Privy Council Appeal No. 20 of 1946

Pemraj - - - - - - - - - - - *Appellant*

v.

Musammat Chand Kanwar - - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER AT AJMER-MERWARA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1947

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
MR. M. R. JAYAKAR

[*Delivered by* LORD NORMAND]

The parties to this appeal are Jains of the Khandelwal sect domiciled and resident in Ajmer. The respondent is the sonless widow of a certain Ratanlal and on 22nd May, 1919, she executed a deed by which she adopted or purported to adopt the appellant to her deceased husband. After the execution of this deed the parties lived in the same house, but disagreements arose into which it is not necessary to enter. Finally, the present suit was commenced in November, 1930. The appellant, founding on his adoption, sought *inter alia* to restrain the appellant from wasting the family property, and the respondent in her defences challenged the validity of the adoption and alleged that Ratanlal had never given her authority to adopt a son to him. This allegation was made because under the general Hindu law adoption by a widow without the prior authority of her husband is not recognised (Mulla, 7th Edition, p. 516), and because it is also an established principle that the rules of Hindu law generally apply to Jains in the absence of special custom varying the law. Apart from a belated and unsuccessful application to amend his pleadings, the appellant did not allege a special custom by which a sonless Jain widow in Ajmer is entitled to adopt a son without the prior permission of her deceased husband. It was therefore necessary for him, since the respondent gave evidence in support of her allegation that she had no authority from her husband to adopt a son, to maintain that the custom was so well known and so well established by judicial decisions that it was no longer necessary to plead and prove it in the Ajmer courts. The Sub-judge, after considering the authorities, upheld the appellant's contention, but his decision was reversed by the Judicial Commissioner of Ajmer-Merwara. The sole question in the present appeal is whether the decision of the Sub-judge is well founded and ought now to be reaffirmed by this Board.

The question is one of degree. It is not doubtful that the ordinary rule is that a party relying on a custom affecting the Jains which is at variance with the ordinary Hindu law must allege and prove it. But it is equally beyond doubt that a custom which has been recognised and affirmed in a series of decisions, each of them based on evidence adduced in the particular case, may become incorporated in the general law, with the result that the *onus* of proof no longer lies on those who assert it but upon those who assert an exception to it. These are familiar general principles which are acknowledged by both the parties to this appeal, but the respondent denies that the decided cases in which the custom has been found proved have been either so widely distributed or so clearly applicable to all sects of the Jains as to enable a court to say that the custom has become part of the personal law of the Jains either in India as a whole or in some defined part of India.

It is in the North West Frontier Province that the custom has been most frequently recognised by judicial decisions. The earliest case which need be considered is *Sheo Singh Rai* v. *Mussumut Dakho*, 1878, Law Reports, 5 Indian Appeals 87. In that case the parties belonged to the Agarwal sect of Jains and were domiciled in the North West Frontier Province. The custom was alleged in that case and evidence from Jains in Delhi, Jeypore, Muttra and Benares was led in support of it. The custom was held by the High Court and by this Board to have been proved. The learned judges of the High Court dealt with the question as one of personal law affecting Jains as such and without regard to particular sects of Jains and they gave consideration to decisions pronounced not only in the North West Frontier Province but in other parts of India. They proceeded on the principle that the Jains as dissenters from orthodox Hinduism are in certain respects subject to the law of their own proved usages and not to the *lex loci*. In an account of the history and religious tenets of the Jains, they said, " They differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is merely a temporal arrangement and has no spiritual object." It was in the view of the Court in this attitude towards death and existence after death, differing as it does so vitally from the religious beliefs of the Hindus, that the custom took its origin. Both in the judgment of the High Court and in the judgment of this Board it was assumed that the custom was not confined to Agarwals but was shared by all the Jain sects, and there is no doubt that the reason underlying this assumption is that all Jains sects have the same views on death and on existence after death. In *Lakhmi Chaud* v. *Gatto Bai* (1886) I.L.R. 8 Allahabad 319, the High Court at Allahabad had to consider whether a Jain widow could make a second adoption. The Court decided this question in favour of the adoption after considering evidence adduced by the parties. But they also dealt incidentally and apparently independently of evidence with the question whether a sonless widow of a Jain could make an adoption without the antecedent permission of her deceased husband, and they affirmed her capacity to do so. Once more no distinction was drawn between the various Jain sects and the custom was treated as applying to them all indifferently. The custom was again considered and judicially affirmed in *Manohar Lal* v. *Banarsi Das* (1907) I.L.R. 29 Allahabad 495, and again the issue was whether the custom prevailed among the Jain community generally and differences of sect were ignored. The High Court cited with approval Sarkar's Tagore lectures of 1888, in which it was said, at page 453 of the second edition, that a Jain widow is competent to adopt a son without having obtained authority to do so from her husband. Sarkar, whose authority commands the highest respect, also connects the special customs of the Jains in matters of adoption with the fact that for them adoption is a purely temporal institution and is not affected in its incidents by the religious considerations which have influenced the Hindu law of adoption. *Asharfi Kunwar* v. *Rup Chand* (1908) I.L.R. 30 Allahabad 197, does not carry the matter further. In *Banarsi Das* v. *Sumat Prasad* (1936) I.L.R. 58 Allahabad 1019, the parties were Agarwal Jains. The authorities, including decisions in other parts of India, were fully considered by the High Court, and at page 1031 the learned judges came to this conclusion:— " As will appear from the cases referred to above, the custom under which a Jain widow can adopt a son to her husband without her husband's authority or permission of his kinsmen has been recognised by judicial decisions since 1833 in different parts of the country, that is Bengal, Central Provinces, United Provinces and the Punjab. In our opinion these decisions are sufficient to hold in this case the existence of the custom, and it is no longer necessary to prove it in each case by oral evidence."

The Calcutta cases point to the same conclusion, though none of them can be said to have arrived at it. In *Manik Chand* v. *Jagat Settani* (1889) I.L.R. 17 Calcutta 518, a Jain widow of the Oswal caste was held entitled to adopt a son without the authority of her deceased husband.

The judgment of the High Court was based partly on evidence and partly upon authority, and the learned judges thought that the custom was prevalent among Jains generally and was not peculiar to any tribe or caste among them. This was still more clearly affirmed in *Harnabh Pershad* v. *Mandil Dass* (1899) I.L.R. 27 Calcutta 379. At page 391, the learned judges of the High Court say " the defendant is not setting up a local custom; his case is that the customs relied on prevail among all the Jains who are now a scattered community . . . . It would be impossible to prove the existence of a custom prevalent amongst the Jains generally by evidence of a purely local character, but if the general custom is proved, the question might arise whether the Jains of any particular locality had adhered to or departed from it, and that would depend upon the facts and circumstances of each case." In that case the Court relied both upon previous decisions and upon the evidence of witnesses resident in various districts west of Arrah, where the parties resided, and extending up to Delhi and Kurnal and also witnesses residing in Calcutta, Moorshedabad and Gaya to the east of Arrah. These witnesses included persons who belonged to all the principal Jain sects. Upon this evidence the comment was made that a widespread belief in the custom existed and was acted on. But the Court was not yet prepared to hold that the existence of the custom must be recognised without further proof as applicable to all Jains; for it was felt that to do so would be inconsistent with the rule laid down by this Board in *Chotay Lall* v. *Chunno Lall* (1878) L.R. 6 I.A. 15, 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 in the absence of proof the ordinary law must prevail." In *Sheokvarbai* v. *Jeoraj* (1920) 25 Calcutta Weekly Notes 273, however, this Board went further in recognising the custom than it had done forty years earlier. There had been in the interval authoritative decisions which had shown that the custom existed in areas about which there had been no decisions in 1878. It was said to be common ground in the case that the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption and it is but a short step from this to the proposition that the custom must now be regarded as established in the absence of proof to the contrary.

In Ajmer itself only one case before the present seems to have come before the Courts. In it (*Dhannalal* v. *Ratanlal* (1927) Supplement at p. 42) the Judicial Commissioner remarked that he assumed that a Jain widow could adopt a son without her husband's authority and that this was the rule in Western India. The observation was, however, *obiter* and the case was decided on other grounds.

In Bombay the question cannot arise in the same form as in this case, because there the widow even of a Hindu is permitted to adopt without her deceased husband's authority. This is recognised by the Court of Appeal of Bombay in *Bhagvandas Tejmal* v. *Rajmal* (1873) 10 Bombay High Court Reports 241, at pages 256 and 257, by Mulla in his Principles of Hindu Law at page 528, and by Rattigan in his Digest of Customary Law, 1898, page 206. Accordingly there is no need in Bombay to assert a Jain custom differing from Hindu law on this point.

In the Punjab the law of adoption is complicated by the local customs of the province, and it would not be possible to draw from the customs of the Punjab any general inference affecting other provinces. Mayne, in his treatise on Hindu Law and Usage, states at page 210 that the custom appears to vary in the Punjab and this statement was not displaced by those authorities which were cited. Thus in *Prem Sagar* v. *Ram Gopal* A.I.R. 1929 Lahore 814, it was held that the evidence had failed to prove the custom, but in *Sundar Lal* v. *Baldeo Singh* (1932) I.L.R. 14 Lahore 78, the opposite conclusion was arrived at. No certain conclusion can be drawn either in favour of the appellant's contention or against it and in any generalisation of the right of a Jain widow to adopt without her deceased husband's consent it would be prudent to omit the Punjab.

In Madras, the authorities are against the custom. They were decided on the particular evidence adduced, but there are in them observations which are pertinent to the general question. In *Peria Ammani* v. *Krishnasami* (1892) I.L.R. 16 Madras, page 182, Mr. Justice Best says, at page 193, " it is open to question whether among the converts to Jainism in the Southern District of the Presidency—to which the parties to this suit belong—there was any drifting away from Hinduism as far as the law regulating the devolution and alienation of property is concerned, and with regard to the powers of a widow to alienate property or to make an adoption to her husband without authority from her husband or his kinsmen." There was, too, in the case evidence from accredited witnesses that among Jains in Southern India widows have no greater powers in regard to adoption than is possessed by widows under the ordinary Hindu law. In *Gettappa* v. *Eramma* (1926) I.L.R. Madras 228, the officiating Chief Justice felt compelled by authority to lay the *onus* of proof on the party alleging the custom, and Mr. Justice Curgenven reached the same conclusion, but remarked that it was not yet possible to accept the view that this custom had so often been found to exist that the *onus* was shifted to the party who denied it.

To sum up, there are good historical grounds for holding that in Madras the Jains have not acquired customs affecting adoption which vary from the ordinary Hindu law; in Punjab adoption, whether by Jains or by people of other beliefs, is subject to local customs which may and do vary from the law and custom observed by the same peoples and sects in other parts of India. But in many other parts of India it has now been established by decisions based on evidence from widely separated districts and from different sects that the Jains observe the custom by which a widow may adopt to her husband without his authority. This custom is based on religious tenets common to all sects of Jains and particularly their disbelief of the doctrine that the spiritual welfare of the deceased husband may be affected by the adoption, and though it cannot be shown that in any of the decided cases the parties were of the Khandelwal sect, yet in none of the cases has a distinction been drawn between one sect and another. It is now in their Lordships' opinion no longer premature to hold that the custom prevails generally among all Jains except in those areas in which there are special reasons, not operative in the rest of India, which explain why the custom has not established itself. Mayne, in his treatise on Hindu Law and Usage at page 209 has lent the weight of his authority to the proposition that among the Jains, except in the Madras Presidency, a sonless widow can adopt a son to her husband without his authority or the consent of his sapindas. Rattigan's Customary Law, twelfth edition, page 205, also supports this view. Their Lordships, for the reasons already explained, would except not only Madras but also the Punjab, but in the rest of India they consider that the *onus* should now lie upon those who deny that the custom prevails.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed and that the judgment of the Sub-judge should be restored. The respondent will pay the appellant's costs of this appeal and in the Courts in India.

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In the Privy Council

PEMRAJ

v.

MUSAMMAT CHAND KANWAR

DELIVERED BY LORD NORMAND

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