
(1930) 04 BOM CK 0003
In the Bombay High Court
Case No : First Appeal No. 165 of 1924

Bhikubai Chunilal Ambaidas	Vs	APPELLANT
Manilal Bhagchand Raychand		RESPONDENT

Date of Decision : 14-04-1930

Acts Referred:

Citation : AIR 1930 Bom 517 : (1930) 32 BOMLR 1217 : (1930) ILR (Bom) 780

Hon'ble Judges : Patkar, J;Amliertson Marten, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Patkar, J.—This is a suit brought by the plaintiff's as reversioners of one Rupchand who died on January 31, 1906, leaving two widows Kupabai and Motibai, who died in January 1917, and leaving a mother Chunabai who succeeded to the estate on the death of Rupabai and Motibai and died on November 3, 1921. The defendant is the daughter of Chunabai's daughter Eadhabai. During her life-time Chuuabai passed a deed of gift, Exhibit 90, dated November 14, 1919, of Immovable property in favour of the defendant. On the same day she passed a will, Exhibit 91, in respect of moveable property in favour of the defendant. The genealogy of the parties is as follows :—[The pedigree is set out in the statement of facts.]

2. The property in suit belonged to Mohanchand who had effected a partition with his brothers Raychand and Kalyanchand. Rupchand made a will Exhibit 194 dated January 25, 1906, by which he appointed his mother Chunabai as the manager of his property including the shop, and directed his wives Rupabai and Motibai to act according to the advice of his mother Chuuabai, and in case of absence of harmonious relations between the wives and the mother, Rs. 25 were given to each of the wives as maintenance and a house of Rs. 500 to live in and a direction was given for taking a boy in adoption.

3. The defendant, the grand-daughter of Chunabai, contended inter alia that the

parties were Jains, and according to the Jain law and the custom of the caste Rupchand's widows became the heirs and absolute owners of Rupchand's property, and after the death of the widows, Chunabai, the mother of Rupchand, according to the Jain law and the custom of the caste, became the heir and absolute owner, and farther that by his will dated January 25, 1906, Rupchand had constituted Chunabai as the absolute owner and the defendant obtained title to the property under the gift deed of Chunabai, Exhibit 90, dated November 14, 1919.

4. It was not disputed in the lower Court nor was it disputed before us that the plaintiffs are the reversioners of Rupchand. The contention that Chunabai was made the absolute owner of the property by Rupchand by his will dated January 25, 1906, was given up before the learned Subordinate Judge and has not been urged before us. The learned Subordinate Judge held that the parties were governed by Hindu law in matters of inheritance and succession in the absence of a custom to the contrary and there was no recognised Jain law as such, It was further held by the learned Subordinate Judge that no custom was proved among the Jains of Deccan in general and of Khandesh in particular which would go to show that Rupchand's widows and his mother Chunabai took an absolute interest in the property in suit, and that Chunabai took the property as a limited owner like an ordinary Hindu widow, and that the deed, of gift and the will, Exhibits 90 and 91, made by Chunabai in favour of the defendant on November 14, 1919, were not valid and binding on the plaintiffs, and therefore passed a decree in favour of the plaintiffs to the extent of the whole of the property reserving the right of the charitable and religious institutions mentioned in the will to sue the plaintiffs for applying the income towards the charitable objects in respect of the properties mentioned in the deed of gift.

5. The parties in this suit belong to the community of Dasha Shrimali Shwetambar Jains. It is urged on behalf of the appellants that they came from northern India to Kathiawar and thence to Khandesh and several parts of the Bombay Presidency. It appears from the evidence of the pleader Keahavlat, Exhibit 167, and the solicitor Motichand, Exhibit 126, that the community to which the parties belong came from Gujarat and Marwar and that a Jain Dasha Shrimali can intermarry a Hindu Dasha Shrinali. The Jain community is scattered all over India, especially in northern India, Kathiawar and Khandesh and other parts of the Bombay Presidency. It appears from Mayne's Hindu Law, paras. 11 and 46, pages 10 and 51, that the usages of the Jains while closely resembling those of orthodox Hinduism diverge exactly where they might be expected to do from being based on secular and not on religious principles, and that Jains though of Hindu origin and generally adhering to ordinary Hindu law, that is the law of the three superior castes, recognise no divine authority in the Vedas and do not practise Shradh or the ceremonies for the dead which constitute the religious element among Hindus. It is unnecessary to go into the question whether the Jains are dissenters from Hindu religion. It is now established that Hindu law applies to the Jains in the absence of custom varying

that law. See *Bhagwan Koer v. Bose* ILR (1903) Cal. 11 : 5 Bom. L.R. 845.; *Sheo Singh Eai v. Dakho* ILR (1878) All. 688 : . L.R. 5 IndAp 87; *Chotay Lali v. Chunnoo Lall* ILR (1878) Cal. 744 : L.R. 6 IndAp 15; and *Ambabai v. Govind* ILR (1898) 23 Bom. 257. In the last mentioned case it was held that a J'in of the Dasha Porwad caste was governed by the general Hindu law applicable to the three regenerate castes, being though not Brahmin, certainly not Shudra, but a Vaishya by origin and having as such carried this law with him from Gujarat to the Belgaum District. According to Hindu law, the widows Rupabai and Motibai would take a limited estate, and similarly Chunabai, succeeding to the inheritance as the mother of Rupchand, would take a limited estate and would be incompetent to pass the deed of gift and the will, Exhibits 90 and 91, and the plaintiffs would be entitled to the possession of the property unaffected by the dispositions made by Chunabai. The only question, therefore, in this case is whether the custom set up by the defendant that Rupabai and Motibai, the widows of Rupchand, took an absolute estate, and Ohunabai the mother also took an absolute estate and was competent to pass the deed of gift and the will, Exhibits 90 and 91, is proved. The learned Subordinate Judge, on consideration of the whole of the evidence, oral and documentary, came to the conclusion that the alleged custom was not proved, and that the deed of gift and the will on which the defendant relied were void as against the plaintiffs, and that the plaintiffs are entitled to the possession of the property.

6. It was not disputed before the learned Subordinate Judge that the property involved in the case was the ancestral property of Bupchand which was held by him as the sole surviving co-parcener. It appears clear from the will of Rupchand that he had given authority to his widows to adopt. The question, therefore, in the present case is whether in respect of such property the custom alleged by the defendant that the widows of Rupchand had an absolute interest according to the custom prevailing in Dasha Shrimali Jain community is clearly proved by the oral and the documentary evidence in the case

7. The learned Subordinate Judge held that there is no Jain law recognised by Courts, and though some verses in the Jain books, namely, Arhan Niti, Bhadrabahu Samhita and Vardhaman Niti, were discussed before us, they were not relied upon as binding on Courts but as providing a legal origin for the custom set up in this case. It appears from verses 11 and 12 of Vardhaman Niti that a widow is mentioned as an heir in preference to the son and the mother is not mentioned as an heir of her son. It is conceded before us that among Jains a widow is not entitled to preference over the son at the present time, and that the mother is an heir. The verses, therefore, in the Vardhaman Niti and the other books relate to a condition of Jain society when the widow was considered as a more preferential heir than the son, and cannot have any binding force at the present time. It appears, however, from verse 24 of the Vardhaman Niti that the widow should maintain her relatives, and for religious and communal purposes she may sell or mortgage the property. This verse is inconsistent with verse 14 which states that the widow has full powers like the husband whether there is a

son or not. Verses 51 and 52 of the Arhan Niti would show that when there is a legitimate son or a well behaved adopted son or when there are none, she, i. e., the widow, may for necessary purposes make a gift or mortgage or sale of the property in her charge. Verse 76 of the Arhan Niti says that if the widow is perverse and of evil conduct, she should be expelled by the husband's brothers and their sons after making settlement for her maintenance, and verse 112 says that when the son dies sonless, his estate is taken by the widow and on her death it is taken by her mother-in-law. The abovementioned verses are somewhat inconsistent with verses 115 and 116 which ordain that on the husband dying sonless the widow is the mistress of all his property. Similarly, in Bhadrabahu Samhita verses 61 and 65 seem to be apparently in conflict with verse 110. These books have no binding force on Courts of law and are besides not consistent with each other and do not represent the customs in force at the present time especially as regards the preference given to the widow over the son of the propositus. The learned Subordinate Judge on considering these authorities held that the texts cited taken with other verses do not establish a definite and uniform practice that the widow has the absolute power, and that though she might probably spend the property for charitable or religious purposes, they do not establish her right to dispose of the whole property by making a gift to anybody she might choose for benefiting the donee at the cost of the reversioners. I think that the texts are not authoritative and binding, and do not prove the alleged custom among the Jains generally, much less among the Dasha Shrimali Porwad Jain community to which the parties belong.

8. Reliance is placed on certain reported decisions of the several High Courts and of the Privy Council on behalf of the appellant. In Sheo Singh Rai v. Dakho ILR (1878) All. 688 : L.R. 5 IndAp 87 it was held that the sonless widow of a Saraogee Agarwala takes by 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 to the extent of at least an absolute interest in the self-acquired property of her husband. The question which the High Court sent down for inquiry in the case related to both the self-acquired property and the ancestral property of the husband, and their Lordships of the Privy Council upheld the conclusion arrived at by the High Court so far as the self-acquired property of the husband was concerned as it was not necessary to go any further in the suit on the ground that the property was purchased by the widow out of the self-acquired property of the husband. In the present case, the property in the hands of Rupchand was the ancestral property of Mohanchand which he obtained by partition, and though it was the separate property of Rupehand which he could have dealt with inter vivos or by will in the absence of a son either born or adopted according to Hindu law, there is a substantial difference between the self-acquired property of a person and the ancestral property which comes into his hands and of which he is possessed as the sole surviving coparcener. He can make a gift or a bequest of the self-acquired property even though a son born or adopted be in existence, but in respect of the ancestral property of which he is

possessed as the sole surviving coparcener, he cannot make a gift or bequest as soon as a son is either born or adopted. In the present case, Rupchand had given authority to his widows to adopt by his will, Exhibit 194, and any alienation made by the widows would be invalid as against the subsequently adopted son. In Sheo Singh Rai's case a custom was set up not only with regard to the self-acquired property of the husband but also with regard to the ancestral property which was in the hands of the husband, and the custom which was held proved in respect of the particular sect of Saraogee Agarwala Jains was that she took an absolute estate in respect of the self-acquired property of the husband, and the question with regard to the custom relating to ancestral property which came into the hands of the husband was not decided. In *Bachebi v. Makhan Lal* ILR (1880) All. 55 it was held in respect of Bindala Jains that the ordinary Hindu law of inheritance applied to Jains in the absence of proof of custom varying that law, and the alienation by gift by the widow of her husband's ancestral property was invalid according to the Mitakshara law, and the custom set up with regard to the ancestral property in the hands of the husband was held not proved, and with reference to Sheo Singh Rai's case it was observed that the custom established among one sect of Jains may not necessarily prevail among another, since the Jains are divided into numerous sects most of which do not eat together. In *Shimbhu Nath v. Gayan Chand* ILR (1894) All. 379 it was held with reference to the Agarwala Banias of the Saraogee sect of the Jain religion that the widow had full power of alienation in respect of the non-ancestral property of her deceased husband, but with regard to the ancestral property the custom was held not proved. The case of *Manohar Lal v. Banarsi Das* ILR (1907) All. 495 relates to the power of the widow to adopt and is not relevant to the question arising in the present case. The Allahabad decisions, therefore, make a distinction between the self-acquired property of the husband and the ancestral property which belongs to the husband at the time of his death, and with regard to the former the custom was held proved among some sects of Jains, and with regard to the latter kind of property the custom was held not proved.

9. The Madras decisions in *Perm Ammani v. Krishnasami* ILR (1892) Mad. 182 and *Gettappa v. Eramma* ILR (1926) Mad. 228 do not favour the contention set up on behalf of the appellant for in those cases it was held that the widow had no power to adopt without the authority of the husband or the consent of his Sapindas. In *Gettappa's* case it was held that the fact that among certain sects of Jains in the other Presidencies a custom has been upheld by Courts does not warrant a general presumption of the prevalence of the custom in the Madras Presidency. It is urged on behalf of the appellant that the Jains in Madras are Hindus converted to the Jain religion and therefore those decisions do not apply to the parties in the present case. It appears, however, that no such distinction is made in the judgments in those cases.

10. In Calcutta there are conflicting decisions in the cases of *Mussammat Mandit Koer v. Phool Chand Lal* 2 C.W.N. 154 and *Harnabh Pershad v. Mandil Dass* ILR (1899) Cal. 379. The case of *Mussammat Mandit Koer* was referred to in the later

case at page 388 and was disregarded on the ground that it was the subject of an appeal to the Privy Council. The decision of the Privy Council does not appear to have been reported, Reliance is placed on behalf of the appellant on the observations in the case of *Harnabh Pershad v. Mandil Dass* (p. 393):-

We see also no reason be dissent from the decision of the Subordinate Judge that a childless Jain widow acquires by the other custom alleged an absolute right to her husband's property when it is his separate property, and it is not necessary to go any further in the present case. There is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for distinction.

11. These remarks appear to be obiter as it is observed that the only custom proved in the case related to the absolute right of the widow to the husband's self-acquired property, and it was not necessary to go any further in that case. Further, the question whether a widow gets an absolute interest in her husband's self-acquired property was a subsidiary question in that case, and the principal question which had to be decided was with regard to the power of a Jain widow to adopt a son without her husband's permission or consent of the kinsmen. In the Bombay Presidency a Hindu widow has a right to adopt a son without the permission of the husband or the consent of the kinsmen, and still the widow takes a limited interest in respect of the Immovable property inherited from the husband. *Harnabh's* case does not support the custom set up in the present case on behalf of the appellant.

12. Coming to the Bombay decisions, in the case of *Rhagvandas Tejmal v. Rajmal* (1873) 10 B.H.C.R. 241 the question related to a curious custom set up in that case that among Jains an adoption could be made by the Panch after the death of the adoptive father and the adoptive mother, and though certain witnesses deposed to the extraordinary custom so set up, it was held that when among Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu law and usage of the country in which the property is located, and the parties resident, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence. Sir Michael Westropp observed at page 256:-

Hitherto, so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island or in this Presidency to persona of the Jaiua sect.

13. In the case of *Madanji Devchand Vs. Tribhowan Virchand*, it was held that according to the custom of the Jain community of Mangrol and Uplata in Kathiawar, a widow becomes on the death of her husband absolutely entitled to the properties left by him. The evidence is not discussed in the judgment of the High Court but is dealt with fully in the judgment of the original Court, Exhibit 95, which would clearly show that the question in that suit did not concern any ancestral property or the power of disposal of Immovable property inherited by a

widow from her husband and that the property involved in that suit was the moveable property of a separated Jain and was his self-acquired property. According to the Hindu law, a widow in Gujarat governed by the Mayukha can dispose of moveable property inherited from her husband by act inter vivos, i.e. by sale, gift or otherwise but cannot will it away. See Chamanlal v. Ganesh Motichand ILR (1904) 28 Bom. 453 : 6 Bom. L.R. 460 and Gadadhar Bkat v. Chandrabhagabai ILR (1892) 17 Bom. 690. But in a case governed by the Mitakshara she has no right to dispose either moveable or Immovable property by a deed or a will. In the present case, we are concerned with the power of a widow to alienate her husband's Immovable property which was ancestral property held by him as the last surviving coparcener, and which was sought to be alienated after the death of the widows by the mother of the deceased by a deed of gift and by a will. In Purshottam Ganpat v. Venichand Ganpat ILR (1920) 45 Bom. 754 : 23 Bom. L.R. 227 it was held that among Jains in the Belgaum District originally coming from the Idar State the adoption of an orphan was valid in law according to custom. The case does not deal with the power of a widow or a mother to alienate the Immovable property either separate or self-acquired of the deceased.

14. It would, therefore, appear from the reported decisions that the custom set up in the present case of a widow having an absolute title with regard to the ancestral Immovable property held by the husband is riot held proved in any of the decisions. In some of the Allahabad cases the widow's right to alienate self-acquired property inherited from the husband was held proved, but distinction is made between Immovable property inherited from the husband and the ancestral property in his hands. There is a conflict of decisions in the Calcutta High Court, and in Harnabh Pershad v. Mandil Dass (at page 393) there is an obiter dictum that there is no distinction between the self-acquired property of the husband and the ancestral property held by him. The Madras decisions are against the widow even adopting without the consent of the husband or of the kinsmen. In Bombay till 1873 Sir Michael Westropp in Shagvandas Tejmal v. Rajmal (at page 256) held that non but ordinary Hindu law had been administered to the persons of the Jain sect. In 1911, in Madanji v. Tribhowan, the right of a widow was held established so far as the Jain community of Mangrol and Uplata in Kathiawar was concerned to the self-acquired moveable property of the husband. Reference was made on behalf of the respondents to Premchand v. Bhurabhai (1921) F.A. No. 177 of 1919, decided by Macleod C.J. and Shah J., on January 31, 1921 (Unrep) in which the decision of the lower Court with regard to a Jain coming from Ahmedabad was confirmed, and it was held that a Jain widow could not alienate the property without necessity. The question of the custom in the present case was raised in the memorandum of appeal, but appears not to have been sufficiently proved by evidence in the case. If the custom set up by the defendant was an invariable and ancient custom, the right of alienation would have been exercised by the widow in the Bombay Presidency in several cases, and it is likely that the reversioners would have objected to the alienations, and

the question of the custom would have ere long formed the subject of adjudication by this Court, It would, therefore, follow that the custom set up by the defendant that a Jain widow is the absolute owner of the Immovable properties inherited from the husband has not been held established in Bombay, much less the power of the widow to alienate ancestral property which had become the separate property of the husband and inherited by the widow has been either proved or established in Bombay. The right of the mother to alienate even the self-acquired property of her son inherited by her has neither been alleged nor held proved in any of the decisions referred to above.

15. The decisions of Subordinate Courts have also been produced in the case. Exhibit 187 is a decision in Suit No. 22 of 1915 of the Court of the District Judge of Delhi Province, It was held in that case that the son adopted by the widow did not, by the fact of his being adopted, immediately succeed to the estate of the adoptive father and divest the estate of the widow, though no misconduct on the part of the adopted son was proved, and that he would be entitled to recover damages for wrongful dismissal but could not recover more than nominal damages. This view would hardly be upheld in this Presidency with regard to Hindus or with regard to Jains. Exhibit 188 is the decision of the Divisional Judge, Delhi Division, in Civil Appeal No. 489 of 1902 where it was held that a widow can get a partition of the joint family property. This does not deal with the question we have to consider in the present case, and such a custom has never up to this time been pleaded OK proved in this Presidency. Exhibit 94 is the decision in Civil Suit No. 350 of 1921 of the "Nandurbar Court. The case related to the self-acquired property of the husband which was willed away in favour of a temple, Exhibit 191 is a decision of the Akola Court in Civil Suit No. 80 of 1919 and the property in suit was the self-acquired property of the deceased though the judgment expresses an opinion that there is no distinction between the self-acquired property and the separate property of the husband. Exhibit 192 is the decision of the Hyderabad Commissioners" Court which related to the self-acquired property of the deceased. The judgment of the lower Court, Exhibit 223, admitted in this appeal as Exhibit AA, says that there was a partnership between Harlal and his father and a stranger, and the property after the death of Harlal's father was the partnership property of Harlal and the stranger Manalal, and on the dissolution of the partnership it became the self-acquired property of Harlal. The next decision relied upon is Exhibit 225, the decision of Mr. Jaini at page 121 of Appendix B to Exhibit 225. It would appear that Mr. Jaini held that the absolute power of the Jain widow was not limited to the self-acquired property of the husband if he died as a separated coparcener, and reliance was placed at p. 121 on the decision of Mr. Piyaarilal, a witness in the case to whom I shall refer hereafter, in original Suit No. 3 of 1309, i. e., 1908, where it was held that the Jains are not governed by Hindu law in matters of adoption, succession and inheritance. That view cannot be upheld in view of the Privy Council decision that Hindu law applies to Jains in the absence of any special custom. Exhibit 193 is the decision of the First Class Munsiff in the Delhi Court in Civil Suit No. 285 of

1918 which related to the self-acquired property which was purchased or built by Jhabbu Mal and would therefore be the self-acquired property of the husband of defendant No. 1 in that case. The decision is based on the admission of the reversioner plaintiff in that case that the Jain widow had full and unrestricted powers of alienation of her property. It would, therefore, appear from these unreported decisions that the right of the mother to alienate by deed or will the Immovable property of her son inherited by her has neither been proved nor established in any of these cases, and in some decisions with regard to certain sects of Jains the widow's right to alienate the self-acquired property of the husband was proved and her right to alienate in favour of charities was either held proved or not objected by the reversioners.

16. The next piece of evidence relating to the alleged custom is the opinion evidence given by certain witnesses on behalf of the defendant.

17. [His Lordship after dealing with the evidence proceeded:]

18. On examination of these instances, it appears that they are insufficient to prove the custom that the widow inheriting even the separate property of the husband is competent to make a will in favour of any person she likes, and though in some instances alienations were made in favour of charities, either the reversioners consented or the reversioners were not in existence. According to the evidence of Mr. Jain, the Jain widow's position is slightly better than that of a Hindu widow. Though according to the text in Jain law the bequest or a gift in favour of charity by a Jain widow is favoured, there is not sufficient evidence to prove that the Jain widow in the Bombay Presidency and belonging to Dasha Shrimali community is the absolute owner of the self-acquired property inherited from the husband. With regard to the ancestral property which was the separate property of the husband, the custom cannot be held to be proved. With regard to the mother inheriting the self-acquired and the separate property of the son, there appears no reliable evidence in the case to support such a custom.

19. Coming to the text books dealing with this point, I may refer to Koy's Customs and Customary Law, pages 267 and 268, and Mayne's Hindu Law, 9th Edition, paragraph 644, page 952, which would support the conclusion arrived at by the learned Subordinate Judge. Mayne observes in paragraph 644, page 952 :-

A different rule prevails among the Jains. A widow among them is said to have an absolute interest over her husband's self-acquired property. It has been suggested in some early cases, but does not appear to be established, that she has some larger interest over his ancestral property than an ordinary widow possesses.

20. It is not necessary to discuss the rebutting evidence on behalf of the plaintiffs, for their case is that no such custom exists) amongst the Jains of the Dasha Shrimali community to which the parties belong and it would be difficult for the witnesses to give negative instances. The witnesses, Exhibits 128, 129, 219 and 220 on behalf of the plaintiffs, prove that in the Deccan a Jain widow

has no better rights than a Hindu widow.

21. The result, therefore, of the evidence, documentary and oral, in my opinion, is that the texts from Arhan Niti, Bhadrabahu Sainhita and Vardhaman Niti are conflicting and relate to a state of society of the Jains when a widow was preferred to a son, and would not be binding on the Courts in view of the Privy Council decisions that the Jains are governed by Hindu law in the absence of a custom. The reported decisions except the obiter remarks in Harnabh Pershad v. Mandril Dass do not recognise the absolute right of the widow over the ancestral property in the hands of the husband and inherited by the widow, and a distinction is drawn in the Allahabad cases between the self-acquired property of the husband and the ancestral property which was the separata property of the husband as the sole surviving coparcener. The unreported decisions appear to recognise the widow's larger powers of disposal in Indore, Akola and Delhi with regard to the self-acquired property of the husband, and though admissible in evidence and can be considered along with the other evidence, are not sufficient to establish an invariable custom amongst the Dasha Shrimali community to which the parties belong who are not shown to have migrated from Delhi and Northern India and are said to have come from Gujarat, Kathiawar and Marwar and intermarry with the Dasha Shrimali caste of the Hindu persuasion. In Bombay as far back as in 1873 the Jains had not established any customs at variance with Hindu law according to the decision of Sir Machael Westropp in Bkayvandas Teymoi v. Rajmal. In Madanji v. Tribhowan the right of a Jain widow to deal with the self-acquired moveable property of the husband was recognised, but it was proved in that case that the parties had migrated from Mangrol and Uplata in Kathiawar. The oral evidence from Delhi and Lucknow and other places is in favour of a somewhat higher right in a Jain widow. With regard to the instances relied upon by several witnesses, there is no evidence of any invariable and ancient custom. In Rama Nand v. Surgiani ILR (1894) All. 221 it was held that:-

Where it is sought to establish the existence of a custom, modifying or varying the general law, the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled, or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law.

A custom at variance with the ordinary law must be established by clear and unambiguous evidence. In Rarnalakshmi Am-mal v. Sivanantha Perumal Sethwayar (1872) 14 M.I.A. 570 it was held that it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable : and it is further essential that they should be established to be so by clear and unambiguous evidence It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of

antiquity and certainty on which alone their legal title to recognition depends. See also Abdul Hussein Khan v. Bibi Bona Dero (1917) L.R. 45 IndAp 10 : 20 Bom. L.R. 528; Mahomed Ibrahim Rowther Vs. Shaikh Ibrahim Rowther, ; and Muthu Ohettiar v. Meenakshisundaram Ayyar (1927) 30 Bom. L.R. 261.. I am not, therefore, satisfied that amongst the Dasha Shrimali community, to which the parties belong, a custom clothing the widow with the absolute power of dealing with the Immovable self-acquired property of the husband or the ancestral property which was in the hands of the husband is proved. It would, therefore, follow that the mother inheriting as an heir after the widow is not competent to deal with the property inherited from her son.

22. It further appears from the will of Rupchand and the conduct of Chunabai that she was not conscious of the prevalence of the custom set up in this case that a widow in the community to which the parties belong had an absolute right with regard to the property inherited from the husband. It appears from the will of Rupchand, Exhibit 194, that the widows were to act according to the advice of Chunabai, and that in case of difference of opinion they were to be given Rs. 25 per month as maintenance and a house of Rs. 50 D to live in It further appears that plaintiff No. 2 sent a notice, Exhibit 200 on July 6, 1917, and Chunabai made an application, Exhibit 202, on July 26, 1917, for a succession certificate after the death of the widows, and in the written statement contended that as long as she lived, the plaintiffs had no right of heirship but that their rights would arise after her death. An inference would, therefore, arise that she and her advisers were not conscious of the existence of such a custom as is set up in the present case. Further, in the will and the deed of gift of Chunabai a statement is introduced that after making his will on January 25, 1906, and a few days before his death on January 31, 1906, Rupchand expressed a wish that in case the widows died, the defendant, who was his sister's daughter, should be the owner of the estate. Such a statement which has been found by the learned Judge either to be untrue or unproved, would have been unnecessary if the custom set up in this case was known either to Chunabai or her advisers. This circumstance militates against the prevalence of the custom set up in this case in the Dasha Shrimali Jain community in the Bombay Presidency.

23. It is, therefore, unnecessary to consider the point urged on behalf of the defendant that in case the custom giving to a Jain widow absolute power over the self-acquired and the separate ancestral property was established, the mother Chunabai being a female inheriting from a female, i. e., widow of Rupchand, got an absolute interest over the property inherited by her. Reliance is placed on the decision in the case of Hukum Chand v. Sital Prasad ILR (1927) All. 232 and the decisions in Gandhi Maganlal v. Bai Jadab ILR (1899) 24 Bom. 192 and Narayan Moreshwar v. Waman Mahadeo ILR (1921) 46 Bom. 17 : 23 Bom. L.R. 587. It is, however, urged, on the other hand, that the Bombay view accepted in the above two cases must be considered to have been modified by the decisions of the Privy Council in Sheo Shankar Lal v. Debi Sahai (1903) L.R. 30 IndAp 203 : 5 Bom. L.R. 828 and Lal Sheo Pertab Bahadur Singh v. Allahabad

Bank (1903) L.R. 30 IndAp 209 : 5 Bom. L.R. 833. It is unnecessary to go into this question having regard to the conclusion reached by me as regards a Jain widow's power of alienation and consider whether the decisions in Sheo Shankar Lal v. Debi Sahai and Lal Sheo Pertab Bahadur Singh v. Allahabad Bank do not relate to the Benares law as distinguished from the law administered in Bombay, and whether the Bombay law or the Benares law should apply to the parties in the present case, and whether Chunabai was the heir of her son or her daughter-in-law.

24. A subsidiary point was urged on behalf of the appellant that an inquiry should be directed as to the extent of the self-acquired property of Eupehand and the extent of the ancestral property which came into the hands of Rupchaud as the last surviving coparcener in case the Court came to the conclusion that the custom allowing the widow to alienate in respect of self-acquired property was proved. It appears from the judgment of the learned Subordinate Judge that in the lower Court it was not disputed that the property involved in the case was the ancestral property of Rupchand and was held by him as the sole surviving coparcener. The property was obtained by Mohanchand after partition, and would as between him and Rupchand be ancestral property and would form the nucleus of the property which was acquired during Mohanchand's and Rupchand's time, and no distinction such as is now sought to be made at a late stage of the case was made in the lower Court. There is no reliable evidence in the case to show that Rupchand was possessed of self-acquired property. The description in the will, Exhibit 194, is not conclusive.

25. The last point urged on behalf of the appellant is that at least with regard to the seven properties which have been bequeathed in favour of charities, the lower Court ought not to have awarded possession to the plaintiff, especially as the defendant was entrusted with the management of the charitable institutions, in case we were satisfied that Chunabai was entitled to make a gift for charitable purposes with regard to the Immovable properties inherited from Rupchand. According to Hindu law, a widow is not entitled to make a gift in favour of charities of a considerable portion of her husband's property as was done in the present case, and we are not satisfied that Chunabai, the mother of Rupchand, belonging to Dasha Shrimali community was competent to make a gift with regard to a considerable portion of the Immovable properties inherited by her from her son. The defendant in the present case contended that the properties belonged to her as owner and repudiated the trust in favour of the charities, and in paragraph 12 of the written statement contended that the Panchas interested in the charitable institutions should be joined as parties to the suit. I think that as between the plaintiffs and the defendant, the defendant is not entitled to retain possession of the properties which were devised in favour of the charities on the ground that she claimed the properties as owner and adversely to the charities, and also on the ground that Chunabai was not entitled as a Jain mother to make a gift of a large portion of the properties in favour of the charities. This decision, however, is not binding on the religious institutions to whom the

properties were given under the deed of gift of Chunabai as they are not parties to the present suit, The learned Subordinate Judge has reserved the right of the religious and charitable institutions, if so advised, to sue the plaintiffs for applying the income towards the charitable objects. I agree with the view taken by the lower Court and think that the order directing the defendant to give over possession of the properties in suit to the plaintiff is correct.

26. No question was raised with regard to the extent of the move-able property belonging to Rupchand.

27. I would, therefore, confirm the decree of the lower Court and dismiss the appeal with costs.

28. The cross-objections filed by the respondent are not pressed and they are, therefore, dismissed. No order as to costs.

29. Similarly, Civil Application No. 955 of 1924 is also dismissed. No order as to costs.

Marten, C.J.

30. I concur. It is claimed by the defendant-appellant that by Jain custom the two widows of Rupchand and after them Rupchand's mother Chunabai took absolute interests in the property which passed on Rupchand's death. It is, however, settled law, that in British India Jaina are governed by Hindu law, unless a custom to the contrary is proved. The parties and their ancestors have been settled in East Khandesh for a long time past, and under the Hindu law applicable there, as expounded in the Mitakshara and the Mayukha, the widows and the mother would only take limited and not absolute interests in the property in question. The alleged Jain custom to the contrary is sought to be established by (a) judicial decisions (b) ancient Jain books (c) opinion evidence, and (d) instance evidence.

31. As regards (a), the decisions of this High Court show that no such custom has hitherto been established in this Presidency. In *Bhagvandas Tejmal v. Rajmal* (1873) 10 B.H.C.R. 241, where the usages and religious tenets of the Jain community were carefully enquired into with reference to an alleged special custom of adoption, Sir Michael Westropp said (p. 256):-

Hitherto, so far as we can discover, none but ordinary Hindu law has been over administered either in this Island or in this Presidency to persons of the Jaina sect. ...

" We have consulted a well-known oriental scholar, the Rev. Dr. Wilson, who we believe to possess a knowledge of the castes of Western India and 2 their literature and customs, as extensive as that of any other living person whom it would be easy to name, and he has with his usual courtesy and earnestness, afforded to us his assistance. He informs us that ho is not aware of any authority in the books of the Jaina community or amongst the Hindu writers which would

tend to support the custom alleged by the plaintiff here* Dr. Wilson has been informed by a learned Jati of the Jaina community and his Brahman assistant that they do not know of any such authority, that adoption is of rare occurrence amongst the facnas and when resorted to, is regulated by the ordinary Hindu law, as is their succession to property generally.

32. That was in 1873. There have been two subsequent reported cases, but both arose with reference to parties who were proved to have migrated from other parts of India. In *Madonji Devchand v. Tribhowan Virchand* ILR (1811) 36 Bom. 306 : 13 Bom. L.R. 1121 the parties had migrated from Mangrol and Uplata in Kathiawar, and it was held proved under the Jain custom applicable there that the widow could alienate the moveable self-acquired property of a separated Jain. In *Purshottam Oanpat v. Venichand Ganpat* ILR (1920) 45 Bom. 754 : 23 Bom. L.R. 227 the parties had migrated from the Idar State, and it was held proved that under the Jain custom applicable there an orphan could be adopted.

33. In a third but unreported case (*Premchand v. Bhurabhai* (1921) F.A. No. 177 of 1919, decided by Macleod C.J., and Shah J. on January 31, 1921 (Unrep.)) Macleod C. J. and Shah J., without giving any reasons, dismissed an appeal from the judgment of the Ahmedabad Court, which had applied the ordinary Hindu law to a Jain widow, viz., that she could not alienate without necessity. The memorandum of appeal distinctly raised the claim that by Jain custom the widow took an absolute interest. In the apparent absence of any evidence of such custom in the Court below, this claim was no doubt bound to fail, On the other hand there are many Jains in Ahmedabad, and if any such custom really existed in Gujerat, one would have expected it to have been raised in the Court of first instance.

34. As regards Southern India, the decisions of the Madras High Court in *Peria Ammani v. Knshnasami* ILR (1892) Mad. 182 and *Geettappa v. Eramma* ILR (1926) Mad. 228 negated the existence of any special custom enabling a Jain widow to adopt without the authority of her husband or the consent of his kinsmen. The former case also negated her alleged customary right to dispose of the property by will as an absolute owner,

35. In Eastern India, the decision of the Calcutta High Court given by Mr. Justice Macpherson and Mr. Justice Wilkins in *Harnabh Pershad v. Mandil Dass* ILR (1899) Cal. 379 was much relied on by the appellant. The actual decision was confined to proof that by custom a Jain widow could adopt without her husband's authority, or the consent of his kinsmen, and also that she took an absolute interest in her husband's separate property. But the judgment went on to say (p. 893): " There is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for distinction." That case was decided in 1899, and the parties were residents of Arrah in the district of Shaha-bad.

36. On the other hand in *Mussammat Mandit Koer v. Phool Chand Lal* 2 C.W.N.

154 Mr. Justice Trevelyan and Mr. Justice Stevens held that an alleged custom for a Jain widow to take an absolute estate was not proved to exist amongst the Jains of Bengal. In the course of the judgment it was said (p. 159):-

It is admitted by the learned Counsel for the Appellant that the Saraogi Agarwallas of Calcutta do not follow any such custom, and it is very remarkable that the parties have gone so far afield as Delhi, Paniput, Benares and Jai-pore for evidence, and that their evidence so far as the place where the parties live is concerned is not of a class upon which any action can be taken. The decision of this Court to which we have referred includes a finding that at Arrah, Calcutta and other places the Jain Agarwalla, although in matters of religion they have usages and customs which differ materially from those of ordinary Hindus as regards their temporal concerns, especially the rules of inheritance, are governed by the Mitakshara law. This is as much a finding as to the position of Jain Agarwalla as is the case in the North-Western Provinces High Court Reports. We are bound to say that it is new to us that any such custom or anything of the kind altering the law of inheritance has found its way into this province.

37. That case was decided in 1897, and the parties would appear to have resided in Arrah or Barh. It was referred to in *Harnabh Pershad*"(r) case as being then under appeal to the Privy Council. But no such appeal is shown to us. And the case as it stands is inconsistent with *Harnabh Pershad*"(r) case.

38. As regards the more Northern parts of India, the decisions of the Allahabad High Court in *Sheo Singh Rai v. Dakho* ILR (1878) All. 668 : L.R. 5 IndAp 87 and *Shimbhu Nath v. Gayan Chand* ILR (1894) All. 379 show that the alleged custom has been established so far as regards the self-acquired property of the husband but not as regards his ancestral property. In particular this custom is shown to exist in Delhi, as is exemplified by the evidence to which their Lordships of the Privy Council drew particular attention at pp. 109 and 110 of 5 I. A..

39. So far then as the decisions of the High Courts in British India ji have been brought to our attention, they none of them establish the custom alleged in the present case as regards ancestral property of a husband ; and though as regards self-acquired property the custom is recognised as regards Delhi and other more northern places including the Idar State, yet as regards the Bombay and Madras Presidencies the custom has not been proved, apart from one case of migrants from a part of Kathiawar; and as regards Bengal, the decisions of the Calcutta High Court are in conflict.

40. As regards other judicial decisions, those in the Indore State are by two witnesses, Exhibit US and Exhibit 123, both of whom place much reliance on ancient Jain books, I will, accordingly, deal shortly with that subject (6) nest. We have been taken carefully through the texts relied on, but it is clear that they contain no code of succession governing Jains now-a-days. Thus a widow is there said to succeed in priority to her husband's sons, which is the direct contrary of the existing law of succession amongst Jains. And this important difference

explains several of the texts giving larger powers to females than is normal amongst Hindu widows now-a-days. But it is unnecessary to pursue the point, because counsel for the appellant was forced to concede that these texts would not govern the succession in the present case, and that he would only rely on them as establishing that in ancient days Jain widows were given far reaching powers, and that therefore there was nothing surprising in finding them still existing now-a-days, even in a modified form. In short, there was thus, as he contended, a legal origin for the alleged custom.

41. Turning next to the above Indore witnesses, Exhibit 118 and 123, their evidence requires special mention. Mr. Jaini, Exhibit 118, and Mr. Piyaarilal, Exhibit 128, have both acted as Chief Justices of the Indore High Court, and are keenly interested in what they describe as Jain law. The former has indeed written a book on the subject, which contains a detailed judgment of his own, in which he follows another judgment of Mr. Piyaarilal. Mr. Jaini's examination-in-chief hardly carries the case further, for he merely exhibited his book, and said that almost all he knew of Jain law and the authorities was given within that book and he continued as follows:

I do not have much to add to or take away from what I have given in that book. So far as I am aware, all the Jains are governed by the same law as regards partition and inheritance of property.

42. In cross-examination he said that the general law of succession would be found in the Jain texts : that on the basis of Jain law the widow had an absolute right over her husband's ancestral as well as self-acquired property, and proceeded:-

So far as I am aware the rights of a Jain widow as given above are taken for granted all over India. In this respect a Jain widow is slightly in a better position than a Hindu widow...the general Jain law applies to all the Jains anywhere.

43. It is, however, clear from the High Court decisions in British India, already referred to, that parts of his evidence are in conflict with those decisions,

44. Then Mr. Piyaarilal, Exhibit 123, states in his examination-in-Chief:-

As far as my memory helps me I all along believed and acted on the implicit faith that amongst Jains the widow of a separated Jain absolutely succeeds to her husband's property...To my mind this rule about absolute succession of a Jain widow applies to all Jains throughout India, Wherever a Jain goes he carries his personal law with him in the matter.

45. Then in cross-examination he said :-

As far as I think the rule of Jain widow succeeding absolutely may be a rule of Jain law or custom, but I have been led to believe in it as a rule of universal observance among Jains, As far as my experience goes, this rule has never been disputed wherever I had been. I have no experience as to what law governs the

Jains in Maharashtra. I cannot give any decision of the Bombay High Court on this point; there may or may not be such decisions. I have not studied them. I cannot trace the origin of the rule of succession among the Jains. It is as old and universal.

46. This evidence then like that of Mr. Jaini's is subject to obvious imperfections. For instance, as Mr. Piyaarilal has had no experience as to what law governs the Jains in this Presidency, and has not studied any of the Bombay decisions, his evidence can hardly be accepted as that of an expert on the law and custom prevailing in this Presidency in this matter.

47. The remaining judicial decisions outside the High Courts of British India have been fully dealt with by my brother Paikar, and it is accordingly unnecessary for me to say anything further than that I concur in his observations with respect to them.

48. So, too, turning to (49. I, accordingly, agree that this appeal should be dismissed, and also with the rest of the order proposed by my brother.