in the present case. A great deal of the evidence produced to show that married men and boys had been adopted was the same in both cases, and the instances in which such an adoption had occurred will be found commented on in the judgement in the earlier case as well as in the judgement now appealed from.

On this appeal.

DeGruyther, *K. C.* and *H. Cowell* for the appellant contended that the High Court had wrongly held that amongst Jains the adoption of a married man was a valid adoption. Jains belonged to the twice-born classes, and were governed by the ordinary Hindu law (in this case, the Mitakshara) in the absence of any special custom proved to the contrary. Reference was made to *Bhagvandas Tejmal* v. *Rajmal* (1); *Chotay Lal* v. *Chunnoo Lal* (2); *Bachebi* v. *Makhan Lal* (3); *Shimbhu Nath* v. *Gayan Chand* (4); *Ambabai* v. *Govind* (5); *Mandit Koer* v. *Phool Chand Lal* (6) and *Peria Ammani* v. *Krishnasami* (7). By the ordinary Hindu law a married man cannot be adopted, even if he were of the same gotra as his adoptive father. "Marriage is the rite by which the filial relation can be completed in the case of Sudras," so that an adoption to be valid must take place before marriage: and the ceremony of "upanayanam is the rite which completed the filial relationship in the case of Brahmans; and though this latter rule has been relaxed in the case of sagotras, there is no warrant for the contention that the relaxation can be extended to marriage": see *Pichuvayyan* v. *Subbayyan* (8). Cases in the Bombay Presidency where the law of the Mayukha prevails allow the adoption of a married man; Stokes, Hindu Law Books, Mayukha, page 64, Chapter IV, section 5, paragraphs 19, 20; but that law does not apply in the United Provinces. And in the case of *Manohar Lal* v. *Banarsi Das* (9) it was held that the instances produced in evidence were sufficient to prove a custom among the Jain community in the United Provinces whereby the adoption of a married man

(1) (1873) 10 Bom., H. C., 241 (250, 253, 256, 259, 263).
(2) (1878) I. L. R., 4 Calc., 744 (752): L. R., 6 I. A., 15 (28).
(3) (1880) I. L. R., 3 All., 55.
(4) (1894) I. L. R., 16 All., 379 (383).
(5) (1898) I. L. R., 23 Bom., 257 (262).
(6) (1897) 2 C. W. N., 154 (158).
(7) (1892) I. L. R., 16 Mad., 182 (184)
(8) (1889) I. L. R., 13 Mad., 128 (139).
(9) (1907) I. L. R., 29 All., 495.

was valid; and that case had been followed in the present case, in which, as well as in that of *Manohar Lal* v. *Banarsi Das*, the Subordinate Judge who saw and heard the witnesses, held that the custom was not established. It was then contended that the custom set up was not proved in this case. As to proof of custom reference was made to Mayne's Hindu Law, 7th edition, pages 56, 57, section 50; and the instances produced to prove the custom were referred to and commented on; and as to the admissibility of certain evidence the Evidence Act (I of 1872), section 32, clause 5, was referred to. Mayne's Hindu Law, 7th edition, pages 129, 132, was also cited. The adoption here was not authorized by the Hindu Law, and no legal custom had been proved authorizing a Jain widow to adopt a married man without the consent of her husband's heirs, and without the concurrence of her co-widow.

Sir R. Finlay, K. C., G. E. A. Ross, B. Dube, and *Moti Lal Nehru* for the respondent contended that his adoption was established and was valid according to the laws and customs by which the Jains were governed. The adoption of a married man was allowed in Madras, Bombay and in the Punjab. [*DeGruyther, K. C.*, "Not in the Punjab."] Reference was made to the Dattaka Chandrika, Stokes' Hindu Law Books (1865), page 644, paragraph 32. *Nitradayee* v. *Bholanath Doss* (1), *Bullubakant Chowdree* v. *Kishenprea Dassea Chowdrain* (2). The cases of *Sheo Singh Rai* v. *Dakho* (3) and *Chotay Lal* v. *Chunnoo Lal* (4), though they lay down that in the absence of any special law or custom the ordinary Hindu Law is to be applied to Jains, yet recognise that that community had freed themselves from restrictions adhered to by the orthodox Hindus, and when such laws or customs were by sufficient evidence capable of being ascertained and defined, and were satisfactorily proved, effect ought to be given to them if in accordance with public policy. Evidence that a married man has been adopted was evidence of a custom and admissible to aid in proving it; Evidence Act (I of 1872), sections 48 and 49; and here there were numerous instances adduced. As to the circumstances and history of the separation

(1) (1853) 9 S. D. A., Beng., 553.

(2) (1838) 6 S. D. A., Beng., 219.

(3) (1878) I. L. R., 1 All., 688 (701): L. R., 5 I. A., 87 (107).

(4) (1878) I. L. R., 4 Calc., 744 (752): L. R., 6 I. A., 15 (28).

1910

RUP CHAND v. JAMBU PRASAD.

between the Jains and the Hindus, Dr. Hœrnle's Presidential Address to the Asiatic Society of Bengal in 1898, pages 39, 40 and 42, and *Bhagvandas Tejmal* v. *Rajmal* (1) were referred to. Adoption amongst Jains was a purely secular matter, and the rules of the Hindu Law of adoption which were based on religious principles were not applicable to them. [*Sir A. Wilson*—Has it ever been decided in the case of the adoption of a married man whether children born to him before his adoption, come into the inheritance or not?] That question has, to my knowledge, not been decided. The restriction of age for marriage, and for the investiture with the sacred thread (upanayanam) took place long after the separation between the Jains and Hindus. Mayne's Hindu Law, 7th Ed., pages 131, 132, 135 *et seqq.* 172, 179, 192, 193; G. C. Sarkar on Adoption (Tagore Law Lectures, 1888), pages 359, 361—364, 367, 452—454, and Dr. Jolly's Hindu Law of Adoption (Tagore Law Lectures, 1885), page 161, were referred to. The evidence was commented on as to the instances of adoption of a married man, and it was contended that they were sufficient to prove the custom alleged. There was no law prohibiting the adoption of a married man in a case where, as here, the adopted son and the adoptive father were of the same gotra: *Govindnath Roy* v. *Gulabchand* (2); *Nitradayee* v. *Bholanath Doss* (3); *Viraraghava* v. *Ramalinga* (4) where the adoption of a boy after the performance of the upanayanam ceremony was held to be valid; Stokes' Hindu Law Books, pages 575, 580; and *Ganga Sahai* v. *Lekraj* (5), were referred to. The High Court were right in their conclusions as to the law and facts of the case, and their decision should be upheld.

DeGruyther, K. C., in reply, to show that the adoption of a married man was not allowed, cited Strange's Hindu Law (Madras Ed. of 1875), chapter IV, "On adoption," pages 80 and 353; West and Bühler's Digest, page 765; Dr. Jolly's Hindu Law, page 161 (at bottom of page), and pages 309, 310, and Stokes' Hindu Law Books, page 575, section 22. No one could adopt

(1) (1873) 10 Bom., H. C., 241 (247—249, 252).
(2) (1835) 5 Sel. Rep. S. D. A., Beng. 276.
(3) (1853) 9 S. D. A., Beng., 553.
(4) (1883) I. L. R., 9 Mad., 148.
(5) (1886) I. L. R., 9 All., 253.

except a widow with authority of her husband; *Amrito Lall Dutt* v. *Surnomoyi* (1); and adoption could take place up to the upanayanam ceremony in cases of the twice-born classes, and up to marriage in case of a Sudra, but not after. Reference was made to *Ganga Sahai* v. *Lekraj* (2); Dr. Guru Das Banerjee's Hindu Law of Marriage, 2nd Ed., pages 127, 252,; Vyavastha Chandrika, pages 93 and 102 (at bottom of page); Steele's Hindu Law, page 22; Mayne's Hindu law, 7th Ed., page 133 (note at bottom of page), and page 134 (middle of page); West and Bühler's Digest, page 952; G. C. Sarkar's Hindu Law, pages 452, 453 (last paragraph but one) and page 454, and *Govindnath Roy* v. *Gulabchand* (3). To prove a custom the best evidence must be produced, or the absence of it accounted for; *Ramalakhshmi Ammal* v. *Sivanantha Perumal Setharayar* (4), and it was submitted that in this case the instances produced in evidence did not prove the custom set up; there were very few in which the evidence was satisfactory; and reference was made to the case of *Chandrika Bakhsh* v *Muna Kunwar* (5) in which it was held that a few instances did not sufficiently establish a custom. The instances, moreover, even if proved, come from only a small number of places out of all those where the Jain community are settled.

1910, *March 9th*:—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

This is an appeal from a judgment and decree of the High Court of Allahabad, which set aside those of the Subordinate Judge of Saharanpur and dismissed the plaintiff's suit.

The plaintiff sued as the nearest reversionary heir of one Lala Mittar Sen, a member of the Jain Agarwala community, who lived and died in the district of Saharanpur.

The defence to the plaintiff's claim was based on the allegation that the defendant Jambu Prasad was the adopted son of the deceased Lala Mittar Sen, adopted by his senior widow after the death of her husband, and it was contended that the title of the adopted son excluded any right that might otherwise have existed in the plaintiff. The first court decided against the

(1) (1900) I. L. R., 27 Calc., 996; L. R., 27 I. A., 128.
(2) (1886) I. L. R., 9 All., 253.
(3) (1835) 5 Sel. Rep., S. D. A., Beng., 276.
(4) (1872) 14 Moo. I. A., 570 (583.)
(5) (1902) I. L. R., 24 All., 273 (281); L. R., 29 I. A., 70 (71, 74, 75.)

1910

RUP CHAND v. JAMBU PRASAD.

adoption and made a decree in the plaintiff's favour. The High Court held that the adoption had taken place in fact and was valid in law, and therefore reversed the decision of the first Court. Hence the present appeal.

That the adoption took place in fact is no longer in dispute. The sole question which has been seriously argued is whether the adoption was valid in law, the objection to the adoption being based upon the fact that the adopted son was already married at the time of his adoption.

So far as the pure law applicable to the case is concerned there is nothing in doubt. There is no longer any question that by the general Hindu law applicable to the twice-born classes, a boy cannot be adopted after his marriage, and there is no doubt that the Agarwala Jains belong to one of the twice-born classes.

To this rule there is an exception in the case of persons governed by the Mayukha, but that exception has no application to the present case. Other exceptions have been held to exist by custom. Again there is no doubt that the Agarwala Jains are governed by the ordinary Hindu law (which for the present purpose means the Mitakshara law) unless and until a custom to the contrary is established.

The question in the present case was, and is, whether a custom, applicable to the parties concerned, and authorizing the adoption of a married boy, has been established. This is strictly speaking a pure question of fact determinable upon the evidence given in the case.

The custom alleged in the pleading was this :—" Among the Jains adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them." And that appears to be the custom found by the High Court to exist. But upon the argument before their Lordships it was strenuously contended that the evidence in the present case, limited as it is to a comparatively small number of centres of Jain population, was insufficient to establish a custom so wide as this, and that no narrower custom was either alleged or proved.

In their Lordships' opinion there is great weight in these criticisms, enough to make the present case an unsatisfactory

1910

RUP CHAND v. JAMBU PRASAD.

precedent if in any future instance fuller evidence regarding the alleged custom should be forthcoming.

But with regard to the relative rights of the parties to the present case, who have had full opportunity of producing whatever evidence they desired to produce, the case was properly dealt with by the High Court upon the evidence before it. And their Lordships are not prepared to dissent from the finding of the learned Judges of the High Court that the evidence in the case supported the custom.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellant :—*Ranken Ford, Ford, & Chester.*

Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

1909.
December 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

DEBI MANGAL PRASAD SINGH (PLAINTIFF) *v.* MAHADEO PRASAD SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Mitakshara—Joint Hindu family—Mother's share on partition—Stridhan—Succession.

Held that, according to the Mitakshara, the share which the mother in a joint Hindu family obtains after the death of the father, on partition of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves on her death upon her own heirs and not upon the heirs of her husband. *Chhiddu* v. *Naubat* (1) and *Gambhir Singh* v. *Makraddhaj* (2) followed. *Sheo Shankar* v. *Debi Sahai* (3) distinguished.

THE facts of this case were as follows :—

One Gaya Prasad Singh died leaving him surviving Sahibzad Kunwari, his widow, and three sons, namely Sheo Prasad Singh, Mahadeo Singh, and Sitla Bakhsh Singh. Sheo Prasad Singh then died leaving him surviving his widow, Dharamraj Kunwari, and a minor son, Debi Mangal Prasad Singh.

On the 4th of January, 1893, Debi Mangal Prasad under the guardianship of his mother, Dharamraj Kunwari, sued his

* First Appeal No. 49 of 1908 from a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 14th of December 1907.

(1) (1901) I. L. R., 24 All., 67. (2) (1907) 4 A. L. J., 673.
(3) (1903) I. L. R., 25 All., 468.