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CHAMBER OF COMMERCE, HAPUR v. COMMISSIONER OF INCOME-TAX

Question No. 2—The answer to this question is that such payments are not income from any sources other than business. We express no opinion as to whether the Income-tax Commissioner's admission that they are not income from business is or is not correct.

Question No. 3—The answer to this question is in the negative.

Question No. 5—The answer to this question is in the affirmative.

APPELLATE CIVIL

Before Mr. Justice Harries and Mr. Justice Ganga Nath

1936
April, 6

BANARSI DAS AND ANOTHER (PLAINTIFFS) *v.* SUMAT PRASAD AND OTHERS (DEFENDANTS)*

Hindu law—Adoption—Jains—Custom—Jain widow can adopt to her husband without anybody's permission or consent—Extent of estate taken by such adopted son—Agreement that adoptive mother is to remain in possession during her life—Validity—Widow's motive for adoption immaterial where she has an unfettered right to adopt—Proof of a custom well recognized by courts—Judicial notice.

According to a well established and recognized custom among the Jains, a widow can adopt without authority from her husband or permission of his kinsmen. This right of the widow is quite independent of the nature and extent of the rights acquired by her in her husband's estate, and the son adopted by her succeeds to all the property, ancestral as well as self-acquired, of her deceased husband.

A deed of agreement under which the adoptive mother was to remain in possession of the property during her life time was valid and did not affect the validity of the adoption. Custom had sanctioned such arrangements postponing the interest of the adopted son to the widow's interest, even though it should be one extending to a life interest in the whole property.

Where the widow has in herself an unfettered power to adopt without any person's permission, an inquiry into her motives for making an adoption would be purely irrelevant.

*First Appeal No. 220 of 1931, from a decree of Nand Lal Singh, Additional Subordinate Judge of Saharanpur, dated the 30th of March, 1931.

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A custom that has been repeatedly brought to the notice of the courts and has been recognized by them regularly in a series of cases attains the force of law and it is no longer necesssary to assert and prove it by calling evidence.

Dr. *S. N. Sen* and Messrs. *P. L. Banerji, S. K. Dar* and *S. N. Seth,* for the appellants.

Dr. *K. N. Katju* and Mr. *Shiva Prasad Sinha,* for the respondents.

HARRIES and GANGA NATH, JJ.:—This is a plaintiffs' appeal and arises out of a suit brought by them against the defendants respondents for a declaration that Sumat Prasad, defendant No. 1, is not the lawfully adopted son of Lala Badri Das and of his widow Mst. Kampa Devi, defendant No. 2, and that he has no title to their estate described in the plaint, and that all declarations made in the deeds dated the 20th January, 1929, do not affect the reversionary rights of the plaintiffs in the estate of Lala Badri Das.

* * * * *

[The parties were Agarwal Jains, and the main question of law was whether the adoption made by the widow was valid and the adopted son succeeded to the ancestral estate of her deceased husband.]

The chief ground on which the validity of the adoption has been attacked is that it was made by defendant No. 2 without the authority of her husband. Among the Hindus the objects of adoption are two-fold. The first is religious—to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water, and the second is secular—to secure an heir and perpetuate the adopter's name. The Jains do not believe in the spiritual efficacy of adoption. They do not perform *shradhs* to the dead, which is at the base of the religious theory of adoption, nor do they believe in the Hindu doctrine of the spiritual efficacy of a son. Adoptions among them want the spiritual element and are entirely secular in character. They are governed by

the Hindu law of adoption, except in certain particulars in which it has been proved that their usages are different. According to the defendants, by a custom prevailing among the Jains a Jain widow is competent to adopt without authority from her husband or permission of his kinsmen. As the adoption is a temporal institution among them, an only son or daughter or sister's son and a married man can also be adopted and no religious ceremony is necessary for adoption. In this case the only point which has to be considered is whether a Jain widow can adopt without authority from her husband or permission of his kinsmen. The custom under which she can do so has been recognized in a series of cases since 1833. The earliest case is that of *Maharaja Govindnath Ray* v. *Gulal Chand* (1), in which the competency of a widow to adopt without the sanction of her husband was recognized. The tradition on which this custom was based has been described at length on pages 280 and 281 of the report.

In 1878 in *Sheo Singh Rai* v. *Dakho* (2), the custom was affirmed by their Lordships of the Privy Council. They held: "According to the usage prevailing in Delhi and other towns in the N. W. P. among the sect of the Jains known as Saraogi Agarwals, a sonless widow takes an absolute interest in the self-acquired property of her husband; has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten."

In 1886 this Court, in accordance with the case of *Sheo Singh Rai* v. *Dakho* (2), referred to above, held in *Lakhmi Chand* v. *Gatto Bai* (3): "The powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son and that no ceremonies are necessary, are controlled by the Hindu law of adoption."

(1) (1833) 5 S.D.A. (Cal.), 276. (2) (1878) I.L.R., 1 All., 688.
(3) (1886) I.L.R., 8 All., 319.

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In 1907 in *Manohar Lal* v. *Banarsi Das* (1), this Court held that according to the law and custom prevailing amongst the Jain community a widow has power to adopt a son to her deceased husband without special authority to that effect, and a married man may lawfully be adopted.

In *Asharfi Kunwar* v. *Rup Chand* (2) this Court again held that according to the law and custom prevailing amongst the Jain community a widow has power to adopt a son to her deceased husband without any special authority to that effect. This decision was affirmed by their Lordships of the Privy Council in *Rup Chand* v. *Jambu Prasad* (3).

In *Jiwraj* v. *Mst. Sheokuwarbai* (4) the court of Nagpur Judicial Commissioners held that the permission of the husband was not necessary in the case of a Jain widow adopting a son. This decision was affirmed by their Lordships of the Privy Council in *Sheokuarbai* v. *Jeoraj* (5). Their Lordships held: "Among the Sitambari Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption, and the adopted son may at the time of his adoption be a grown up and married man. The only ceremony to the validity of such an adoption is the giving and taking of the adopted son."

In a very recent case, First Appeal No. 51 of 1935, which was decided in this Court on the 10th April, 1935, adoption by a Jain widow without permission has been recognized.

In 1889 the Calcutta High Court held in *Manik Chand* v. *Jagat Settani* (6): "A widow of the Oswal Jain sect can adopt a son without the express or implied authority of the husband."

(1) (1907) I.L.R., 29 All., 495.
(2) (1908) I.L.R., 30 All., 197.
(3) (1910) I.L.R., 32 All., 247.
(4) (1917) 56 Indian Cases, 65.
(5) (1920) 61 Indian Cases, 481.
(6) (1889) I.L.R., 17 Cal., 518.

In 1899 the same High Court again, in *Harnabh Pershad* v. *Mandil Dass* (1), held that "Upon the evidence in the case, consisting partly of judicial decisions and partly of oral testimony, the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen was sufficiently established and that in this respect there was no material difference in the custom of the Agarwal, Choreewal, Khandwal and Oswal sects of the Jains, and there was nothing to differentiate the Jains at Arrah from the Jains elsewhere."

In the Punjab also the same custom has been recognized. In *Sundar Lal* v. *Baldeo Singh* (2) it was held: "It is well settled that Jains of Delhi in particular and Northern India in general are governed by the Hindu law of the Mitakshara school, except in so far as it may be proved to have been modified in any material particular by a well established custom. Among the Jains of Delhi the Hindu law has been varied to this extent that in the matter of adopting a son to her deceased husband a widow need not possess express or implied authority from him, nor is the consent of the kinsmen necessary for the purpose. A son validly adopted by a widow to her predeceased husband is under Hindu law like a son begotten on her by him and succeeds not only to the self-acquired or separate property of the adoptive father, but takes also the latter's coparcenary interest in the joint Hindu family of which he was a member at the time of his death, and the usage of the Jains relating to this matter is in accord with Hindu law."

It has been argued on behalf of the appellants that the judicial decisions might be regarded as recognizing a custom of the right of a Jain widow to adopt a son to her husband without her husband's authority or the permission of his kinsmen only when she succeeds to the self-acquired property of her deceased husband. The

(1) (1899) I.L.R., 27 Cal., 379. (2) (1932) I.L.R., 14 Lah., 78.

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argument is based on the following observations of their Lordships of the Privy Council in *Sheo Singh Rai's* case (1):

"These findings are thus stated in the judgment, and their Lordships entirely concur in them:

"Contrasting this evidence with that given by the independent witnesses examined under the several commissions and having regard to the position which several of the Delhi witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the respondents. 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 suit, 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."

The argument is that the sentences, "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 suit, for the property in suit was purchased by the widow out of self-acquired property of her husband)" and "That she enjoys a right of adoption without the permission of her husband or the consent of his heirs", should be read together. On examination of the report of the judgment against which

(1) (1878) I.L.R., 1 All., 688 (704).

the appeal was preferred, in *Sheo Singh Rai* v. *Mst. Dakho* (1), it will be found that these two sentences record two separate customs and are not dependent on each other and cannot be read together as connected with each other. The observations made on page 383 of the report will clearly show that each point was in reply to each of the separate questions framed by the High Court. In order to explain this it is necessary to refer to the points in issue which were inquired into in the case. The issues which were framed by the court would appear from the following passage on page 385:

"The Jains have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them, and for the ascertainment of those customs we think the court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community, in the places in which they are said to be numerous and respectable, namely Delhi, Muttra and Benares. The questions to be addressed to those gentlemen would be the following:

'What interest does the widow take under Jain law in the movable and immovable property of her deceased husband, and does her interest differ in respect of the self-acquired property and the ancestral property of her husband?'— 'Is a widow under Jain law entitled to adopt a son without having received authority from her husband and without the consent of her husband's brother?'— 'May a widow adopt the son of her daughter?'— 'By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?'— 'Has the adoption of a son by a widow any effect, and if any, what effect, in limiting the interest which she takes in her husband's estate?'"

So there is no foundation for the argument that the custom recognized in *Sheo Singh Rai* v. *Dakho* (2) was in any way dependent on the nature of the property which the widow acquired in the estate of her deceased husband. The right of the widow to adopt without the permission of the husband and consent of his kinsmen was recognized quite independently of the

(1) (1874) 6 N.W.P. H.C.R., 382. (2) (1878) I.L.R., 1 All., 688.

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nature and extent of the widow's rights acquired by her in the estate of her deceased husband. The second question relating to the widow's power to adopt has no reference to the property and is quite general.

Not a single case has been cited on behalf of the appellants in which the widow's right to adopt without the authority of her husband or permission of his kinsmen was ever disputed or denied or not recognized in any case where the husband was possessed of ancestral property to which the widow succeeded on his death.

On the other hand, there are several cases in which even in the case of ancestral property this right of the widow was established and recognized. In the earliest case of 1833, *Maharaja Govindnath Ray* v. *Gulal Chand* (1), of the Sudder Dewani Adawlat, Calcutta, the property in dispute was ancestral. In both the Calcutta cases, *Manik Chand* v. *Jagat Settani* (2) and *Harnabh Pershad* v. *Mandil Dass* (3), also, the properties in dispute were ancestral.

An adoption made by a widow without the authority of her husband was recognized in the family of the parties themselves. A suit was brought in 1903 by Manohar Lal, son of Kedar Nath, brother of Banarsi Das, plaintiff No. 1, and Badri Das for partition of the family property . . .Ganeshi Lal's widow, Mst. Kishen Dei, had adopted Banarsi Das's son Mulchand. Mulchand's adoption was disputed by Manohar Lal. On behalf of the defendants Mulchand's adoption was set up. . . . The learned Subordinate Judge held that Mulchand had been adopted by Mst. Kishan Dei without her husband's permission. The learned Subordinate Judge held that the plaintiff's share was 1/5th. Being dissatisfied with this judgment, Manohar Lal appealed to the High Court where the validity of Mulchand's adoption was contested merely on the ground that the adoption of a married man was not valid under

(1) (1833) 5 S.D.A. (Cal.), 276. (2) (1889) I.L.R., 17 Cal., 518.
(3) (1899) I.L.R., 27 Cal., 379.

the law and custom prevailing amongst the Jain community. If there had been no custom entitling a widow to adopt a son to her husband without the husband's authority or permission of his kinsmen, the validity of the adoption must have been contested on the ground of want of permission, especially when the learned Subordinate Judge had held that the adoption had been made by the widow without the permission of her husband. The decision of the High Court is reported in *Manohar Lal* v. *Banarsi Das* (1), referred to above.

Adoption and succession are two distinct matters, and so are the rules which govern them. An adoption may be made even when there may be no question of any succession. There is no reason for making any distinction in the custom in cases where the widow succeeds to the self-acquired property and the ancestral property of her husband. The nature of the property, i.e. whether it is self-acquired or ancestral, would affect the rights which the widow would acquire in it, but not the widow's right of adoption. The adopted son does not succeed to the property through the widow, but succeeds through the adoptive father, having the same status as that of a natural born son begotten by the husband on his adopting widow. An adoption would be either valid or invalid, but it cannot be partly valid and partly invalid. It has been argued on behalf of the appellants that where a widow possesses both self-acquired and ancestral property of her husband, the widow might adopt without authority of her husband, but the adoption would be valid only in respect of the self-acquired property of the husband. This argument is wholly untenable because the adoption is not made with regard to property. The adoption confers on the adopted son all the rights of a natural born son begotten on the adopting widow by her deceased husband, and he succeeds to all the property, ancestral as well as self-acquired, of his adoptive father.

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

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The question of the rights of the adopted son was considered in *Sheo Singh Rai* v. *Dakho* (1). One of the questions referred for inquiry by the High Court was: "By the adoption of her son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?" The finding of the High Court on this point, which was confirmed by their Lordships of the Privy Council was, "That a daughter's son may be adopted and on adoption takes the place of a begotten son." (vide page 704).

The same point was considered in *Harnabh Pershad* v. *Mandil Dass* (2), where it was observed: "Whether she took an absolute or qualified estate, the evidence is uniform that the adopted son acquires the same right to the property as her husband had, although there is some slight difference of opinion as to the extent of the control which she may retain over it." In *Kapur Chand* v. *Narinjan Lal* (3), the Punjab Chief Court also considered the rights of a son adopted by a Jain widow. It was held: "A valid adoption by a widow to her husband has the effect of placing the adopted son in the position which he would have occupied had he been adopted by that husband or been a posthumous child of that husband, and that the adopted son must be received into the joint family partnership on adoption, and is entitled to all the rights of an ordinary member of that partnership, which has continued to exist in spite of the death of the deceased partner. . . . The adoption was valid and had the effect of vesting in the adopted son the share of the deceased in the joint family property of every description."

The Lahore High Court again held in *Sundar Lal* v. *Baldeo Singh* (4), referred to above: "A son validly adopted by a widow to her predeceased husband is under Hindu law like a son begotten on her by him and succeeds not only to the self-acquired property of the

(1) (1878) I.L.R., 1 All., 688.
(2) (1899) I.L.R., 27 Cal., 279(393).
(3) Punj. Rec. 1897, p. 74.
(4) (1932) I.L.R., 14 Lah., 78.

adoptive father, but takes also the latter's coparcenary interest in the joint Hindu family of which he was a member at the time of his death." As already stated, Jains are governed by Hindu law of adoption, except in the matters of (1) authority for adoption, (2) restrictions as to the adoptee's qualifications and (3) religious ceremonies; see *Lakhmi Chand* v. *Gatto Bai* (1), referred to above. Among them there is no restriction as to the adoption of an only son or a daughter's son or sister's son or a married man and no religious ceremonies are necessary. In all other matters the Hindu law of adoption applies to them. Under the Hindu law the adopted son becomes for all purposes the son of his father and his rights unless curtailed by express texts are in every respect the same as those of a natural born son. The only express text by which the heritable rights of an adopted son are "contracted" refers to the case of his sharing the heritage with an after-born natural (*aurasa*) son. Rajkumar Sarvadhikari states in his lectures on Hindu law at page 557: "In every other instance the adopted son and the son of the body stand exactly on the same position." An adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and an adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line; see *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji* (2). There is no authority for the proposition that a son adopted by a Jain widow has restricted rights of inheritance. On the other hand, the cases cited above would show that he has the same rights as a natural born son has.

The right of the widow to make an adoption does not depend on the nature and character of the estate to which she succeeds from her husband. In *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji* (2), at page 793 their Lordships of the Privy Council observed: "The

(1) (1886) I.L.R., 8 All., 319. (2) (1918) I.L.R., 43 Bom., 778(792).

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right of the widow to make an adoption is not dependent on her inheriting, as a Hindu female owner, her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her."

In *Harnabh Pershad* v. *Mandil Dass* (1), referred to above, at page 393 it was observed: "There is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for distinction. We do not, however, consider that the two customs must stand or fall together. They seem to us quite independent. The custom by which the widow can adopt without her husband's permission does not in any way depend upon the nature of the estate which she takes from her husband. Whether she took an absolute or qualified estate, the evidence is uniform that the adopted son acquires the same right to the property as her husband had, although there is some slight difference of opinion as to the extent of the control which she may retain over it."

It may also be observed here that defendant No. 2, the widow, has succeeded to both ancestral and self-acquired property of her husband.

[Certain facts were then referred to as establishing this.]

The next point that arises for consideration is whether in the absence of oral evidence it can be held in this case on the basis of the judicial decisions referred to above that the custom exists. A custom that has been repeatedly brought to the notice of the courts and has been recognized by them regularly in a series of cases attains the force of law and it is no longer necessary to assert and prove it. In *Jadu Lal Sahu* v. *Janki Koer* (2) the question was whether the plaintiffs who were Hindus were entitled to a right of pre-emption under Muhammadan law, under a custom prevailing in Bihar. This custom had been recognized in

(1) (1899) I.L.R., 27 Cal., 379. (2) (1912) I.L.R., 39 Cal., 915.

Fakir Rawot v. *Sheikh Emambakhsh* (1). Their Lordships of the Privy Council observed in *Jadu Lal Sahu* v. *Janki Koer* (2) at page 922: "In the case of *Fakir Rawot* v. *Emambakhsh* a Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Bihar. . . . In their Lordships' judgment the decision in *Fakir Rawot's* case is conclusive on the point raised on behalf of the defendants."

In *Rama Rao* v. *Rajah of Pittapur* (3), at page 785 their Lordships of the Privy Council observed: "No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the courts of a country, the courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case."

As will appear from the cases referred to above, the custom under which a Jain widow can adopt a son to her husband without her husband's authority or permission of his kinsmen has been recognized by judicial decisions since 1833 in different parts of the country, that is Bengal, Central Provinces, United Provinces and the Punjab. In our opinion these decisions are sufficient to hold in this case the existence of the custom, and it is no longer necessary to prove it in each case by oral evidence.

The validity of the adoption has also been contested, though not seriously, on the ground of the execution of the deed of agreement under which defendant No. 2 is to remain in possession of the property during her life time. The agreement is valid and does not affect the validity of the adoption. At one time it was questionable whether the natural guardian of the adopted son could enter into any agreement with the adopting

(1) (1863) B.L.R. (Sup. Vol.), 35. (2) (1912) I.L.R., 39 Cal., 915.
(3) (1918) I.L.R., 41 Mad., 778.

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widow so as to bind the adopted son. The matter has been conclusively decided by their Lordships of the Privy Council in *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (1). Their Lordships observe at pages 263 and 264:

"It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decision in the cases, with the exception of the case of *Jagannadha* v. *Papamma* (2), that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view if whether, in view of the adoption only being granted on condition of the arrangement, this is, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that if a natural father consented to give his son in adoption he would only do it if it were reasonable, i.e., for the boy's benefit in the circumstances. Others look at it from the point of view whether the adoption will put the boy in a reasonable position, i.e., not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way, namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements."

The appellants have not shown any corrupt or capricious motive on the part of the defendant No. 2 in making the adoption. The plea is based on the following passage in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (3), on page 442: "All that can be

(1) (1927) 54 I.A., 248.

(2) (1892) I.L.R., 16 Mad., 400.

(3) (1868) 12 Moo.I.A., 397.

said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." What was meant by this passage has been explained by their Lordships in *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (1), at page 13:

"This being so, is there any ground for the application which the High Court has made of a particular passage in the judgment in the *Ramnad* case? The passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of the authority of the kinsmen that was required. After dealing with the *vexata quaestio* which does not arise in this case, whether such an adoption can be made with the assent of one or more sapindas in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of a father-in-law would probably be sufficient, they said: 'It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence', not, be it observed, of the widow's motives but 'of the assent of kinsmen, as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bona fide* attained.'

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

(1) (1876) 4 I.A., 1.

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These cases are not applicable to the case where no consent of kinsmen is required and no family council need be called or consulted. Whenever a widow has in herself full and free power to adopt without any person's permission, any inquiry into her motives must be irrelevant, for her action is that of a person who does what she has the right to do. The mere fact that the adoption puts an end to the expectations of the persons who would have succeeded to the property if no adoption had been made is not sufficient to constitute a corrupt or capricious motive, as this result is bound to arise in each case of an adoption. The fact that adoption has in fact been made has not been challenged. We agree with the learned Subordinate Judge and hold that the adoption in question is valid. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Young and Mr. Justice Niamat-ullah

1932 *December*, 2

BHOLA UMAR (DEFENDANT) *v.* KAUSILLA AND ANOTHER (PLAINTIFFS)*

1933 *November*, 16

Hindu law—Remarriage of widows—Forfeiture of interest in first husband's estate—Custom of remarriage in a particular caste—No forfeiture where custom existed prior to Act XV of 1856*—Proof of custom—Instances may be referable either to the Act or to ancient custom—Hindu Widows' Remarriage Act* (*XV of* 1856), *section* 2.

In order to escape the operation of section 2 of the Hindu Widows' Remarriage Act, 1856, by which the widow upon remarriage forfeits her interest in her first husband's estate, it must be established that in the community or caste to which she belonged there already existed an ancient custom of remarriage of widows prior to the passing of that Act, as distinguished from a practice which might have come into existence since the passing of that Act. Instances of remarriage of widows in any community after 1856 might well be referable to the

*First Appeal No. 523 of 1928, from a decree of Chatur Behari Lal, First Additional Subordinate Judge of Jaunpur, dated the 13th of August, 1928.