
(1957) 04 BOM CK 0007
In the Bombay High Court
Case No : First Appeal No. 163 of 1950

Pralhad Sheonarayan Chokhani	Vs	APPELLANT
Damodhar Rankaran Vaishnao and Others		RESPONDENT

Date of Decision : 02-04-1957

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103, 104, 114
Succession Act, 1925 — Section 57

Citation : AIR 1958 Bom 79 : (1957) 59 BOMLR 1178 : (1958) ILR (Bom) 970

Hon'ble Judges : Tambe, J;Mudholkar, J

Bench : Division Bench

Advocate : V.L. Prabhune and M.R. Bobde, for the Appellant; N.L. Abhyankar, A.V. Khare, K.V. Tambe and T.B. Pendharkar, for the Respondent

Judgement

Tambe, J.—This appeal of the plaintiff is directed against the dismissal of his suit by the trial Court.

2. The dispute now relates to the immovable property left by one Mahadeo as described in Schedules A to C of the plaint. No dispute was raised before us in respect of the movable property shown in Sch. D of the plaint. The contest chiefly lies between the plaintiff, the son of the deceased Mahadeo's daughter Anchi on the one hand, who claims to be the next reversioner on the death of all the daughters of Mahadeo, and the second defendant Jainarayan on the other, who claims the property under the oral will of Mahadeo and also as his adopted son. The claim of Jainarayan is supported by the 14th defendant Kukhminibai who is the daughter of Mahadeo's deceased daughter Narbada, and also by the first defendant Damodhar, who is the son of Mahadeo's another deceased daughter Saraswati. Defendants Nos. 5, 6, 7, 9, 11 and 12 are only the tenants of the portion of the suit properties. They plead that they have taken this portion from the second defendant and claim no interest in the suit property. They have also stated that they are willing to deliver possession of the portion in their respective possession to the person held entitled thereto. Defendants 3 and 4 are

transferees of the second defendant Jainarayan and they support Jainarayan's case. They also support the sale in their favour on the ground of legal necessity. Defendant No. 10 was discharged during the pendency of the suit. It is not clear from the plaint why defendants 8 and 13 were joined as parties to this suit. No contest, however, is raised on their behalf before us.

3. The following genealogical tree will be helpful in appreciating the dispute raised in the case.

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BADRINARAYAN
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Ganeshram Gulabehand Mahadeo Ramkaran Hajarimal | (d. 13-10-30) (d. 12-3-40) | | ----- --- | | | | Mathuradas Jainarayan Hanumandas Champal ----- | | | Narbada Saraswati Anchi (d. 14-4-37) (d. 1936) (d. 4-12-33) | | | Rukhman Damodhar Pralhad (delt. 1) (plff.)

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It is common ground that Mahadeo was separate in mess and estate from his brothers and the property in dispute is his separate property. Mahadeo died on the night of 13-10-30, leaving behind three daughters, Narbada, Saraswati and Anchi, and the suit property. All the three daughters were married prior to his death and had died before 15-8-1945 when the suit was instituted. The family of Mahadeo belongs to the sect known as "Vaishnao Bisa Agarwal".

4. The plaintiff's case was that the family of Mahadeo belonged to Jaipur in Rajputana (Marwar) and has migrated from there to Berar and is thus governed by Benares School of Hindu Law. On Mahadeo's death, his daughters succeeded to his property but had only a limited interest therein. Out of these daughters Narbada died last and on her death, the plaintiff and the first defendant Damodhar became the full owners of the property left behind by Mahadeo, owning equal shares therein. The plaintiff, therefore, claims separation and possession of his half share in the suit property. He also claims accounts from the second defendant of the income of the suit property which is in his possession, Plaintiff also denies the alleged oral will of Mahadeo and the adoption of the second defendant by Mahadeo under which he claims to be in possession of the property. Plaintiff also challenges the deed dated 28-10-1930 executed by the second defendant Jainarayan and the daughters of Mahadeo under which separate items of Mahadeo's property have been allotted to each of the three daughters of Mahadeo and to Jainarayan. The plaintiff pleads that the contents of the document are pure inventions. According to him, the document is merely a device to divide the property amongst the second defendant and the three daughters of the deceased Mahadeo. Also according to him the document was not executed by the daughters of their free will and that they were merely tools in the hands of designing persons including the second defendant. In the alternative, the plaintiff pleads that the document was executed by the daughters in ignorance of their lawful rights. On these grounds the plaintiff pleads that the document is not binding on him. It is also pleaded on behalf of the plaintiff that

the adoption, if any, of Jainarayan was not valid in law as he was an orphan at the time of the adoption and a married man. The factum of adoption also was denied.

5. The defence raised was as follows; That the family of Mahadeo originally belonged to Agroha in Hissar district of Punjab. From there it migrated to Jaipur in Rajputana and from there it came to Yeotmal in Berar. In matters of succession and adoption, the family is not governed by the Banares School of Hindu Law but by the customary law prevailing in the sect of Agarwal Banias to which Mahadeo belonged. According to the customary law, daughters and their issues are excluded from inheriting the property of their father. The principle underlying is that the gaddi of the deceased should be taken and continued by a male member of the family and should not go in the daughter's family. There is also a custom of nominating a successor to the property in order that the gaddi should not remain vacant. Such a successor is generally selected to and nominated by the deceased himself during his life-time from out of the male members of his family. In case where the deceased is unable to nominate his successor, one is appointed by the relatives of the deceased and/or panchas after the latter's death. After such nomination or appointment a turban is tied to the nominee even after the death of the person nominating. On tying the turban, such a nominee or appointee becomes a legally adopted son or at any rate a legal heir and successor of the deceased, even apart from his adoption, and is recognised as such. Even a married man or an orphan can be so nominated. In accordance with this custom, Mahadeo had on 13-10-1930 expressed his last wish in the presence of his daughters and others nominating the second defendant as his successor and had given a direction that a pagdi be tied to Jainarayan, the second defendant. In accordance with this direction, Mahadeo's pagdi was tied to Jainarayan on the 13th or 14th day of the death of Mahadeo. The second defendant had thus become the adopted son of Mahadeo and in that capacity was entitled to Mahadeo's property as his adopted son or at any rate in his capacity as the successor as nominated by Mahadeo. It is also pleaded that Mahadeo had made an oral will on the 13th morning whereunder he had given certain house property to his daughters and rest of his property to the second defendant. According to these wishes, the property given to the daughters was put in their possession and the rest of the property was taken possession of by Jainarayan. The property so given to the daughters and Jainarayan is mentioned in the document dated 28-10-1930 validly and properly executed by the daughters of Mahadeo and Jainarayan. The first, the second and the fourteenth defendants thus claim ownership of the property under the will also of the items of the properties in their respective possession.

6. The trial Court held that the family of Mahadeo originally belonged to Agroha in Hissar district in Punjab. From there it migrated to Jaipur in Rajutana (Marwar) and thereafter it migrated to Berar. In matters of adoption it was not governed by Benares School of Hindu Law but by the customary law prevailing among the sect to which Mahadeo belonged. According to this customary law, adoption of a

married man and an orphan was permissible. No particular ceremony was required to be performed for adoption, but the tying of a turban was sufficient to constitute a valid adoption. This tying of the turban could be performed even after the death of the adoptive father if he had left behind instructions to adopt any person as a son to him. The trial Court, however, held that the defendants have failed to prove the custom which excludes the daughters from inheritance and the custom which permits even the panchas or castemen to nominate a successor to the deceased. The trial Court further held that Mahadeo had made a valid oral will disposing of his property as pleaded by the defendants. It further held that Mahadeo had given a direction that Jainarayan should be adopted as his son and in pursuance of this direction Mahadeo's pagdi was tied to Jainarayan on 28-10-1930 and thereby he had become a validly adopted son of Mahadeo. The trial Court has also held that the document dated 28-10-1930 was executed by the daughters of Mahadeo knowing full well their legal rights and was not a result of any fraud or misrepresentation practised on them by Jainarayan or any other person. On these findings the trial Court dismissed the plaintiff's suit except in respect of his one-third share in the property given by Mahadeo to his daughters. Hence this appeal.

7. The findings of the trial Court regarding the factum of tying Mahadeo's pagdi to Jainarayan on 28-10-1930 and the genuineness of the deed of 28-10-1930 are not disputed before us. All other adverse findings are challenged by the appellant. On behalf of the respondents the decree in their favour is supported before us on the following grounds:

(1) An oral will by Mahadeo on 13-10-1930 bequeathing a portion of his property to his daughters and the remainder to Jainarayan, and

(2) The adoption of Jainarayan to Mahadeo according to the aforesaid customary law. The following points for determination, therefore, arise in this appeal.

(1) (a) Was an oral will made by Mahadeo on 13-10-1930 giving certain house property to his daughters and the rest of the property to Jainarayan?

(b). Did Mahadeo on the same day nominate Jainarayan for being adopted as a son to him and instruct that his turban be tied on his head?

(2) Did the family of Mahadeo originally belong to Agroha in the Hissar district of Punjab and from there did it migrate to Jaipur in Rajputana (Marwar) and thereafter to Berar?

(3) Was Mahadeo's family governed by the alleged customary law in matters of adoption?

(4) Was Jainarayan validly adopted according to the said custom?

8. As regards the first question, reliance is placed by the learned counsel for the respondents on the oral evidence of the second defendant Jainarayan, Mohanlal (2 D.W. 11), Jethibai (2 D.W. 14), Kanhayalal (2 D.W. 19) and the 14th defendant

Rukhminibai, and the document dated 23-10-1930. It is not in dispute that it was permissible under law to Mahadeo to dispose of his property by an oral will. Indian Succession Act was not made applicable to Berar even on the date of Mahadeo's death, and he was, therefore, capable in law to dispose of his property by an oral will. It is, however, to be remembered, as observed by their Lordships of the Privy Council, that in dealing with the case of an oral will it is beyond doubt that the burden of proving an oral will rests very heavily on the person who is desirous of propounding the oral will. Their Lordships of the Privy Council in *Baboo Beer Pertab Sahee v. Rajender Pertab Sahee* 12 Moo Ind App 1, observed that he who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place. Now the plea raised is that this oral will was made by the deceased Mahadeo on the morning of 13-10-1930 and he also gave instructions for adopting Jainarayan as a son to him. There is abundant evidence in this case that Mahadeo had called a number of people to his bedside on that morning as he was then feeling uncertain about his health and had left behind certain instructions in their presence. But the real question is what were those instructions. None of the witnesses except two, have deposed to the words said to have been uttered by the deceased Mahadeo at that time. One is Kanhayalal (2 D.W. 19). This Kanhayalal is the husband of Mahadeo's daughter Narbada. Narbada was alive at the time of the death of Mahadeo. Kanhayalal deposes that he had received a telegram about Mahadeo's illness, asking him to come to Yeotmal. He accordingly left his place along with his wife Narbada and his daughter Rukhminibai, the 14th defendant, and arrived at Yeotmal at about 6 or 7 p.m. on 12th. That evening Mahadeo told him that he intended to give two houses to his three daughters and rest of his property to Jainarayan and the next morning, that is on the 13th Mahadeo asked him to call the panchas. He then called certain people whose names he gives in his evidence, and in their presence Mahadeo declared that he had given two houses to his three daughters and rest of his property to Jainarayan to whom his pagdi should be tied after his death. In cross-examination he deposes to the words:

^^ E;kjh rfc;r cjkcyj ugha lks ;s rhuks ekekus nks
 edku fnuk gS- vkSj ^ckdh dh lc bLVsV dks ekyd t;
 ukjk;.k* fnuks Ns- bFks ixMh ca/kk fntks t; ukjk;.kuss
 ekjs xksn nhuks Ns- **

(Underlining (here in "... ") is by us) As regards the words uttered by Mahadeo on the 13th morning in the presence of the people-of the village, Rukhminibai, daughter of Kanhayalal and grand-daughter of Mahadeo, deposes as under:--

^^ rhu eqyh vkgsr R;kuk nksu nqdkus nsrks ^ckdh loZaaaa
 bLVsV nss.ks ?ks.ks dtZ ek>~;k xknhpk ekyd t; ukjk;.k*

vkgs R;kl nsrks- ek>h f?;k oxSj loZ t; ukjk;.kp

djhy- ek>h ixMh R;kyk cka/kk-**

(Underlining (here in "...") is by us)].

9. It was urged that according to the testimony of Kanhayalal, Mahadeo then spoke in Marwadi language, while according to the testimony of Rukhminibai the words were uttered in Marathi language by Mahadeo, and this shows that the witnesses are not deposing to the words uttered by Mahadeo. It is pertinent to note that the answer given by Kan-hayalal to a question which must have been put to him before he was asked to depose to the words uttered by Mahadeo, related to the language in which he spoke, and Kanhayalal reproduced the words according to his recollections in the language uttered by Mahadeo. No such question was put to Rukhminibai immediately before she was asked to depose thereto, and therefore she reproduced the words, according to her recollection, not in the language uttered by Mahadeo but most probably in the language in which she was answering questions. We see no reason to discard the testimony of these two witnesses in respect of the instructions given by Mahadeo on the morning of 13-10-1930 on this ground.

10. But, in our view, these instructions do not amount to a disposition by an oral will of any property to Jainarayan though it amounts to a disposition of his two houses by way of an oral will in favour of his three daughters. It is to be noted that when these instructions are taken as a whole, it is clear that Mahadeo was not desirous of giving any property to Jainarayan independently of his capacity as an adopted son, i.e., malik of his gaddi. The property directed to be given to him was given only in his capacity as an adopted son. It is to be noted that he had not only declared that Jainarayan would become the owner of the property other than the two shops given to the daughters, but he had also directed that Jainarayan should pay his dues and should tie his pagdi and he had also given instructions that his pagdi should be tied to Jainarayan as he was desirous of adopting him. Further the document which was executed both by the daughters as well as by Jainarayan on 28-10-1930 shows that the instruction left behind by Mahadeo making Jainarayan owner of his property other than the two houses was not independent of his capacity as an adopted son. The following two relevant portions from this deed make the position clear:

"And, it was the desire of his heart that Jainarayan should get some of his estate, and that he should continue his name as his father. And, therefore, he gave instructions about the disposition of his estate..... In case Jainarayan does not continue the name Jainarayan son of Mahadeo (Mahadeo Jainarayan according to Marwadi style), then Nos. 1-2-3 daughters of Mahadeoji have got full authority to demand back by right of inheritance Mahadeoji's estate given to him."

Thus, it is clear that what Mahadeo intended to give Jainarayan was only an estate inheritance on his accepting the position of an adopted son of Mahadeo by

tying his pagdi. The other oral evidence on which reliance is placed on behalf of the respondents does not make the case any further than the evidence of Kanhayalal and Rukhminibai. Disagreeing with the finding of the trial Court, we hold that Mahadeo, by an oral will, had given only two houses, known as shops, to his daughters. He had not given any property to Jainarayan irrespective of his accepting the position of an adopted son of Mahadeo by tying his pagdi. He had also nominated Jainarayan for being adopted as son to him and for that purpose had given instructions that his pagdi be tied to Jainarayan. This property which is given to the daughters is shown in the deed dated 28-10-1930 (Ex. P-I), which is item No. 1 of Sch. A of the plaint. No dispute as regards the identity of this property was raised before us if the oral will was upheld by us. The second defendant therefore, can succeed in this case only if he is able to establish that he is the validly adopted son of Mahadeo in accordance with the custom prevailing amongst Agarwal Banias.

11. It is urged on behalf of the appellant that this evidence should not be accepted. According to learned counsel, the evidence of the witnesses examined on behalf of Jainarayan shows that Mahadeo wanted to adopt Jainarayan since a long time before his death; that if really this was so, Mahadeo would have adopted him during his life-time; that Jainarayan also was not residing with Mahadeo; and that this shows that Mahadeo never intended to adopt him. He characterised the evidence put forward on behalf of defendant No. 2 as a got-up one. In our view this contention has no force. If there is a custom as alleged by Jainarayan that a person can nominate his successor and if he does so, his turban can be tied on the head of the nominee even after his death and the nominee thereby becomes his adopted son, then it is easy to understand why the adoption was not made during the life-time of the person making the nomination. This conduct of Mahadeo, therefore, in not adopting Jainarayan during his life-time does not militate against the probative force of the evidence of these witnesses.

12. This brings us to the second question. As already stated, according to the plaintiff, Mahadeo's family belonged to Jaipur in Raj-putana (Marwar), while, according to the defence, the family originally belonged to Agro-ha in Hissar district of Punjab and from there it first migrated to Jaipur and then to Berar. The family belongs to a sect known as "Vaish-nao Bisa Agarwal". From amongst the relations of Mahadeo, the second defendant, besides himself, has examined Ramkaran (2 D.W. 13), husband of Mahadeo's daughter Saraswati, and Kanhayalal (2 D.W. 19), husband of Mahadeo's daughter Narbada. These witnesses depose that Mahadeo's family originally belonged to Agroha in Hissar district in Punjab. Besides these members of the family, the second defendant has examined other witnesses, namely Bhurmal (2 D.W. 2), Gangadhar (2 D.W. 4), Champalal (2 D.W. 5), Brijmohan (2 D.W. 8), Nathmal (2 D.W. 9), Mohanlal (2 D.W. 11), Ke-darmal (2 D.W. 15), Mulchand (2 D.W. 16) and Ramkuwar (2 D.W. 18), who all depose that Agarwals originally belonged to Agroha Situated in Hissar district in Punjab- Russell in his book The Tribes and Castes of the Central

Provinces of India", Vol. II, p. 136, while dealing with the people belonging to the Agarwal Sect, observed:

"This is generally considered to be the highest and most important sub-division of the Banias. They numbered about 25,000 persons in the Central Provinces in 1911, being principally found in Jubbulpore and Nagpur. The name is probably derived from Agrona, a small town in Hissar District of the Punjab, which was formerly of some commercial importance." He further observed that Agarwals trace their descent from one Raja Agar Sen who is said to have ruled both over Agra and Agroha. These observations of Russell support the defence. As against this evidence, the plaintiff has not examined any witness related to the family of Mahadeo except his (plaintiff's) father. The plaintiff's father has deposed that the family came from Nawalgad in Shekhawati area in Jaipur State. He, however, contrary to the plea raised by the plaintiff that in matters of succession and adoption Mahadeo's family was governed by Benares School of Hindu Law, deposes that in matters of succession and adoption the family is governed by customs obtaining in Shekhawati or in Jaipur State. His evidence, therefore, makes it clear that in matters of adoption the Agarwals are not governed by the Benares School of Hindu Law but by a customary law.

13. Shankarlal (P. W. 1), who belongs to the Agarwal Sect, in his cross-examination admits that Agrasen is regarded as the original ancestor of Agarwals and this Agrasen is reported to have belonged to Agroha. Some members of the community say that this Agroha is situated in Punjab and the others say that it is in Rajasthan. The evidence of Shankarlal to a certain extent supports the evidence led on behalf of the defence though it does not go to the full extent. Labhchand (P. W. 3) who is related to the plaintiff, frankly admits that their ancestors originally belonged to Agroha in Hissar district in Punjab. His evidence fully supports the defence on this point. Mathuradas (P. W. 4) in his cross-examination admits that Agarwals trace their descent from King Agrasen. He also admits that he had been told by his elders that the original place of Agarwal is Agroha in Hissar district in Punjab. The other witness Balraj, examined on commission on behalf of the plaintiff, also admits that he had heard that all Agarwals claim their origin from Agroha in Hissar district in Punjab and they claim to be descendants of Raja Agrasen. Thus it may be said that except the plaintiff's own father Shri Narayan, the rest of the witnesses of the plaintiff support the defence in this respect. We, therefore, agreeing with the trial Court, hold that the family of Mahadeo originally belonged to Agroha in Hissar district in Punjab and therefrom it migrated first to Jaipur in Marwar and then to Berar.

14. Now, it is well settled that if nothing is known about a person except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place, but if more is known, then in accordance with that knowledge his personal law must be determined unless it can be shown that he has renounced his original law in favour of the law of the place to which he has migrated. In other words, when such an original variance of law is once

established, the presumption arises that it continues and the onus of making out lies on those who assert that it has ceased by conformity with the law of the new domicile. Now, in the instant case it is not the plea of the plaintiff that on migration to Jaipur or Yeot-mal the family of Mahadeo, or Agarwala in general, had conformed in its religious and social usages, to the locality in which it had settled. As already stated, we have found that Mahadeo's family originally belonged to Agroha and from there it migrated. The family, therefore, will, in the matter of adoption, be governed by the law prevailing in Hissar district so far as it is in variance from the law of the domicile.

15. This brings us to the consideration of the custom alleged by the defendants in support of their case. In our opinion, the rest of the points for determination i.e. Nos. 3 and 4 can conveniently be considered together. Sir W. H. Rattigan at page 492 of his book "A Digest of Customary Law in the Punjab" 13th edition, observes :

"In the Punjab adoption under customary Law is different from adoption under Hindu Law in many respects. The latter is founded on a spiritual idea, varying from the belief that a son is necessary to save a man's soul from the "Hell called Pat", to the very natural feeling of regret that your line should become extinct; that there should be no one to represent you in the family gatherings and offer the "pind". The essence of the Hindu adoption being true sonship, all the rules regarding it are intended to give effect to this idea. The person adopted must be a mere infant; his mother must be a person whom the adopter could have married; there is a formal transfer of the patria potestas from the natural to the adoptive father; there is the same religious ceremony as at the birth of a son; in short, the only difference between the adopted and the natural son is the one which cannot be obliterated by the birth itself.

X X X As has already been observed, adoption under customary law in the Punjab is quite distinct from adoption under Hindu Law. Adoption under custom is no more than a customary appointment of an heir, and consequently religious rights are not necessary to constitute a valid adoption "even among Hindus of non-agricultural classes. The really important thing is the unequivocal intention and treatment." (Underlining (here in " ") is by us).

X X X Thus one of the essential requirements for the validity of an adoption is that it should be made public. And this can be effected either by a formal declaration before the clansmen, or by a written declaration, either preceded or followed by some treatment consistent with a deliberate appointment, or by a long course of treatment, "evidencing an unequivocal intention to appoint the specified person as heir.""

At page 528 it is further observed that under the customary law adoption of an orphan is generally not considered as valid.

16. The aforesaid book of Rattigan is a well-known authoritative publication on the customary law of Punjab. It is true that the custom even in Punjab varies

from tribe to tribe and from one locality to another. It is, therefore, necessary to see how far the aforesaid custom prevails amongst the Agarwals. In an article "Adoption among Marwari Agra-wals" AIR 1937 PC 80, Lala Chiranjilal Agarwal. M. A., LL. B., observes that an adoption among the Agarwals is purely a secular affair, not being regarded as an act of any religious sanctity; "that no ceremony is necessary for adoption except tying oi turban on the head of the adoptee or distribution of cocoanuls and sweets; that there is not much difference between Vaishnavas and Jains and whatever difference there might be between them in rituals of worship there does not appear to be any in the rules relating to the adoption recognised by the caste as a whole; and that there is no bar of marriage or age for the purpose of adoption". (Undeiling there in "...") is by us.) This article of Mr. Agarwal has been cited with approval by a Division Bench of the Nagpur High Court in AIR 1948 398 (Nagpur) .

17. Thus it is clear that amongst Agarwals", either Vaishnavas or Jains, adoption is purely a secular affair. No ceremony is necessary for an adoption except tying of turban on the head of the adoptee or distribution of cocoanuts.

18. It is next necessary to consider how far an adoption of an orphan is accepted among the Agarwal sect, who has migrated from Punjab. In *Chiman Lal v. Hari Chand* ILR 40 Cal 879 , the dispute was raised regarding the adoption of an orphan in an Agarwal Bania family of Zira in Punjab. The validity of the adoption depended upon whether they were governed by customary law or by Hindu Law. The case went up before the Judicial Committee of the Privy Council. The Courts below had concurrently found that in the class to which the parties belonged the rules of Hindu Law as to adoption did not apply, and that by the customary law applicable to that class an unequivocal declaration by the adopting father that a boy had been adopted, and the subsequent treatment of that boy as the adopted son was sufficient to constitute a valid adoption. The Courts below further held that, according to the custom, the plaintiff who was an orphan at the time of his adoption was validly adopted. Their Lordships of the Judicial Committee affirmed tnis decision. They, however, owing to the limited nature of tne evidence tendered in that case as to the custom among Agarwal Banias of Zira, confined the eilect ot their decision to that particular case.

19. The question again came up before this Court in *Parshottam Ganpat v. Venichand Ganpat* ILR 45 Bom 754: AIR 1921 Bom 147, wherein the adoption of an orphan was upheld. The parties were Agarwal Jains then residing in Western India. At p. 763 (of ILR Bom): (at p. 150 of AIR), it is observed :

"But if the recognition of the different standpoint 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 passages 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 ILR 40 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 ILR 1 All 688, and Asharfi Kunwar v. Rup Chand, ILR 30 All 197 . Another case in which an orphan adoption has been judicially upheld is that of Manak Chand v. Munnalal 4 Ind Cas 844, where the parties were Jains of Delhi belonging to the Agarwala 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 this case. The Jains are a scattered community and in Harnabh Pershad v. Mandil Dass ILR 27 Cal 379 , it was held that Judicial decisions recognising 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." (Underlining (here in "..") is by us)

20. In view of the aforesaid two decisions of the Judicial Committee of the Privy Council we do not propose to discuss the other decisions cited by the learned counsel for the respondents. They also do not relate to an adoption of an orphan in Agarwal sect though in those decisions an adoption of an orphan was upheld amongst other communities residing in or migrated from Punjab.

21. The learned counsel for the appellant relies on the decisions in Bhagvandas Tejmal v. Rajmal 10 Born HCR 241; AIR 1925 118 (Privy Council) ; Ramdayal v. Chaturbhujlal, S. A. No. 730 of 1946 D/- 12-4-1955: AIR 1957 Nag 79, in support of his contention that amongst Agarwals there is no custom recognising an adoption of an orphan. In our opinion, the aforesaid decisions do not support his proposition. In Bhagvandas Tejmal v. Rajmal (J) (supra), the parties to the suit professing Jain religion were at the material time residing at Ahmadnagar in Bombay Presidency, One Tejmal had three sons who survived him. Of these Lachimandas was the eldest. He died in 1867, without issue, but leaving a widow Hirabai, who survived him and died in September, 1868. The two other sons of Tejmal-Ganeshdas and Bhagvandas -- were the defendants in the case. Some time previous to her death Hirabai widow of Tejmal was desirous of adopting a son. In her last illness she decided to adopt Rajmal, the son of Ganesh-das, but

she died without adopting him. Ganeshdas, Bhagvandas and some other persons appeared to have given, with certain ceremonies, Rajmal as adopted son to his uncle Lachimandas and aunt Hirabai. On the same day a deed purporting to be a deed of adoption was executed by Bhagvandas. Rajmal brought that suit to establish his sole right to the property left by Lachimandas and Hirabai as their adopted son. He, in support of his adoption, relied upon custom of Jain Marwadi caste, as well in Marwad, as in Ahmadnagar. Rajma's natural father Ganeshdas did not question the validity of the adoption. Bhagvandas, however, contended that the adoption was invalid under Hindu Law. Their Lordships of the Privy Council dismissed the plaintiff's suit on the ground of the insufficiency of evidence tendered in that case on behalf of the plaintiff. At page 264 of the Report it is observed :

"There are then but three perfect instances established in proof, and of these, the most remote happened less than 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 of authority amongst the Jainas 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."

All that their Lordships held was that the custom could not be said to have been established by the evidence adduced in the case before them. They did not hold that there could be no such custom at all. The aforesaid remarks were considered by another Division Bench of this Court in ILR 45 Bom 754: AIR 1921 Bom 147 . Macleod C. J. at p. 759 (of ILR Bom): (at p. 149 of AIR), observed:

"These remarks would appear to me most pertinent, but from the later cases which have come before the Courts on 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 tests or experts that those instances have occurred in pursuance of a recognised custom, in order to link the present with the past."

After considering certain decisions, the learned Chief Justice at p. 760 (of ILR Bom): (at p. 149 of AIR), further observed :

"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 recognised, 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 and as long as tests are not cited and experts called to negative the alleged custom, it is unnecessary to cite tests or call experts to support it."

We are, therefore, of opinion that the decision in 10 Bom HCR 241, is no authority for holding that there is no custom amongst the Agarwals under which an adoption of an orphan is recognized.

22. In S. A. No. 730 of 1946, D/- 12-4-1955: AIR 1957 Nag 79, no doubt, the dispute related to the validity of the adoption of an orphan of Vaishnava Agarwals who were calling themselves as Delliwala Agarwals. However, the plea raised was that the parties, on their migration to Berar about 200 years back had adopted the custom of Berar where they resided since about 200 years ago. An attempt was made at the appellate stage before the High Court to support the adoption with the aid of the customary law of the original place from which the parties claimed to have migrated. This was not allowed to be done. The learned Judges in paragraph 16 of their judgment observed :

"Actually the defendants did not rely on the law of origin or on any custom in that law as empowering the widow to make an adoption without proof of authority from her husband. The adoption was sought to be sustained solely on the ground of adoption of custom prevailing in Berar and West Khandesh and not because of any custom in Punjab or any custom governing the caste as such without reference to the locality."

This decision, therefore, has no relevance for the issue under consideration.

23. The third decision on which reliance was placed on behalf of the appellant, in our view, not only does not support the appellant but supports the respondents. The relevant facts as stated in the report in brief are : The suit was brought by Sonibai, daughter of one Ramdhan, for a declaration that she was entitled, by inheritance, to the estate of her father Ramdhan, who died in Amravati in Berar on 14-6-1914. This Ramdhan resided and carried on business at Khanapur in Amravati district while his brother Joharmal lived in Chandur Bazar, another township in Amravati district. Both were Agarwals by caste, Joharmal died in September 1912 and the defendant Dhanraj claimed to be adopted by this Joharmal some years before his death. He took possession of the estate of Ramdhan on his death in 1914 and claimed to be entitled to Ramdhan's property as an adopted son of Joharmal. In order to establish his right of succession to Ramdhan's estate in opposition to the claim of Ramdhan's rightful heir, Dhanraj alleged that he had been adopted in accordance with the rules prescribed by Hindu Law and that the essential rites were duly performed. He further alleged that Joharmal and Ramchand Were joint and undivided. Plaintiff Sonibai's case, on the other hand, was that in year 1908 when the formal adoption of Dhanraj was alleged to have taken place, he was art orphan and as such could not be validly adopted under the Hindu Law. She further denied that Johar-mal and Ramdhan were joint. According to her, Joharmal and Ramdhan were separate in estate and consequently Dhanraj, even if he bad been adopted, could not claim the estate of Ramdhan. To the allegation of the plaintiff that in 1908 both the defendant's parents were dead and, therefore, he could not have been validly adopted, the defendant Dhanraj averred that in the year 1903 his mother who

was alive at that time gave him in adoption to Joharmal although the usual ceremonies and the document connected with the adoption were completed in 1908. He further contended that Ramdhan was estopped by his conduct, from impugning the validity of the adoption and consequently the plaintiff was affected by the said estoppel. The trial Court found that the adoption had taken place. On appeal the "Judicial Commissioner's Court held that Dhanraj had failed to prove giving and taking in 1903, as alleged by him, as was required to be established under the Hindu Law. Neither Ramdhan nor the plaintiff was estopped from Impugning the validity of defendant's adoption.

24. Considering the question about the alleged giving and taking, their Lordships came to the conclusion that what had happened was not giving of Dhanraj in adoption by his mother to Joharmal in 1903 but only tying of a turban by Joharmal on Dhanraj's head in 1908 and giving a feast to the panchas. Considering the question of estoppel raised by Dhanraj against Ramdhan and his daughter Sonibai at pages 493 to 495, it is observed :

"Assuming, however, that such a status can be established by applying the doctrine of equitable estoppel embodied in Section 115, "so as to affect the rights of persons other than the adopter," it is necessary to consider in the first place what actually happened in 1908 and what were the acts and representations of Ramdhan which created the estoppel. He is said to have brought the boy to Chandur Bazar from his native village, to have become a witness to the deed of adoption; allowed him to perform the cremation ceremony of Joharmal; and at the time of his marriage represented him to be the adopted son of Joharmal. The parties to this litigation belong to the caste or sect of Agarwalas. These Agarwalas, as has been pointed out in the case of 10 Bom HCR 241; ILR 1 All 688 , generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of Shraddh, the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father. The Agarwalas are said to be divided into a number of sub-castes or sects.

X X X Among the Agarwalas the qualifying age for adoption extends to the 32nd year; "and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community (the panchas) and giving them a feast. According to the document D-63. as well as the agreement D-62, this was the only ceremony performed in 1908, and it is exactly the ceremony referred to in ILR 1 All 688: 5 Ind App 87."

"Their Lordships have no doubt on the evidence that the story about a 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."

X X X If the Brahminical fringe is taken off, the whole of the evidence in the present case points to a secular adoption in 1908, and so far as the representation and acts of Ramdhan are concerned, they only relate to that

adoption".

25. Thus it will be seen that, in the opinion of their Lordships, the adoption of an orphan by tying a turban on his head is sufficient to constitute a secular adoption, but that is not sufficient to constitute a regular Hindu or Brahminical adoption, entitling him to a collateral succession. An adopted son in this form may not be entitled to succeed to the agnates of the adoptive father. But their Lordships have nowhere held that he was not entitled to succeed to the estate of his adoptive father. Further, the facts found in that case show that Dhanraj's adoption in this form was recognized by the brother of Ramdhan. This authority, therefore, is of no assistance to the appellant's case but, on the other hand, goes to a great length in supporting the plea raised by the report about the existence of thy custom.

26. We will now turn to consider the oral evidence tendered in the case. On behalf of the respondents, reliance is placed on the evidence of Gangadhar (2 D. W. 4), Mukhram (2 D. W. 7), Brijmohan (2 D. W. 8), Nathmal (2 D. W. 9), Ramkaran (2 D. W. 13), Ramkuwar (2 D. W. 18) and Kanhayalal (2 D. W. 19). Ramkuwar (2 D. W. 13) was 70 years old at the time he was examined on commission in the case. He is Agarwal Bania and belongs to the same community to which Mahadeo belonged. He had been then residing in Yeotrnal for 68 years. He deposes that in their community if a man nominates a person to whom a pagdi is to be tied that person succeeds to his property when a pagdi is tied to him. Such a person becomes the son of the deceased and acquires all rights of the son. Pagdi can be tied even to an orphan and also even if he is a married man with children. He also deposes to the following instances where such an adoption had taken place. According to him, Ganeshram, the eldest brother of Mahadeo, had no son but had a daughter when he died. His pagdi was tied to his youngest brother Hajarimal. Hajarimal then succeeded to the property. Hajarimal is dead but the property is in possession of Hajarimal's sons. In cross-examination, however, he admits that he did not then remember whether he was present actually at the time the pagdi was tied to Hajarimal. He also deposes that the widow of Ganeshram and the father of Hajarimal were both living at the time the pagdi was tied. This instance, therefore, is of no assistance for purposes of this case. The second instance to which he deposes is the adoption of Mahadeo to Ram-narayan. He, however, has deposed that he did not remember whether Mahadeo was adopted during the lifetime of Ramnarayan or after his death. His evidence alone is, therefore not sufficient to place reliance on this instance.

27. He also deposes to a third instance, namely, the adoption of Nagarmal to Hanu-mandas. He deposes that he was present when Hanumandas's pagdi was tied to Nagarmal after death of Hanumandas according to the wishes of Hanumandas. According to him, this happened one or two months after the death of Hanumandas. According to him, at the time of Hanumandas's death his widow was pregnant. She later on delivered the child and thereafter

Hanumandas''s pagdi was tied to Nagarmal.

28. As regards the first instance deposed to by this witness, Ramkaran (2 D. W. 13), the husband of Mahadeo''s daughter Saraswati, deposes that in their community they observe the custom prevailing in Punjab in matters of adoption. A pagdi is tied on the head of person selected for adoption from the family and when the pagdi is tied on his head he becomes the adopted son. He further deposes that such person could be an orphan as well as a married man. He also deposes to an instance of an adoption of an orphan. One Sitarani died with-out a son after having expressed his desire that Rudmal should be adopted as a son to him. On the 13th day of the death of Sitaram, Rudmal tied his turban in pursuance of the desire expressed by Sitaram. He thereafter was treated and accepted as his son. This waa in the year 1944 or so. At the time Rudmal tied the turban of Sitaram, he was an orphan and also was a married man. Sitaram''s daughters are alive. The only reason advanced by the learned advocate for the appellant for not accepting the evidence of this witness in support of the adoption of Rudmal is that Rudmal, though alive, was not examined. True, it would have been better if Rudmal had been examined in this case, but this alone is not sufficient to discard the testimony of Ramkaran (2 D.W. 13) though it calls for further scrutiny of his evidence on the point. No cross-examination was directed about the facts of Rudmal''a adoption deposed to by this witness. This evidence of Rudmal''s adoption as a son to Sitaram by tying his pagdi in pursuance of the wishes expressed by Sitaram goes fully to support the defendant Jainarayan''s case.

29. Kanhayalal (2 D.W. 19) is the husband of Mahadeo''s daughter Narbada. He also similarly deposes to the custom prevailing among the Agarwals. He also corroborates the evidence of the aforesaid two witnesses as regards the general custom as well as the instances of the adoption of Hajarimal and Rudmal. He further deposes to give more instances of adoption performed by tying of a pagdi, but only one relates to the adoption of an orphan and we will, therefore, only advert to that instance. i.e., adoption of Ramgopal as son to Motilal who was the cousin brother of the witness''s mother. At the time of the adoption neither Motilal nor his widow was living.

30. We will now advert to the other witnesses, who have deposed to the adoption of Nagarmal. Nagarmal (2 D.W. 17) himself deposes that Hanumandas died in February; 1923. At the time of the death of Hanumandas, his wife was carrying. Hanumandas, prior to his death, had expressed his desire that in case his wife gave birth to a female child, one of the two sons of Surajmal (witness''s natural father) should be selected and taken on his gaddi to continue his name. This, according to the custom of the community, was a direction for an adoption of either of the two sons. Alter Hanumandas''s death, his widow delivered a female child. Hanumandas also had another daughter living at his death and both these daughters were living when the witness gave his evidence. The widow of Hanumandas died in October 1929. On 3-10-1929, prior to his death, she made

a choice of the witness, one of the sons of Surajmal, for being adopted in accordance with the desires of her husband and thereafter she died on 15-10-1929. On 27-10-1929, that is, on the 13th day of the death of Hanumandas's widow, Hanurnandas's pagdi was tied to the witness's head in the presence of the relations of Hanu-mandas and the panchas. Since then he had become the adopted son of Hanumandas. The evidence of this witness, no doubt, to a certain extent, is different from the evidence of Ram-kuwar (2 D.W. 18). According to Ramkuwar, the pagdi of Hanumandas was tied on Nagar-mal's head on the 13th day of the death of Hanumandas, i.e., when Hanumandas's widow was alive; but, according to this witness, the pagdi was tied on the 13th day of Hanumandas's widow's death, i.e., when none of the adoptive father and mother were alive. Ramkuwar (2 D.W. 18) is a very old man. He was deposing to an incident- which he had witnessed about 20 years back. It is quite likely that his memory was failing him. Nagarmal was a person directly concerned. He is, therefore, likely to remember the facts better. Nothing is shown from his evidence showing his bias in favour of Jainarayan. We, therefore, prefer to accept his evidence and especially so because it finds support in the evidence of Gangadhar (2 D.W. 4), Brijmohan (2 D.W. 8) and Nathmal (2 D.W. 9) who all depose that Hanumandas's pagdi was tied on Nagarmal's head after the death of Hanumandas's widow. Nathmal (2 D.W- 9) was a servant in the shop belonging to Hanumandas. We see no reason to discard the testimony of these witnesses. This instance of adoption of Nagarmal as a son to Hanumandas by pagdi-tying ceremony in pursuance of the wishes expressed by Hanumandas goes to fully support the custom pleaded by the defendants. Out of these witnesses Gangadhar (2 D.W. 4) and Nathmal (2 D.W. 9) also generally depose to the aforesaid custom of adoption by pagdi-tying ceremony and also of an orphan amongst the Agarwal Baniyas."

31. We will now proceed to consider the evidence tendered on behalf of the plaintiff in rebuttal of this custom. Shankarlal (P.W. 1) and Shrinarayan (P.W. 2), no doubt, depose that for a valid adoption amongst the Agar-wals giving and taking ceremony is essential but much value cannot be attached to their evidence. Shrinarayan is the father of the plaintiff and Shankarlal's sister's daughter is married to Shrinarayan. Labhchand (P.W. 3) has given very guarded answers. He deposes in his examination-in-chief:--

"If the deceased does not disclose any desire it (property of the deceased) would go according to law prevalent in Jaipur State or in his part of the country. "It is not always that tying of turban to a boy makes him the adopted son"."

(Underlining (here in " ") is ours.) He, however, frankly admits in his cross-examination:--

"Our ancestors came to Parashrampur from village Agroha in Hissar district, Punjab. If a Vaishnavite Agarwal dies expressing his wish that his property should go to a particular person and if on his death panchas tie a turban on the head of that particular person without objection from relations that particular

person becomes the son of the deceased and owner of his property."

This witness is a relation of the plaintiff. His evidence supports the defendants' case. The other witness Mathuradas (P.W. 4) also has not supported the plaintiffs case. In his cross-examination he admits:--

"Agarwals who take themselves as descendants of Agrasen want that the line of heirs on the male side should be continuous, and for that purpose it is customary to have an adopted son by one who does not have a natural son. I cannot say if there is a custom amongst Agarwals that a person dying without a natural son tells during his life-time or at the time of his death that a particular person will continue his line."

It appears that the witness is not deposing frankly to avoid incurring displeasure of the plaintiff's father. The only remaining witness examined on behalf of the plaintiff is Balraj. No doubt, he deposes that giving and taking ceremony is essential for a valid adoption amongst the Agarwals, but from his cross-examination it appears that he had been helping the plaintiff's father to a certain extent in the conduct of the litigation. Much importance, therefore, cannot be attached to his evidence.

32. It is beyond doubt that on the 13th or 14th day of Mahadeo's death his pagdi was tied on the head of Jainarayan. At that time all his daughters were present. On that day a deed was executed whereunder distribution of the property was effected between the daughters and Jainarayan according to the wishes of Mahadeo. This deed mentions that Mahadeo had expressed a desire that Jainarayan should continue his line and name. It is signed by two of his daughters, Saraswati and Anchibai, (mother of the plaintiff). It also bears the thumb-mark of his third daughter Narbada. It was duly registered. It is clear that this deed was executed with sufficient publicity. It was not challenged till the date of suit by any person. The trial Court has found that since the tying of the pagdi, Jainarayan has been recognised as an adopted son-of Mahadeo. He has been styling himself as Jainarayan son of Mahadeo, and has been managing his property and has also paid off his debts. These findings had not been challenged before us. Had the adoption of Jainarayan been contrary to the custom prevailing amongst the Agarwal Baniyas, one would have naturally expected a challenge to the claim of Jainarayan as an adopted son of Mahadeo at a much earlier stage. Further, it is to be noted that the first defendant Damodhar, who stands equally to gain along with the plaintiff, is not challenging Jainarayan's claim as an adopted son.

33. For reasons stated above, in our opinion, suffice it to say that for purposes of this case there was sufficient evidence and material before the trial Court to come to the conclusion that amongst Agarwals the adoption is a secular affair. The only essential ceremony of adoption is the tying of a turban of the person nominating to the nominee. No giving and taking as such is necessary. The tying of the pagdi ceremony could be performed even after the death of the person

nominating. The nominee can be an orphan and a married man. We, therefore, uphold the finding of the trial Court.

34. As already stated before, it is not in dispute that Jainarayan, as a matter of fact, tied the turban of Mahadeo on the 13th or 14th day of Mahadeo's death in the presence of his daughters and panchas. It was contended on behalf of the appellant that this was because Jainarayan performed the last rites and obsequies of Mahadeo, and the evidence on record shows that a person who performs the last rites and obsequies of the deceased, ties his turban on the 13th or 14th day of his death, but in the instant case this was not the only reason. Besides the fact that Jainarayan had performed the last rites and obsequies of Mahadeo, Mahadeo also had nominated Jainarayan as a successor to him and had directed that for this purpose his pagdi be tied on his head. This direction of Mahadeo, coupled with the fact that Jainarayan tied Mahadeo's pagdi on the 13th or 14th day of Mahadeo's death, gave him the status of an adopted son of Mahadeo according to the customary law prevailing in that community.

35. It is next necessary to consider one more contention raised on behalf of the appellant. It is urged that even if Jainarayan had been validly adopted as a son to Mahadeo, he was adopted 13 or 14 days after Mahadeo's death; the inheritance opened up on the death of Mahadeo could not be held in abeyance; the property of Mahadeo on his death had vested in his daughters; the adoption of Jainarayan, therefore, had no effect of divesting the estate of Mahadeo which had already vested in his daughters. Reliance is placed on the decision *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, . In our opinion, this contention also has no force. What is held in this case is that the ground on which an adopted son is held entitled to take in defeasance of the rights acquired prior to his adoption is that in the eye of law his adoption relates back, by a legal fiction, to the date of the death of his adoptive father, he being put in a position of a posthumous son. The scope of the principle of relation back is thus clear. It applies only when the claim made by the adopted son relates to the estate of his adoptive father. The theory on which this doctrine is based is that there should be no hiatus in the continuity of the line of the adoptive father. Their Lordships in explaining the scope of this principle have observed that this doctrine has application only when the question relates to the succession of the property of the adoptive father and not when it relates to the succession of the property of his collaterals. It is to be noted that in the instant case we are concerned only with the property left behind by the adoptive father Mahadeo. The dispute does not relate to any of the property of Mahadeo's collaterals.

36. In the result, this appeal fails and is dismissed with costs.

37. Appeal dismissed.