APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan
and Mr. Justice A. H. deB. Hamilton

NEMI CHAND (DEFENDANT-APPELLANT) *v.* SANTOSH CHAND (PLAINTIFF-RESPONDENT)* 1937 *February* 9

Hindu Law—Adoption—Custom of adoption among Jains—Jain widows' adoption without authority of her husband, validity of—Adopted son whether divests survivors of joint family after his adoption—Custom recognized by courts in series of cases, whether acquires force of law—Proof of custom, necessity of.

A Jain widow can adopt without authority from her husband and the consent of his collaterals and this custom is applicable to the Khandelwal sub-sect of Jains too. Case law discussed.

Adoption among the Jains confers on the adopted son all the rights of a natural born son and he succeeds to all the property of his adoptive father and divests the survivors of the joint family of the joint family property. *Dhanraj Joharmal* v. *Soni Bai* (1), distinguished. *Sundar Lal* v. *Baldeo Singh* (2), and *Banarsi Das* v. *Sumat Prasad* (3), relied on.

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. *Sri Raja Rao Vankata Mahipati Gangadara Rama Rao Bahadur* v. *Raja of Pittapur* (4), followed. *Tulsiram Khirchand Parwar* v. *Chunnilal Panchamsao Parwar* (5), and *Chunni Lal* v. *Srimandir Das* (6), dissented from.

Messrs. *Radha Krishna, Daya Kishan Seth* and *Ganga Dayal Khare,* for the appellant.

Messrs. *Makund Behari Lal* and *Manik Chand Jain,* for the respondent.

*First Civil Appeal No. 111, of 1937, against the order of Thakur Surendra Vikram Singh, Civil Judge of Malihabad, Lucknow, dated 31st July, 1937.

(1) (1925) L.R., 52 I.A., 231. (2) (1932) A.I.R., Lahore, 426.
(3) (1936) A.I.R., All., 641. (4) (1918) P.C., 81.
(5) (1938) A.I.R., Nagpur, 391. (6) (1906) 9 O.C., 125.

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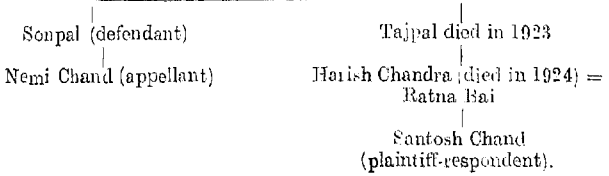
ZIAUL HASAN and HAMILTON, JJ.:—This is a first appeal against a decree of the learned Civil Judge of Malihabad, Lucknow. The following pedigree will elucidate the facts of the case—



It is admitted that Sonpal, Tajpal and Harish Chandra were members of a joint Hindu family. The plaintiff-respondent claims to be the adopted son of Harish Chandra and brought the present suit for partition of a half share of the joint family property. The property in suit was mentioned in lists A and B attached to the plaint. List A compromised immovable property and list B movables. By a compromise arrived at between the parties during the pendency of the suit, the plaintiff withdrew his claim in respect of movables and the suit continued about the properties of list A only. The parties are Jains of the Khandelwal sect and though it was stated in the plaint that Ratna Bai adopted the plaintiff on the 15th December, 1936, after permission was given to her by her husband, yet it was also contended that among Jains a widow could adopt a son even without the authority or permission of her husband.

The defendant Sonpal raised various pleas in defence which will appear from the following issues framed by the trial Court:

(1) Whether Harish Chandra gave any permission to his widow to adopt a son as alleged by the plaintiff?

(2) Whether there is any custom among Digambari Khandelwals where a widow can adopt without the permission of the husband?

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(3) Whether under Jain law or customary law of the Jains (if any) the adoption of the plaintiff by Ratna Bai is valid?

(4) (*a*) Whether the plaintiff was adopted by Ratna Bai?

(*b*) If so, is that adoption invalid as alleged in paragraphs 18 and 19 of the written statement?

(5) Which property is available for partition?

(6) Whether this suit for partition does not lie without seeking for possession?

(7) To what relief, if any, is the plaintiff entitled?

The first issue was decided against the plaintiff as there was no evidence on the point. On the second and third issues the learned Civil Judge held that as under the customary law of Digambari Khandelwal Jains a widow can adopt without the permission of her husband, the plaintiff's adoption by Ratna Bai was valid. Issue 4(*a*) was decided in the affirmative and 4(*b*) in the negative. On issue 5 it was held that only the immovable properties were liable to be partitioned. Issue 6 was also decided in favour of the plaintiff and in the affirmative. Eventually the court gave the plaintiff a decree for partition of his half share in the immovable properties of list A of the plaint with proportionate costs. The defendant appears to have died after the trial court passed its decree and the present appeal has been brought by his son Nemi Chand.

The main point urged before us was that the lower court was wrong in holding that a widow of the Khandelwal Jain sect has power to adopt a son without authority from her husband. We are of opinion, however, that there is no force in this contention. We think it is now well settled that a Jain widow can adopt without authority from her husband and the consent of his collaterals. Section 66(2) of Gour's Hindu Code is as follows:

> "The Jain widow is entitled to make an adoption without the express or implied authority of her husband,

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or of his kinsmen and irrespective of whether the property she has inherited from her husband was his self-acquired or ancestral property."

Similarly Mulla in his Principles of Hindu Law (8th edition, page 632) says—

> "Amongst the Agarwala Banias of the Saraogi sect, a sonless widow may by custom adopt without the permission of her husband or the consent of her husband's *sapindas*."

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It is not disputed that Sarogi is synonymous with Jain. Mayne in his book, Hindu Law and Usage, 10th edition, says at page 209—

> "Among the Jains, except in the Madras Presidency, a sonless widow can adopt a son to her husband without his authority or the consent of his *sapindas*."

This customary law of the Jains has also been established by judicial decisions beginning as far back as 1833. The first reported case on the point is *Maharajah Govind Nath Roy* v. *Gulal Chand* (1). The same view was held in *Mst. Chunnee Baee* v. *Mst. Gubboo Baee* (2).

In 1878 their Lordships of the Judicial Committee held in *Sheo Singh Rai* v. *Mst. Dakho* (3) that a sonless widow of Sarogi Agarwalas enjoys the right of adoption without the permission of her husband or the consent of his heirs.

In *Lakhmi Chand* v. *Gatto Bai* (4) decided in 1886, their Lordships of the Allahabad High Court remarked:

> "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."

It was conceded that this was a case of Khandelwal Jains. The custom in question was recognized by the Calcutta High Court in 1889 in *Manik Chand Gobcha* v. *Jagat Settaini Prankumari Bibi* (5) and it was held

(1) 5 Sadar Dewani Adalat Reports, 276.
(2) 8 Sadar Dewani Adalat Reports, 636.
(3) (1878) 5 I.A., 87.
(4) (1886) I.L.R., 8 All., 319.
(5) (1890) I.L.R., 17 Cal., 518.

that the custom which enables a Jain widow of the Oswal caste to adopt a son without the express or implied authority of her husband will not be affected by the conversion of the family to Vaishnavism.

Again in 1899 their Lordships of the Calcutta High Court held in the case of *Harnabh Pershad* alias *Rajajee* v. *Mandil Das* (1) that 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 further that in this respect there was no material difference in the custom of the Agarwala, Chooreewala, Khandelwal and Oswal sects of Jains. This decision was arrived at on evidence which consisted partly of judicial decisions and partly on oral testimony.

In 1907 a Bench of the Allahabad High Court again held in *Manohar Lal* v. *Banarsi Das* (2) that according to the law and the custom prevailing among the Jain community, a widow has power to adopt a son to her deceased husband without special authority to that effect.

The question arose in the Allahabad High Court again in 1908 in *Asharfi Kunwar* v. *Rup Chand* (3) and again it was 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.

Coming to the Punjab, we find that in 1909 the Punjab Chief Court held in *Manak Chand* v. *Munna Lal* (4) that the widow of a deceased Jain may adopt without authorization from her husband.

In 1917 a Bench of the Nagpur Judicial Commissioner's Court also held that the permission of the husband is not necessary in the case of a Jain widow adopting a son, *vide Jiwraj* v. *Sheo Kunwarbai* (5).

(1) (1900) I.L.R., 27 Cal., 379. (2) (1907) I.L.R., 29 All., 495.
(3) (1908) I.L.R., 30 All., 197. (4) (1909) 4 I.C., 844.
(5) (1920) 56 I.C., 65.

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This decision was affirmed by their Lordships of the Privy Council in *Sheo Kunwar Bai* v. *Jeoraji* (1) where their Lordships held that 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.

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In the Punjab the custom in question was again affirmed in 1932 in *Sundar Lal* v. *Baldeo Singh* (2) in which TEK CHAND and MONROE, JJ. of the Lahore High Court held that though under the Mitakshara a widow cannot make an adoption to her husband without express or implied authority from him, yet among the Agarwala Jains of Delhi, Hindu law has been varied to this extent that for 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.

The last case on the point is that of *Banarsi Das* v. *Sumat Prasad* (3) in which it was held that by a custom prevailing among Jains, a Jain widow is competent to adopt without authority from her husband or permission of his kinsmen.

It will thus be seen that the custom set up by the plaintiff-respondent has been well-established by judicial decisions and it is we think idle on the part of the defendant-appellant to deny it.

Reliance was placed on some cases, e.g. *Mst. Mandit Kuer* v. *Phool Chand Lal* (4) in which it was held that unless a custom be proved to the contrary, Jains are governed by the Hindu Law, but we have already said that the custom in question has been established by an overwhelming string of decisions of the various High Courts in India and of their Lordships of the Judicial Committee, so that there cannot now be any question

(1) (1921) 61 I.C., 481=(1921) A.I.R.P.C., 77.
(2) (1932) A.I.R., Lahore, 426.
(3) (1936) A.I.R., All., 641.
(4) (1897) 2 C.W.N., 154.

of the Hindu law of adoption being modified so far as regards Jains to this extent that no permission of the husband is necessary for adoption by a Jain widow.

We cannot also accept the argument that it has not been established in this case that the custom upheld by the decisions referred to above is applicable to the Khandelwal sub-sect of Jains. It may be mentioned that the Jains are divided into two main sects of Swetambaris and Digambaris and that while the Oswal and Srimal are branches of the Swetambari sub-sect, Agarwal and Khandelwal are the main divisions of the Digambaris. We have seen however that most of the decisions by down that the custom in question is common to all the Jains. Moreover, the case of *Lakhmi Chand* v. *Gatto Bai* (1) was a case of Khandelwal Jains like the present. Further, we have seen that in *Harnabh Pershad* alias *Rajajee v. Mandil Das* (2) their Lordships held that there was no difference as regards the custom in question among the different sub-sects of the Jains. Apart from this it is not disputed that the family of Khushal Chand, ancestor of the parties, migrated from the Jaipur Estate to this province and the plaintiff has filed a certified copy of a decision of the Jaipur Chief Court (Ex. 4) in which the custom set up by the present plaintiff was upheld by that court also. The case related no doubt to Agarwala Jains but the learned Judges of the Jaipur Chief Court referred to four other cases of their court in all of which it was "decided that a Jain widow can make a valid adoption without the consent of her husband or of her husband's reversionary heirs", so that there is no substance in the argument that the decision proceeded on anything peculiar to the Agarwal subject.

It was also argued that in some of the cases referred to above, the custom was held to be proved on the strength of the evidence that was produced in those cases. This is no doubt true but in *Sri Raja Rao Venkata*

(1) (1886) I.L.R., 8 All., 319. (2) (1900) I.L.R., 27 Cal., 379.

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Mahipati Gangadara Rama Rao Bahadur v. *Raja of Pittapur* (1) their Lordships of the Privy Council said at page 83:

> "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 customs or usage to be introduced into the law without the necessity of proof in each individual case."

so that the custom in question can now be taken to be fully established. It cannot in our opinion be doubted, as remarked by a Bench of the Nagpur High Court in *Tulsiram Khirchand Parwar* v. *Chunnilal Panchamsao Parwar* (2) that Judicial decisions recognizing a custom constitute the most satisfactory evidence that can be produced about the custom. In the present case there is the evidence of a witness (P. W. 2) also to support the existence of the alleged custom.

The learned counsel for the appellant has relied on the case reported in *Chunni Lal* v. *Srimandir Das*, (3). A certified copy of the judgment is on the record and in it the learned Judicial Commissioners of Oudh held that the custom that a widow can adopt without authority from her husband was not established among Agarwala Sarogis throughout India. We are unable to follow this decision after having seen the overwhelming number of decisions to the contrary. Moreover, one of the reasons given by the learned Judicial Commissioners for their decision was that the parties to the case before them were Sarogis of Nawabganj and it had not been shown that they were in any way connected with the Sarogis of Delhi to whom mostly the evidence produced in the case related. In the present case however we have seen that the custom was recognized in the Jaipur Estate itself from where the parties to the case before us migrated to Oudh.

(1) (1918) P.C., 81. (2) (1938) A.I.R., Nagpur, 391.
(3) (1906) 9 O.C., 125.

We are in full agreement with the court below in holding that the custom set up by the plaintiff-respondent has been established.

The only other point urged on behalf of the appellant was that as among the Jains adoption has no religious significance but is made for a secular purpose, namely, to find a successor to property, the plaintiff could not divest the defendant of the property to which he succeeded by survivorship on the death of Harish Chandra. A similar objection was considered by the Lahore and the Allahabad High Courts in the cases of *Sundar Lal* v. *Baldeo Singh* (1) and *Banarsi Das* v. *Sumat Prasad* (2) referred to above and it was held that adoption among the Jains confers on the adopted son all the rights of a natural born son and he succeeds to all the property of his adoptive father. In the Lahore case also the adoption was made by the widow, as in the present case, several years after the death of her husband and it was held that the adoption had the effect of taking away from the other coparceners the interest of the deceased husband and vesting it in the adopted son where the family remains joint till adoption. Section 618 of Mulla's Principle of Hindu Law which we quoted above only in part runs as follows:

> "Amongst the Agarwala Banias of the Sarogi sect a sonless widow may by custom adopt without the permission of her husband or the consent of her husband's *sapindas*. *If the family is joint he becomes a co-parcener.* There is no such custom in the Madras Presidency."

We do not therefore think that merely because the customary law of adoption among the Jains is different from the ordinary Hindu law to the extent that no permission of the husband is necessary no other rules of the Hindu law of adoption would apply to a Jain adoption. The learned counsel has in support of his argument relied on the following passage from the judgment of

(1) (1932) A.I.R., Lahore, 426. (2) (1936) A.I.R., All., 641.

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their Lordships of the Judicial Committee (occurring at page 242) in *Dhanraj Joharmal* v. *Soni Bai* (1).

> "Their Lordships have no doubt on the evidence that the story about the regular Hindu, or, rather, Brahminical adoption in 1903 was invented with the object of giving to an ordinary Agarwala adoption the rights of collateral succession, and with the same object the statement had been put forward that the defendant had been adopted by both brothers, Joharmal and Ramdhan, which is held to be illegal under the Hindu law.

No doubt this seems to imply that an adopted son in a Jain family has no right to collateral succession but the question which arises before us in the present case, namely, whether or not an adopted son among the Jains can divest the survivors of a joint family of the joint family property was not directly before their Lordships in the case referred to above, and we do not feel justified in going against the decisions of the Lahore and Allahabad High Courts and the law as enunciated by the late Sir D. F. Mulla in his book on Hindu Law. We decide this point also against the appellant.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH

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MOHAMMAD YUSUF (APPLICANT) *v.* IMTIAZ AHMAD KHAN (OPPOSITE PARTY)*

Contempt of Courts Act (XII of 1926), section 2(2) (3)—Contempt of Courts subordinate to Chief Court—Chief Court of Oudh, whether, has jurisdiction in respect of contempt of courts subordinate to it.

Under section 219 of the Government of India Act, 1935, the Chief Court of Oudh is a High Court and is the highest Court of Record with a position akin to that of the Court of the King's Bench. It has its power of superintendence over all inferior civil and criminal courts, and it has power to pro-

*Criminal Miscellaneous Application No. 70 of 1938, under Act XII of 1936, and 561A, Criminal Procedure Code, in a case pending in the Court of the City Magistrate, Lucknow.

(1) (1925) L.R., 52 I.A., 231.