

(1920) 09 BOM CK 0012
In the Bombay High Court
Case No : Second Appeal No. 191 of 1918

Parshotam Ganpat Gujar

APPELLANT

Vs

Venichand Ganpat Gujar

RESPONDENT

Date of Decision : 01-09-1920

Acts Referred:

Citation : AIR 1921 Bom 147(1) : (1921) 23 BOMLR 227 : 61 Ind. Cas. 492

Hon'ble Judges : Norman Macleod, J;Fawcett, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Norman Macleod, Kt., C.J.—The plaintiff, a posthumous son of one Ganapat Bhaichand, filed this suit through his next friend praying for a declaration that the defendant was not the adopted son of Ganapat and that his adoption was invalid as he was an orphan at the time of his adoption. Ganpat died in 1906 leaving his widow Mainabai pregnant. On the 12th October 1906, she adopted the defendant. In February 1907, the plaintiff was born. Mainabai died in 1908 leaving a will whereby she appointed one Vishnu Vinayak as manager during the plaintiff's minority. This suit was filed in 1913 by Vishnu Vinayak purporting to act as next friend of the minor plaintiff then aged six. If Vishnu's allegations are correct, proceedings of some sort had become necessary owing to the conduct of the defendant in interfering with the management of the estate, and the learned Subordinate Judge found that as a matter of fact, whoever was to blame, the estate had been mismanaged. The defendant claimed to manage the estate as a coparcener, and there can be little doubt that the validity of defendant's adoption was questioned by Vishnu owing to the antagonism between him and the defendant.

2. The main issues in the trial Court were-

1. Is the adoption of the defendant valid, and, if so
2. Is it proved ?

3. Can defendant set up a custom of Swayamdatta, and if yes is it proved ?

3. All these issues were found in the affirmative and the plaintiff's suit was dismissed.

4. In first appeal this decision was confirmed.

5. In second appeal the High Court was of the opinion that the defendant-respondent should have an opportunity of adducing all the evidence, which was indicated in his application of 1914 for evidence to be taken on commission, bearing on the question of the custom alleged. This case, therefore, was remanded to the lower appellate Court to allow the defendant-respondent to have that evidence taken, leave being given to the plaintiff-appellant to give rebutting evidence. Issue 3 was recast as follows;-" Whether the custom of adopting an orphan among Jains in Western India is established as a valid custom ?

6. Further evidence was taken in accordance with orders by the Subordinate Judge who held that the custom alleged was duly proved. The finding being certified to the lower appellate Court, the learned Assistant Judge after hearing arguments and scrutinising the evidence agreed with the Subordinate Judge.

7. The case after having been heard at different times before six Judges now comes before us for final hearing in second appeal.

8. The parties are Jains. There is no need to consider the numerous authorities on the question by what law the Jains are governed or the history of the origin of the Jain community and the nature of their religious belief. I need only refer to the judgment of Westropp, C.J. in *Bhagvandas Tejmal v. Rajmal* (1873) 10 B.H.C 241.

9. As laid down in the most recent Privy Council decision in *Sheokuarbai v. Jeoraj* (1920) 25 C.W.N. 273, "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." What is required to establish a special usage deviating from the ordinary law is a question of law : *Hashim Ali v. Abdul Rahman* I.L.R(1906) All. 698.

10. In *Bhagvandas Tejmal v. Rajmal* the special custom sought to be established was a custom amongst Jains to allow the adoption, of a person when both the adoptive parents were dead, and the remarks of the learned Chief Justice on the question of law are binding on us unless it can be shown that by later decisions of a higher authority they have been in some way modified. Reference was made to the rule as to what is required to establish a special usage as laid down in *Ramalakshmi Ammal v. Sivananatha Perumal* (1872) 17 W.R. 553 by the Privy Council. " Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but 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," The Chief Justice then considered the argument which has been addressed to us that the Jains totally discard the Shradha ceremonies and disbelieve in their efficacy and pay little regard to sacrifice, which was fatal to the existence amongst Jains of the principal reason which rendered adoption almost indispensable to the more orthodox Hindus when they were sonless, while the perpetuation of the name of the adoptor, the only reason for adoption amongst Jains, would be a secondary and worldly motive amongst Hindus. The Chief Justice, therefore, considered there was in the case of Jains a stronger reason for not extending the right of adoption beyond that allowed by precedent and text law to Hindus at large than in the case of the orthodox believers in Hinduism. Then after considering the evidence the Chief Justice said : " There are then but three perfect instances established in proof, and of these, the most remote happened less than a quarter of a century ago. It is impossible to regard such cases as proof of an ancient, still less of an immemorial, custom, unsupported as they are, by a single text from any book...amongst the Jains themselves or amongst the Hindus at large, or by any Pandit, Yati, priest or other expert. For these reasons, we are of opinion that the plaintiff has failed to prove the existence of any such deviation from the Hindu law of this Presidency as he has asserted, The proceeding, which he says constituted an adoption, appears to us to have been a complete nullity, and not to be validated by the assent, although given, of the Panch of the caste, or of the senior members of it, in Ahmednagar to the transaction. They had no power to establish any such custom, and could not clothe it with the antiquity which has not been proved, and which was essential to its legal existence." These remarks would appear to me most pertinent, but from the later cases which have come before the Courts in which it was sought to establish a custom, it seems to be no longer considered that the evidence of modern instances, which alone can be proved by oral evidence, cannot establish the custom, unless the Court is satisfied by the evidence of texts or experts that those instances have occurred in pursuance of a recognized custom, in order to link the present with the past.

11. In *Rup Chand v. Jambu Prasad* I.L.R(1910) All. 247 their Lordships of the Privy Council said: "the question in the present case was...whether a custom applicable to the parties concerned and authorizing the adoption of a married boy has been established. This is strictly speaking a pure question of fact determinate upon the evidence given in the case. It was strenuously contended that the evidence in the present case, limited as it is to a comparatively small number of centres of Jain population, was insufficient to establish a custom so wide as this, and that no narrower custom was either alleged or proved. In their Lordships' opinion there is great weight in these criticisms enough to make the present case an Unsatisfactory precedent, if in any future instance fuller evidence regarding the alleged custom is forthcoming. But with regard to the relative rights of the parties in the present case who have had full opportunity of

producing whatever evidence they desired to produce, the case was properly dealt with by the High Court upon the evidence before it." Again in *Chiman Lal v. Hari Chand* I.L.R (1913) cal. 879, their Lordships said : " the evidence upon which it was found that the Agarwal Banias of Zira do not in matters of adoption follow the general rules of Hindu Law, and that by the custom applicable to them an unequivocal declaration of adoption, followed by subsequent treatment of the person as an adopted son, is sufficient to constitute a valid adoption, appears to their Lordships to have been somewhat limited, but their Lordships consider that, as between the parties to this suit and...appeal and those claiming through or under them, that evidence was sufficient to entitle the Chief Court and the Divisional Judge to find that the adoption was valid."

12. If, then, the evidence shows that for a certain number of years, and some cases appear to lay down as a useful guide a period of twenty years, there have been a number of instances in which the alleged custom has been recognized, the presumption arises that the parties concerned have acted in that manner, not from the desire to set up a new custom, but because they are acting in accordance with the tradition of immemorial usage (*The King v. Joliffe* (1823) 2 B. & C. 54; *Brocklebank v. Thompson* (1903) 2 Ch. 344 and as long as texts are not cited and experts called to negative the alleged custom, it is unnecessary to cite texts or call experts to support it. I think it was unfortunate that the issue sent down by the High Court prescribed geographical limits which cannot be strictly defined and no doubt there would be some difficulty in holding that the evidence established that all the Jains in Western India, including at any rate the Presidency proper recognized the custom set up by the defendant, considering that evidence was confined to a few instances in two or three Districts in the Southern Mahratta Country and a few instances from the Idar State. On the other hand it was open to the plaintiffs to call the evidence of Pandits and elders of the Jain community to show that the validity of orphan adoption was not recognized by them, and it is a significant fact that the evidence which they did call to negative the custom was, as pointed out by the learned Assistant Judge, not entitled to any credence whatever. Some of the witnesses had actually attested the adoption deed. The minor of course was too young, when the suit was instituted, to know what was being done in his name, and there is little doubt that the defendant's adoption was challenged owing to his own conduct in dealing with the estate. I do not think, therefore, that it would be safe to say that the issue sent down by the High Court should be found in the affirmative, but I think it may be said that the evidence was sufficient as between the parties to the suit and those claiming through and under them to entitle the Court below to dismiss the plaintiff's suit.

13. The appeal is dismissed with costs.

Fawcett, J.

14. In *Bhagvandas Tejmal v. Rajmal* (1873) it was laid down that, when, in the case of Jains, some custom different from the the normal Hindu law and usage is

alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion. This case gave very little encouragement to the idea that Jains in this Presidency had any custom differing from ordinary Hindu law. But it was pointed out by their Lordships of the Privy Council in *Sheo Singh Bai v. Dakho* I.L.R(1878) All. 688 that the custom alleged in *Bhagvandas Tejmal v. Rajmal*, being a custom entirely opposed to the spirit of Hindu law of adoption, would undoubtedly require strong evidence for its support, and that it would be unreasonable to exclude Jains from the ordinary liberty of proving special customs. Accordingly they held that the question whether among the sect of the Jains known as Saraogi Agarwalas a sonless widow could adopt without permission from her husband or consent of his kinsmen and whether she could adopt the daughter's son was one which had been rightly held to be proved by the evidence given in that case. It is now fully recognized that among the Jains adoption is a mere temporal or secular arrangement and has no spiritual or religious object or significance: and consequently several variations from the ordinary Hindu law have been judicially upheld as valid among them. In *Asharfi Kunwar v. Rup Chand* I.L.R (1908) All. 197 the Court in its judgment says: " In view of the fact that the Jains dissented from Hinduism more than two and a half centuries ago, (sic. should be "2 1/2 millennia") at a time when, so far as the authorities go, no trace of the restriction of marriage existed in the matter of adoption, and seeing that in primitive times, the practice of adoption had no religious basis; also in view of the fact, which is admitted, that the practice of adoption amongst the Jains is necessarily unlike that observed amongst the Bramins and Vaishiyas, as we have already pointed out, it might be thought that the onus of proving the existence of a restriction upon adoption in the case of the Jains such as prevails amongst Hindus proper lay upon the party making this assertion." Such an assumption cannot of course prevail in view of the ruling of the Privy Council that in the case of Jains it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation. But if the recognition of the different stand-point that governs adoption in the case of Jains from that applying in the case of orthodox Hindus cannot go so far as is suggested in the passage I have just quoted, yet it seems to me that in this case the Court may legitimately give due weight to the fact that the restriction against the adoption of orphans imposed by Hindu law would not naturally operate in the case of Jains. That restriction follows from the rule of Hindu law that only a father or mother can give in adoption and that there must be a giving and taking of the adopted son. But as among the Jains adoption is purely a secular institution, the reason for such a restriction disappears and the ceremony of giving and taking may be dispensed with : *Chiman Lai v. Hari Chand* I.L.R(1913) Cal. 879. We have the further fact that in the last mentioned case an adoption of orphans has been recognized as valid in the case of Agarwala Banias by the Chief Court of the Punjab and the Privy Council. As pointed out in the judgment of the lower Court, it is quite clear that the Agarwalas there referred to are Jains; and such Agarwala Jains figure also in *Sheo Singh Rai v. Dakho* I.L.R(1878) All. 688

and Asharfi Kunwar v. Rup Chand I.L.R (1908) All. 197. Another case in which an orphan adoption has been judicially upheld is that of Manak Chand v. Munna Lal (1909) 4 I.C. 844 where the parties were Jains of Delhi belonging to the Agarwalas sect. As remarked by the District Judge in the first judgment of the lower Court, it is not improbable that the Jains of Idar State, whence the parties in this suit come, would follow the customs of Delhi rather than those obtaining in Southern India. Steele in his Law and Custom of Indian Castes, page 97, states that the Jains in the Southern Mahratta Country came originally from near Delhi. These decisions therefore support the customs alleged in the case. The Jains are a scattered community, and in Harnabh Pershad v. Mandil Dass I.L.R(1899) Cal. 379 it was held that judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom among the Jains of another place, unless of course it is shown that the customs are different. This applies with considerable force to the present case in view of the probability that the southern Mahratta Jains originally came from the vicinity of the locality where the alleged custom has been held to exist. Also, so far as public policy affects the matter, there can be no question that it favours the adoption of an orphan.

15. In the case before us the two lower Courts have held the alleged custom permitting the adoption of orphans to be established as a valid one. The main question is whether there is sufficient ground for our interfering with this finding in second appeal. The Privy Council have more than once held that, whether a custom is proved, is mainly a question of fact. Cf. Muhammad Kamil v. Imtiaz Fatima I.L.R(1909) All. 557 and Rup Chand v. Jamhu Prasad I.L.R(1910) All. 247. Accordingly in Kailash Chandra Datta v. Padmakisore Roy I.L.R(1917) Cal. 285 it was held, on a review of all the authorities, that the question whether the facts found in any given instance prove the existence of the essential attributes of the custom or usage is a question of law which might be discussed in second appeal, while the question whether such a state of facts has been proved by the evidence is merely a question of fact. A case in which the same view was taken by this Court is that of Bai Shirinbai v. Kharshedji I.L.R (1896) Bom. 430. Therefore, in my opinion, the only question we can enter into in this appeal is whether the finding in favour of the custom is based on legal and sufficient evidence. The legal attributes of a custom on which stress is laid in *Bhagvandae v. Rajmal*, are antiquity and invariability; but the latter of these has no application to the present case. As is pointed out in the first judgment of the lower Court, Jains do not invariably adopt orphans, and there is no question of an invariable custom such as, for instance, primogeniture. The learned Advocate General for the appellants has mainly attacked the finding of the lower Courts on the grounds that the evidence is not sufficient to prove the antiquity of the alleged custom. The oldest instance of adoption regarding which evidence has been given in this case is one that took place some thirty-five years ago, and it is contended that the instances were too recent to establish the alleged custom. But in dealing with this question there are two circumstances which must be given due weight. The

first is that the Jains in the Bombay Presidency are a small community whose number has been decreasing of recent years. In the Census of India 1911, Vol. VII, Part I, page 56, it is stated that the followers of Jainism showed a decrease in numbers of 20,000 in the decade of 1891-1901 and this falling of has continued and appreciably increased so that they then numbered 44,000 less than in 1901, a decrement of 9 per cent. As already mentioned Jains are not obliged to adopt orphans, and therefore I agree with the learned District Judge in the Court below that it is unreasonable to expect numerous instances in support of the alleged custom. Then we have the further fact that the class of Jains to which the parties in this suit belong consists of petty traders or cultivators, who are generally illiterate. In the Census Report, to which I have already referred, it is stated, at page 140, that the ratio of literate Jains in the Karnatak is only 158 males and 7 females per thousand of each sex, and it is added that "the Jains in the Karnatak are indistinguishable both in appearance and dress from the local cultivators, and the comparatively low ratio of literacy is due to racial causes. " It follows that they are not likely to keep records of family matters such as adoption in past generations; and in *Asharfi Kunwar v. Rup Chand* I.L.R.(1908) All. 197 the Court pointed out that it could not expect to find records of adoptions in the case of Jains such as might be met with in the case of land-owners. Therefore it is not surprising that the only evidence in support of the custom adduced in the present case consists of instances that have occurred within the present generation. Similarly in the cases of *Manohar Lal v. Banarsi Das* (I.L.R(1907) All. 495 and *Asharfi Kunwar v. Rup Chand* I.L.R(1908) All. 197, where the custom of adoption of a married man was held established, the instances adduced do not appear from the judgment to have gone back beyond some thirty to thirty-five years. In *Chiman Lal v. Hari Chand* I.L.R(1913) Cal. 879, where the adoption of the plaintiff who was an orphan and married was held valid, the evidence is stated in their Lordships' judgment to be "somewhat limited." Halsbury's Laws of England Vol. X, Article 442, at page 234 says that as a general rule proof of the existence of the custom, as far back as living witnesses can remember, is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial, and that evidence of the existence of the alleged custom for a period of twenty years may be sufficient to warrant a Court in finding as a fact the existence of the custom from time immemorial. A similar rule was applied to Hindu usages by Gray, C.J. in a judgment delivered so long ago as 1831, a quotation from which is given in Roy's Customs and Customary Law in British India at pages 27 and 28, and which is referred to in *Ambaliku Dasi v. Aparna Dasi* I.L.R(1918) Cal. 835. In that case he held that it was sufficient in Calcutta to go back to 1773, and that "a usage for twenty years may raise a presumption, in the absence of direct evidence, of a usage existing beyond the period of legal memory." Accordingly and in view of the strong antecedent probability in favour of the adoption of such a custom by Jains for reasons already given, I think, a presumption arises in favour of the antiquity of a custom, of which instances extending over a period of some thirty years are forthcoming, I agree, therefore,

with the learned Chief Justice in holding that there is no sufficient ground for our differing from the view taken by the two lower Courts that the adoption of the defendant was valid. In view, however, of the limited nature of the evidence adduced in the present case, I also agree that the issue which was framed in this Court's interlocutory judgment of 18th November 1918, which is unnecessarily wide for the purpose of deciding this case, cannot be answered entirely in the affirmative. But as the evidence adduced in the present case was sufficient as between the parties to the suit to entitle the Courts below to dismiss the plaintiff's suit, I concur in dismissing the appeal with costs.