
(1926) 08 MAD CK 0087
In the Madras High Court

Bobbaladi Gateppa by next friend Andragal Adeppa	APPELLANT
Vs	
Bobbaladi Eramma and Others	RESPONDENT

Date of Decision : 13-08-1926

Acts Referred:

Citation : (1927) ILR (Mad) 228 : (1927) 26 LW 408 : (1926) 51 MLJ 757

Hon'ble Judges : Curgenvan, J; C.V. Kumaraswami Sastri, J

Bench : Full Bench

Judgement

C.V. Kumaraswami Sastri, Kt. Officiating C.J.

1. The only question in these appeals is whether the consent of the husband or his sapindas is necessary to validate an adoption made by a Jain widow. The Lower Court held that the Jains are governed by Hindu Law in the absence of proof of any custom to the contrary and that the adoption is invalid as no consent was obtained either from the husband or his sapindas. The finding of fact as to the absence of consent is not disputed before us. The main argument of Mr. Sambasiva Rao who appears for the appellants is that so far as the Jains are concerned no consent is necessary and that the Lower Court is wrong in thinking that the Hindu Law applied to them. Were the matter *res Integra* I would be inclined to hold that modern research has shown that Jains are not Hindu dissenters but that Jainism has an origin and history long anterior to the *Smritis* and commentaries which are recognised authorities on Hindu Law and usage. In fact, Maha Veera, the last of the Jain Theerthankars, was a contemporary of Buddha and died about 527 B.C. The Jain religion refers to a number of previous Theerthankars and there can be little doubt that Jainism as a distinct religion was flourishing several centuries before Christ. In fact Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of the various ceremonies which Hindus consider essential. There is a great force in the observations of Holloway, J., in *Rathams Lull v. Soojan Mull* 9 Mad Jur 21 that Hindu Law cannot be applied to them. So far as Jain law is concerned it has its own law books of which *Bhadrabaku Samhit* is

an important one. Vardhamana Niti and Ashana Niti by the great Jain teacher Hemachandra deal also with Jain Law. No doubt by long association with Hindus who form the bulk of the population Jainism has assimilated several of the customs and ceremonial practice of the Hindus but this is no ground for applying Hindu Law as developed by Vignaneswara and other commentators, several centuries after Jainism was a distinct and separate religion with its own religious ceremonial and legal systems, en bloc to Jains and throwing on them the onus of showing that they are not bound by the law as laid down by Jain law-givers. It seems to me that in considering questions of Jain law relating to adoption, succession and partition we have to see what the law as expounded by Jain law-givers is and to throw (he onus on those who assert that in any particular matter the Jains have adopted Hindu Law and custom and have not followed the law as laid down by their own law-givers. I have not been referred to any Jain law-giver requiring consent of the husband or sapindas to enable a widow to adopt. Several Jain communities have successfully shown the custom of adoption without consent being valid. The absence of any necessity for consent was probably due to no consent having been required by the Jain law-givers. I see nothing in the Bhadrabahu Samhita requiring any consent (see trans. Bhadrabahu Samhita by J.L. Haini, M.A., Judge, High Court, Indore). As regards Bhadrabahu Samhita, verse 40 empowers a sonless man or woman to take a boy in adoption. Verse 83 empowers a widow to adopt a boy and make over her property to him. Verse 73 runs as follows:

The virtuous lady may like her husband take to herself a son of a good Kotra and instal him on the estate of her husband.

2. In *Maharaja Govinda Nath Ray v. Gulab Chand* (1833) 58 D A 276 decided as early as 1833 the pandits consulted were of opinion that according to Jain Sastras a widow had power to adopt without any authority from her husband. There was some difference of opinion if she could depose an adopted son. They refer to Jain Sastras and there is no suggestion that the law applicable to them is the Hindu Law or that any special custom was necessary to be alleged and proved to support an adoption by a widow without consent of her husband or sapindas. There is a great force in the argument of Mr. Sambasiva Rao that it is for those who contend that the consent of the husband or his sapindas is necessary to prove that the Jains have in the matter of adoption followed Hindu Law. The matter, however, in my opinion is concluded by authority and a series of decisions extending over several years have held that the presumption is that the Jains are governed by ordinary Hindu Law unless it is shown that by custom a different law prevails among them.

3. In *Chotay lall v. Chunnoo lall and Ors.* ILR (1878) C 744 decided in 1878 their Lordships of the Privy Council held that the ordinary Hindu Law of Inheritance should apply to Jains in the absence of any proof of special custom varying it. Their Lordships in dealing with the argument of Mr. Cowell, that Jains should be presumed to be governed by their customs differing from ordinary law, and

referring to the case of Sheo Singh Rai v. Dakho (1878) ILR 1 A 688 (PC) observed that the case Sheo Singh Rai v. Dakho (1878) ILR 1 A 688 (PC) did no more than adopt and affirm the law to be deduced from a roll of cases in India, that when the customs of the Jains are set up they must be proved like other custom varying the ordinary law, and that, when so proved, effect should be given to them. In Sheokuarbai v. Jeoraj (1920) 25 C W N 273 (P C) their Lordships of the Privy Council observe:

The Jains are Hindu dissenters, and although, as was pointed out by Mr. Mayne in paragraph 46 of his Hindu Law and Usage, generally adhering to the ordinary Hindu Law, that is, the law of the three superior castes, they recognise no divine authority in the Vedas and do not practise the Shradh, or ceremony for the dead.

4. The due performance of the Shradh, or religious ceremonies for the dead, is at the base of the religious theory of adoption, but the Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of some contrary usage (Mayne's Hindu Law, paras. 148 and 106, and cases there cited). In Musammat Mandit Koer v. Phool Chand Lal (1897) 2 C W N 154 it was held that unless a custom to the contrary is proved, Jains are governed by the Hindu Law of Inheritance and ordinarily the Mitakshara school of law would be applicable to them. In Bachebi v. Makhan Lal ILR (1880) A 55 it was held that the ordinary Hindu Law of Inheritance would apply to Jains in the absence of proof of custom or usage varying that Law. The learned Judges treated the question as well settled and referred to the decision of their Lordships of the Privy Council in Chotay Lal v. Chunnoo Lall 6 I A 15 (PC). The same view was taken as early as 1867 by Sir Barnes Peacock, C.J., and Jackson J., in Lalla Mohabeer Pershad and Ors. v. Musammat Kundun Koowar (1867) 8 W R 116 where the learned Judges held that the Jains are governed by the Hindu Law of inheritance applicable in that part of the country in which the property is situate. In Asharfi Kunwar v. Rup Chand ILR (1908) A 197 the learned Judges take it that the law as laid down by their Lordships of the Privy Council is that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation and they throw the onus on him of showing the custom that a widow can adopt without the permission of her husband, though on the evidence they held that custom proved. In Peria Ammani v. Krishnaswami ILR (1892) M 182 it was held by Muthuswami Aiyar and Best, JJ., that the onus lay on the party asserting to show that among the Jains a widow could adopt without permission from her husband or his sapindas, and that the custom which was set up was not proved.

5. Reference has been made to authorities in Bombay but they do not afford much assistance as according to Mayukha no permission of the husband or his sapindas is necessary for a widow to adopt. I may, however, point out that in Bhagwandas Tej Mull v. Rajmal (1873) 10 Bom H C R 241 it was held that adoption amongst Jains was regulated by the ordinary Hindu Law as was their succession to their property generally and that it was for the Jains to allege and

prove any custom, which was different from the normal Hindu Law and usage in the country in which the property is located and the parties reside.

6. Cases have been referred to where among special sects of Jains Courts have held that a custom has been proved whereby authority to adopt is unnecessary. [See Lakhmi Chand v. Galto Bai ILR (1886) A 319, Manohar Lal v. Banarsi Das ILR (1907) A 495, Askarji Kunwar v. Rup Chand ILR (1908) A 197 and Harnabh Pershad v. Mandil Das ILR (1899) C 379].

7. The argument of Mr. Sambasiva Rao is that there is such a general agreement as to usage not requiring consent in other parts of India that we may presume that there is such a usage among the Jains in the Madras Presidency. I do not think that having regard to the various sects in which the Jains are divided there can be any general presumption as contended for by Mr. Sambasiva Rao. In fact so far as the Jains in the Madras Presidency are concerned the usage was negatived in Peria Ammani v. Krishnaswami ILR (1892) M 182 . In the present case there is no evidence of any custom among the Jains in the Bellary District and little help is afforded by the fact that this family migrated from the Nizam's Dominions as there is nothing to show that in the Nizam's dominions the customary law among the Jains is that permission is not necessary.

8. The appeals fail and are dismissed with costs.

Curgenven, J.

9. The question in all these four appeals is whether the widow of a Jain is competent to make an adoption without having received her husband's consent or the consent of the sapindas. Padmanna, a Jain and resident of the Bellary District, adopted Somanna. The father and the adopted son traded in partnership and acquired property. Padmanna made a will leaving some of his property to his wife Viramma for her life and the remainder to Somanna. Somanna pre-deceased Viramma leaving a widow Maremma; and the two widows engaged in a dispute about the property. Maremma relinquished her rights for a certain consideration, but subsequently purported to adopt one Gateppa, admittedly without any authority from her husband and without the sapindas consent. Appeal No. 422 of 1922 arises out of a suit by Gateppa against Eramma, Maremma and others to establish the validity of his adoption. Appeals Nos. 432 and 433 of 1922 and 394 of 1923 relate to suits by Eramma to recover certain moneys, the adoption being put forward in response to her claims.

10. We know nothing of Padmanna's antecedents except from the statement of one witness, that he migrated to Bellary from the Nizam's dominions. But, even if this statement be accepted, it affords no help in deciding the question in issue; since no evidence has been offered as to the usage of Jains in those dominions. Indeed, no evidence of usage has been given at all, so that it lies upon the party asserting the validity of the adoption to establish that it is a part of the Jain Law that an adoption might be so made. It must be shown that there is a usage so universal as to have the force of law.

11. The only reported case of this Court, *Peria Ammani v. Krishnaswami* 3 M L J 109, related to Jain converts in Tanjore and the circumstances were perhaps special. The plaintiff was put to the proof of the custom and it was held on the evidence that he had failed to prove it. Best, J., in whose judgment Muthuswami Aiyar, J. concurred, pointed out that the Jains are seceders from Brahmiical Hinduism but that they retained many of the customs of the orthodox Hindus, so that where a custom different from the ordinary Hindu Law is set up as prevailing among Jains, the burden of proving such a custom is on those who allege it, and in the absence of such proof the ordinary law must prevail. The course taken by decisions in Allahabad is in full agreement with this decision. The earliest of those cases relates to a sect of Jains known as Saraogi Agarwalas and came before the Privy Council in *Sheo Singh Rai v. Dakho* (1878) ILR 1 A 688 (P C). Their Lordships' judgment shows that the position adopted by the High Court and approved by themselves was that when amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu Law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence.

12. The evidence of the representative Jains was therefore taken, and upon this evidence it was found that the widow of a Saraogi Agarwala Jain enjoys the right of adoption without the permission of her husband or the consent of his heirs. In the next case, *Lakhmi Chand v. Gatto Bat* ILR (1886) A 319, it appears to have been accepted without contest that a Saraogi Jain widow may so adopt. The chief question arising in *Manohar Lal v. Benarsi Das* ILR (1907) A 495 was whether a Jain widow might adopt a married man to her husband. The judgment of Stanley, C.J. and Burkitt, J. contains an instructive summary from the works of various writers on the Jain religion. The conclusion was again drawn that the Jains are Hindu dissenters, and are governed by the Hindu Law of Adoption except in such respects as any different usage that may be proved. Hence, upon the question raised in that case it was necessary to take evidence of the usage alleged by proving a number of instances in which such adoption had been made, and these instances were held to establish the usage. The same question came before the same two Judges in *Asharfi Kunwar v. Rup Chand* ILR (1908) A 197, and was disposed of in the same way. They quoted the ruling of the Privy Council that in Jain cases it rests on the party alleging a custom of practice at variance with that of orthodox Hindus to prove his allegation. In disposing of the appeal against that judgment the Judicial Committee took occasion again to give expression to this principle, adding:

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

13. These observations apply equally to a contention that a widow may adopt

without authorisation. The same principle was accepted by their Lordships of the Privy Council in *Chotay Lall v. Chunnoo Lall* ILR (1878) C 744 where referring to *sheo Singh Rai v. Dakho* (1878) ILR 1 A 688 (P C) they observe:

The effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail.

14. This principle was also found in an early Allahabad case, *Bachebi v. Makhan Lal* ILR (1880) A 55.

15. It is thus clear that the onus of establishing that Jain widows have power to adopt in the manner claimed lies upon the party asserting it. The nature and the amount of evidence sufficient to shift the onus must vary with the particular circumstances of the case. It may however be safely said that judicial decisions which have reference to parts of India other than the Madras Presidency are not by themselves sufficient material upon which to found an affirmative decision. That could only be so if the usage were so invariable as to have become a part of the Jain Law. No doubt, as was held in *Harnabh Pershad v. Mandil Das* ILR (1899) C 379, judicial decisions recognising the existence of a disputed custom among the Jains of one place are very relevant as evidence of the existence of the same custom among the Jains of another place, but as that case equally shows, the evidence that the usage has application to the particular case cannot be dispensed with. It is certainly not yet possible to accept the view that this custom has so often been found to exist that the onus is now shifted on to the person who denies it. The Madras Presidency, where the single reported ruling is against such a custom, cannot be the first place in which such a doctrine should be accepted. In the absence of any evidence of local usage, therefore, it must be concluded that the adoption was not validly performed.