ALLAHABAD HIGH COURT

Banarsi Das

Vs

Sumat Prasad

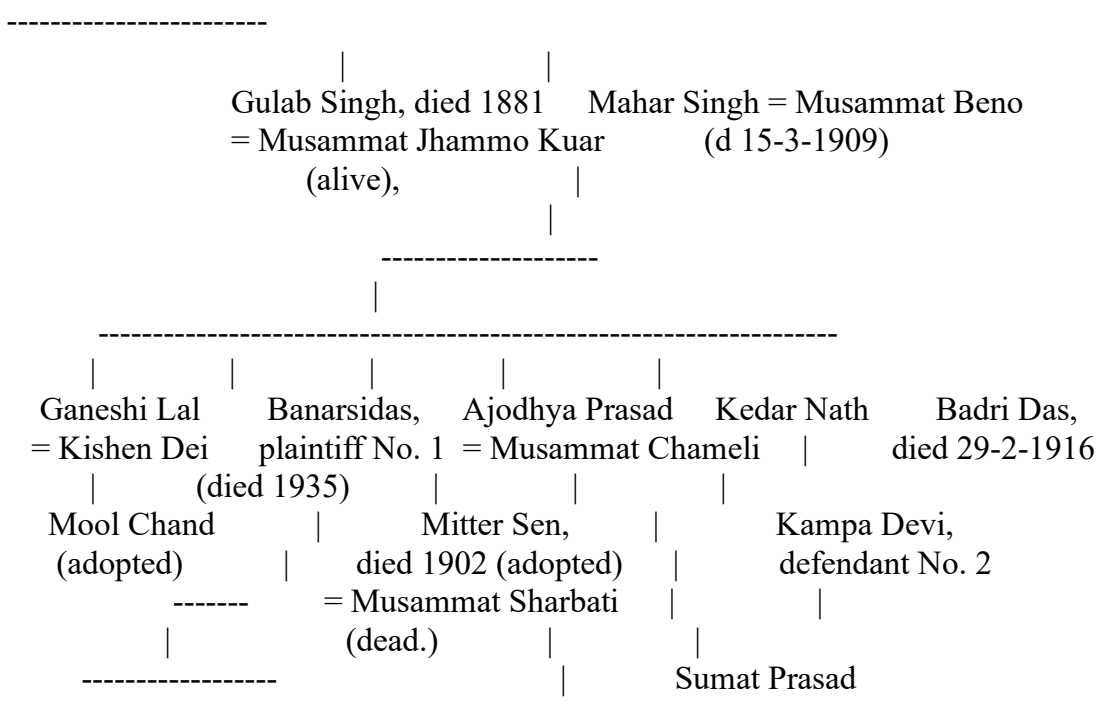
(Harries, CJ. G Nath, J.)

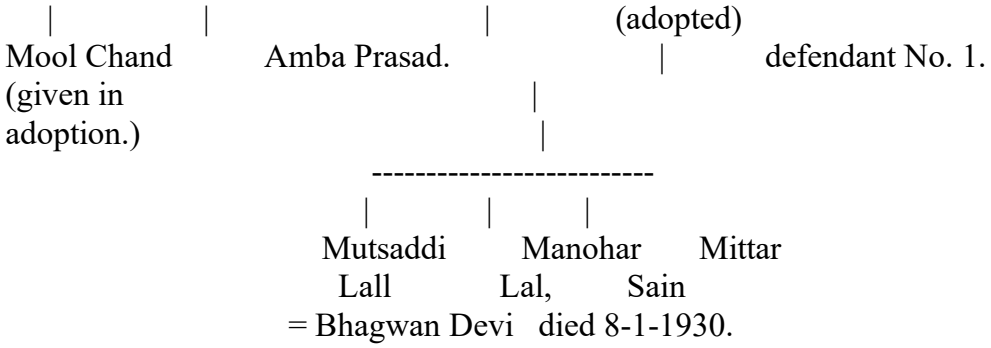
6 April, 1936

JUDGMENT

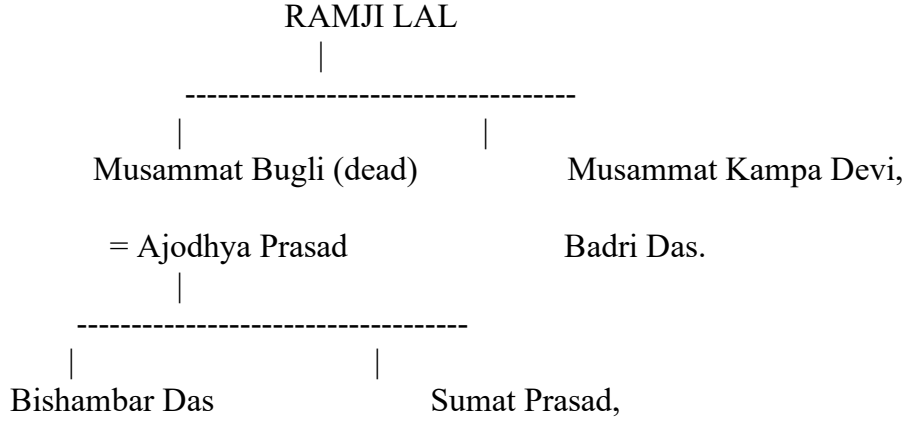
Harries, CJ. G Nath, J.

1. This is a plaintiffs' appeal and arises out of a suit brought by them against the defendants-respondents for a declaration that Sumat Prasad, defendant No. 1, is not the lawfully adopted son of Lala Badri Das and of his widow Musammat Kampa Devi, defendant No. 2, and that he has no title to their estate described in the plaint, and that all declarations made in the deeds dated January 20, ,1929, do not affect the reversionary rights of the plaintiffs in the estate of Lala Badri Das. Banarsi Das, plaintiff No. 1, died during the pendency of the suit, and after his death his son Amba Prasad has been substituted in. his place. The relations of the parties will appear from the following genealogical tree :Pedigree Table No. I HARJAS RAI |





Pedigree Table No. II



2. The plaintiffs alleged that Lala Badri Das died on February 29, 1916, leaving unto him surviving defendant No. 2, Musammat Kampa Devi, his widow, Banarsi Das his brother, plaintiff No. 1 and Mulchand plaintiff No. 2 his nephew. On or about January 9, 1916 Lala Badri Das gave a testamentary direction to the effect that his wife, defendant No. 2, after his death, should not [adopt any son, and in case she did so, the adoption should be confined to the members of his family. Lala Badri Das was governed by a "kulachar," or family custom, which prohibits adoption outside the family but which within the family permits the adoption of an only son and of a married person, and allows to make the adoption in the absence of any authority from her husband, but subject to the consent of the head of the family. Save as aforesaid Lala Badri Das was governed by the Mitakshara or Benares School of Hindu Law in all matters of adoption, marriage, inheritance and succession. On the death of Lala Badri Das his widow, defendant No. 2, succeeded to the estate as a Hindu widow and has since been in possession of the same.

3. On January 20, 1929 defendant No. 2 being actuated by motives of enmity, and with a desire of unlawful gain executed a deed in which she stated that, with the consent of defendant No. 4, the father of defendant No. 1, she had received from defendant No. 3 and taken in adoption

defendant No. 1 as a son to Lala Badri Das and to herself on condition that during her life-time she Would continue to be the owner of the estate as if there were no adoption, and after her death the estate would devolve upon defendant No. 1 as the adopted son of Lala Badri Das and herself. On the same date defendant No. 3 as guardian of defendant No. 1, also executed a document in which she stated that she had given defendant No. 1 in adoption with the consent of defendant No. 4, on terms and conditions given in the deed of defendant No. 2 mentioned above. The alleged adoption is invalid and confers no title upon defendant No. 1 in the estate of Lala Badri Das according to Hindu-Law and usage, and also according to the usage and customs of the Agarwal Jain community inter alia for the following reasons : (a) For it was made with a wilfully corrupt and capricious motive. (6) For it was a mere device to enlarge the Hindu widow's estate of defendant No. 2. (c) For it was a mere device to transfer the estate of Lala Badri Das by a testamentary disposition which defendant No. 2 had no power to do. (d) For it was an adoption without the authority of Lala Badri Das and against his specific prohibition. (e) For it was an adoption of a person not permitted by family custom. The plaintiffs further alleged that they were the prospective reversioners of Lala Badri Das entitled to succession on termination of the widow's estate of defendant No. 2.

4. Defendant No. 4 died after the institution of the suit and his name was struck off the plaint. The remaining three defendants contested the suit. They contended that no testamentary direction had been given by Lala Badri Das. He got an attack of paralysis on January 7, 1916, and died on February 29, 1916, without regaining consciousness and could not make any testamentary direction. There was no such family custom as is alleged by the plaintiffs. Under the custom prevailing among the Agarwal Jains every widow is authorized to adopt a boy to her husband without the authority of the husband or permission of his kinsmen. Defendant No. 1 was validly adopted by defendant No. 2 to her husband. The plaintiffs' allegations that the adoption had been made with corrupt and capricious motives or that it was only a device to enlarge the widow's estate or to transfer the property by a testamentary disposition were absolutely untrue.

5. The learned Subordinate Judge found that no testamentary direction was given by Badri Das, that there was no kulachar or family custom that a Jain widow could adopt a son to her husband without the authority of her husband or consent of his kinsmen and that the adoption made by defendant No. 2 was valid. He dismissed ' the plaintiffs' suit. Hence this appeal. The appellants have not seriously pressed that the learned Subordinate Judge's findings as regards the kulachar and the testamentary direction given by Badri Das, as alleged by the plaintiffs in their plaint, are incorrect. It may be observed that an examination of the evidence produced by" the plaintiffs shows that the learned Subordinate Judge's findings are correct. (His Lordship then discussed the evidence and proceeded.) We agree with the findings of the learned Subordinate Judge as regards the family custom and the testamentary direction alleged in the plaint, and find that the plaintiffs have failed to prove them.

6. The chief ground on which the validity of the adoption has been attacked is that it was made by defendant No. 2 without the authority of her husband. Among the Hindus the objects of adoption are twofold. The first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water, and the second is secular to secure an heir and perpetuate the adopter's name. The Jains do not believe in the spiritual efficacy of adoption. They do not perform shrads to the dead which is at the base of the religious theory of adoption, nor do they believe in the Hindu doctrine of the spiritual efficacy

of a son. Adoptions among them want the spiritual element and are entirely secular in character. They are governed by the Hindu Law of adoption except in certain particulars in which it has been proved that their usages are different. According to the defendants by a custom prevailing among the Jains, a Jain widow is competent to adopt without authority from her husband or permission of his kinsmen. As the adoption is a temporal institution among them, an only son or daughter or sister's son and a married man can also be adopted and no religious ceremony is necessary for adoption. In this case the only point which has to be considered is whether a Jain widow can adopt without authority from her husband or permission of his kinsmen. The custom under which she can do so has been recognized in a series of cases since 1833. The earliest case is Maharaja *Govind Nath Ray v. Gulab Chand*[1] in which the competency of a widow to adopt without the sanction of her husband was recognized. The tradition on which this custom was based has been described at length on pp. 280 and 281 Pages of 5 S.D.A.-[Ed.] of the report as follows :(An extract from the same work Vardhamana.) This is a part of a diffuse story of the rich Shrestr (or Seth) Kamala Kanta and his wife Kamala Sri, They lived at Hustinapur (Delhi). He had a favourite clerk, Sumati Siromani, whom he regarded as his son. The Seth died of a fever; and years after, the clerk was killed by lightning. The widow was reflecting on the necessity of adopting a son (which she resolved to do, to preserve the great wealth of her husband) when the gardner of the Asoka Bati reported that the Suri Dharma Ghose, with Rishis, had stopped at the garden and a concourse of the inhabitants had gone to see him. Kamala Sri went for this purpose and took occasion to ask the devout man how the wealth of her husband should be preserved. The Saint foretold that within one month, in the temple of Khanna Purosa, four Xatria brothers would come, viz., Bridh Debraj, Hansraj, Dhanraj and Dhumraj, whose respective ages were than 32, 27, 22 and 16 years, adding 'choose whom you please. In answer to the question as to rites to be performed he said: 'The nine members of Rishabhadev are to 'be first adored.' Then is adoration of the Guru and Book to be made with five resources or with sixteen. This is ordained. Reverence of the Guru is enjoined.' After this, having heard from the Guru's mouth auspicious words, then is (?) worshipped the Devi of his own family. Then in a place where are the five-fold principal witnesses, before the ruler after having taken the son, attention is given to a feast to the Kin of the adopter. Food is then given to a man and wife. An auspicious moment is taken, and after repeating the words, 'glory to the Arhats,' and placing him in his own place, a spot with red powder is impressed on his forehead, and a pearl necklace, rice, fruit, meals, are to be given with blasts of the conch, and beating of the bhari; various dancing is performed, and there is the vocal harmony of beautiful women who express many sorts of benedictions with reverence to his kin. Clothes or something else are given, or the Sriphala is given: if poor, the pungi phal. Night watching is practised. The betel leaf and the like are to be given to each. More may be learnt from the Achar Dinakara. At present a summary only has been declared.' Having heard the words of Vardhamana, she then asked. 'O Lord, if he do not abide in his religion, if he be not apt in reverence tome, if by bad acts he should dissipate wealth, what then am I to do?' The Acharya replied, 'if he do not abide in virtue, he is to be deserted as a finger bitten by a snake.' The pith of this prolix story is this. Singh Sena, King" of Singh pur, died without male issue. There were three Xatriya brothers of that city, Anand, Parmanand and Devanand (a boy). The first earned his livelihood as a cowherd, and the second as a wood-seller. A Yati taught them the Jain religion, and Anand put up in the forest an image of Rishabha Deva before which he read daily the Bhaktamara. A goddess one day appeared and predicted that he should become king. Singha Vati, the widow of the King, gets acquainted with the three brothers by frequenting the forest. She took a fancy to them, and resolves to adopt the eldest, and associate him in the kingdom. This is done in due form. The second brother is constituted heir-apparent, and the third made

General. Asked by the queen, the Yati, Singha Kesar, Suri, declares the Utsava, or solemnities belonging to adoption according to the 'Gautam Prasna.

7. In 1878 in *Sheo Singh Rai v. Dalcho*[2] the custom was affirmed by their Lordships of the Privy Council. They held:According to the usage prevailing in Delhi and other towns in the N.W.P., among the sect of the Jains known as Saraogi Agarwals, a sonless widow takes an absolute interest in the self-acquired property of her husband; has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten.

8. In 1886 this Court, in accordance with the case in *Sheo Singh Rai v. Dajeho*[3] referred to above, held in *Lakhmi Chand v. Gatto Bai*[4] The powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu Law of adoption.

9. In 1907 in *Manohar Lal v. Banarsi Das*[5], this Court held that according to the law and custom prevailing amongst the Jaia community (1) a widow has power to adopt a son to her deceased husband without: special authority to that effect, and (2) a married man may lawfully be adopted. In *Ashrafi Kunwar v. Rap Chand*[6] this Court again held that according to the law and custom prevailing amongst the Jam community a widow had power to adopt a son to her deceased husband ' without any special authority to that effect. This decision was affirmed by their Lordships of the Privy Council in *Rup Chand v. Jambu Prasad* [7]In *Jiwaraj v. Sheokuwarbai*[8], the Court of the Nagpur Judicial Commissioner held that the permission of the husband was not necessary in the case of Jain widow adopting a son. This decision was affirmed by their Lordships of the Privy Council in *Sheokuwarbai v. Jiwraj*[9], Their Lordships held:Among the Sitambari Jains 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 the adopted son may at the time of his adoption be a grown-up and married man. The only ceremony to the validity of such an adoption is the giving and taking of the adopted son.

10. In a very recent case, F.A. No. 51 of 1935, which was decided in this Court on April 10, 1935, adoption by a Jain widow without permission has been recognised. In 1889 the Calcutta High Court held in Manik Chand Golecha v. Jagat Settani Fran Kumari Bibi 17 C 518:A widow of the Oswal [Jain sect can adopt a son without the express or implied authority of the husband.

11. In 1899 the same High Court again in *Harnath Prasad v. Mandil Das*[10] held:
Upon the evidence in the case consisting partly of judicial decisions and partly of oral evidence the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen was sufficiently established, and. in this respect there was no material difference in the custom of the Agarwal, Chaniwal, Khandwal and Oswal sects of the Jains, and there was nothing to differentiate the Jains at Arrah from the Jains elsewhere.

12. In the Punjab also the same custom has been recognised. In *Sunder Lal v. Baldeo Singh*[11] it was held:It is well settled that Jains of Delhi in particular and Northern India in general are governed by the Hindu Law of the Mitakshara School, except in so far as it may be proved to have been modified in any material particular by a well-established custom. Among the Jains of

Delhi the Hindu Law has been varied to this extent: that in the matter of adopting a son to her deceased husband a widow need not possess express or implied authority from him, nor is the consent of the kinsmen necessary for the purpose. A son validly adopted by a widow to her predeceased husband is under Hindu Law like a son begotten on her by him and succeeds not only to the self-acquired or separate property of the adoptive father, but takes also the latter's co-parcenary interest in the Jain "Hindu family of which he was a member at the time of his death. The usage of the Jains relating to this matter is in accordance with Hindu Law.

13. It has been argued on behalf of the appellants that the judicial decisions might be regarded as recognising a custom of the right of a Jain widow to adopt a son to her husband without her husband's authority or permission of his kinsmen only when she succeeds to the self-acquired property of her deceased husband The argument is based on the following observations of their Lordships of the Privy Council in *Sheo Singh Rai v. Dakho*[12] A.-[Ed]:These findings are thus stated in the judgment, and their Lordships entirely concur in them. Contrasting this evidence with that given by the independent witnesses examined under the several commissions, and having regard to the position which several of the Delhi witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the respondents. It appears to us that, so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a Saraogi Agarwal takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu Law to the widows of orthodox Hindus; that she takes an absolute interest at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs; that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the more reliable evidence that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right in the guardianship of the adopted son and the management of the property during the minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family.

14. The argument is that the sentences:That she takes an absolute interest at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of the husband).and that she enjoys a right of adoption without the permission of her husband or the consent of his heirs should be read together. On examination of the report of the judgment against which the appeal was preferred, in *Sheo Singh Rai v. Dakho*[13] it will be found that these two sentences record two separate customs and are not dependent on each other and cannot be read together as connected with each other. The observations made on p. 383+ of the report will clearly show that each point was in reply to each of the separate questions framed by the High Court. In order to explain this it is necessary to refer to the points in issue which were enquired into in the case. The issues which were framed by the Court would appear from the following passage on p. 385 Pages of 6 N.W.P.H.C.R.-[Ed.]:The Jaina have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them and for the ascertainment of those customs we think the Court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community in the places in which they are said to be numerous and respectable, namely, Delhi,

Muttra and Benares. The questions to be addressed to those gentlemen would be the following: 'What interest does the widow take under Jain Law in the movable and immovable property of her deceased husband and does her interest differ in respect of the self-acquired property and the ancestral property of her husband ?'-'Is a widow under Jain Law entitled to adopt a son without having received authority from her husband and without the consent of her husband's brother ? 'May a widow adopt the son of her daughter ?'- 'By the adoption of her son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband ?'-'Has the adoption of a son by a widow any effect and if any, what effect, in limiting, the interest which she takes in her husband's estate ?

15. So there is no foundation for the argument that the custom recognized in *Sheo Singh Rai v. Dakho 1 A 688 : 5 I.A. 87 : 3 Suther 529 : 3 Sar. 807 : 6 N W P H C R 382 (PC),(Supra)* was in anyway dependent on the nature of the property which the widow acquired in the estate of her deceased husband. The right of the widow to adopt without the permission of the husband and consent of his kinsmen was recognized quite independently of the nature and extent of the widow's rights acquired by her in the, estate of her deceased husband. The second question relating to widow's power to adopt has no reference to the properly and is quite general. Not a single case has been cited on behalf of the appellants in which the widow's right to adopt without the authority of her husband or permission of his kinsmen was ever disputed or denied or not recognized in any case where the husband was possessed of ancestral properly to which the widow succeeded on his death.

16. On the other hand, there are several cases in which even in the case of ancestral property this right of the widow was established and recognized. In the earliest case in Maharaja Govind Nath Ray v. Gulab Chand 5 S D A 276(Supra), the property in dispute was ancestral. In both the Calcutta cases Manik Chand Golecha v. Jagat Settani Pran Kumari Bibi 17 C 518,(“Supra) and Harnath Prasad v. Mandil Das 27 C 379, also the properties in dispute were ancestral. An adoption made by a widow without the authority of her husband was recognized in the family of the parties themselves. A suit was brought in 1903 (Suit No. 213 of 1903; by Manohar Lal, son of Kedar Nath, brother of Banarsi Das, plaintiff No, 1, and Badri Das for partition of the family property. He claimed one-third share in the property. Nahar Singh had five sons, Banarsi Das, Ajodhya, Ganeshi Lal, Kedar Nath and Badri Das. At the time of the suit Ganeshi Lal and Ajodhya had died. Ajodhya's widow Musammat Chameli had adopted Mitter Sen. The plaintiffs did not dispute his adoption. Ganeshi Lal's widow Musammat Kishan Dei, had adopted Banarsi Das's son Mulchand. Mulchand's adoption was disputed by Manohar Lal. Manohar Lal claimed one-third share in the whole property.

17. On behalf of the defendants Mulchand's adoption was set up and it was contended that Musammat Beno, widow of Nahar. Singh, was entitled to one share and Mulchand was entitled to one and consequently the plaintiff's share was not one-third but one-fifth. The learned Subordinate Judge held that Mulchand had been adopted by Musammat Kishan Dei without her husband's permission : vide, judgment Ex. B, dated November 7, 1903, printed on p. 141 of the paper book. The learned Subordinate Judge held that the plaintiff's share was one-fifth. Being dissatisfied with this judgment Manohar Lal appealed to the High Court where the validity of Mulchand's adoption was contested merely on the ground that the adoption of a married man was not valid under the law' and custom prevailing amongst the Jain community. If there had been no custom entitling a widow to adopt a son to her husband without the husband's authority or

permission of his kismen, the validity of the adoption must have been contested on the ground of want of permission, specially when the learned Subordinate Judge had held that the adoption had been made by the widow without the permission of her husband. The decision of the High Court is printed on p. 157 of the paper-book and is also reported in Manohar Lal v. Banarsi Das 29 A 495 : 4 A L J 407 : AWN 1907, 121(Supra), referred to above.

18. Adoption and succession are two distinct matters and so are the rules which govern them. An adoption may be made even when there may be no question of any succession. There is no reason for making any distinction in the custom in cases where the widow succeeds to the Self-acquired property and ancestral property of her husband. The nature of the property, i.e., whether it is self-acquired or ancestral, would affect the rights which the widow would acquire in it but not the widow's right of adoption. The adopted son does not succeed to the property through the widow but succeeds through the adoptive father having the same status as that of a natural born son begotten by the husband on his adopting widow. An adoption would be either valid or invalid, but it cannot be partly valid and partly invalid. It has been argued on behalf of the appellants that where a widow possesses both self-acquired and ancestral property of her husband, the widow might adopt without authority of her husband, but the adoption would be valid only in respect of the self-acquired property of the husband. This argument is wholly untenable because the adoption is not-made with regard to property. The adoption confers on the adopted son all the rights of a natural born son begotten on the adopting widow by her deceased husband and he succeeds to all the property, ancestral as well a self-acquired, of his adoptive father. The question of the rights of the adopted son was considered in Sheo Singh Rai v. Dakho 1 A 688 : 5 I.A. 87 : 3 Suther 529 : 3 Sar. 807 : 6 N W P H C R 382 (PC)(Supra). One of the questions referred for enquiry by the High Court was :By the adoption of her son does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?

19. The finding of the High Court on this point, which was confirmed by their Lordships of the Privy Council was :That a daugther's son may be adopted and on adoption takes the place of a begotten son ; vide p. 701 Page of 1 A [Ed.]

20. The same point was considered in Harnath Prasad v. Mandil Das 27 C 379,(Supra) where it was observed :Whether she took an absolute or qualified estate, the evidence is uniform that the adopted son acquires the same right to the property as her husband had although there is some slight difference of opinion as to the extent of the control which she may retain over it.
21. In Kapur Chand v. Narinjan Lal 20 P.B. 1897(Supra), the Punjab Chief Court also considered the rights of a son adopted by a Jain widow. It was held :A valid adoption by a widow to her husband has the effect of placing the adopted son in the position which he would have occupied had he been adopted by that husband or been a posthumous child of that husband and that the adopted son must be received into the joint family partnership on adoption and is entitled to all the rights of an ordinary member of that partnership which has continued to exist in spite of the death of the deceased partner. The adoption was valid and had the effect of vesting in the adopted son the share of the deceased in the joint family property of every description.

22. The Lahore High Court again held in *Sunder Lal v. Baldeo Singh 14 Lah. 78 : 138 Ind. Cas. 151 : AIR 1932 Lah. 426 : 33 PLR 501 : Ind. Rul. (1932) Lah. 413,(Supra)* 'referred to above :
A son validly adopted by a widow to her predeceased husband is under Hindu Law like a son begotten on her by him and succeeds not only to the self-acquired or separate property. of the

adoptive father, but takes also the letter's co-parcenary interest in the joint Hindu family of which he was a member at the time of his death.

23. As already stated, Jains are governed by the Hindu Law of adoption, except in the matters of (1) authority for adoption, (2) restrictions as to the adoptee's qualifications, and (3) religious ceremonies : Lakhmi Chand v. Gatto Bai 8 A 319 : AWN 1886, 113(Supra), referred to above. Among them there is no restriction as to the adoption of an only son or a daughter's son or sister's son or a married man and no religious ceremonies are necessary. In all other matters the Hindu Law of adoption applies to them. Under the Hindu Law the adopted son becomes for all purposes the son of his father and his rights unless curtailed by express texts are in every respect the same as those of a natural born son. The only express text by which the heritable rights of an adopted son are "contracted" refers to the case of his sharing the heritage with an after-born natural (aurasa) son. Rajkumar Sarvadhikari states in his lectures on Hindu Law at p. 557 :
In every other instance the adopted son and the son of the body stand exactly on the same position.

24. An adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and an adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line: *Pratap Singh Shivsing v. Agarsinghp Rajaaangji*[14] Pages of 43 B.-[Ed.]. There is no authority for the proposition that a son adopted by a Jain widow has restricted rights of inheritance. On the other hand, the cases cited above would show that he has the same rights as a natural born son has. The right of the widow to make an adoption does not depend on the nature and character of the estate to which she succeeds from her husband. In Pratap Singh Shivsing v. Agarsinghji Rajasangji 43 B 778 : 50 Ind. Cas. 457 : AIR 1918 PC 192 : 46 IA 97 : 36 MLJ 511 : 17 ALJ 522 : 21 Bom. L.R. 496 : 1 UPLR (PC) 39 : (1919) M W N 313 : 10 LW 339 : 24 CWN 57 : 27 M L T 47 (P C)(Supra), referred to above, at p. 793 Pages of 43 B.-[Ed.] their Lordships of the Privy Council observed:
The right of the widow to make an adoption is not dependent on her inheriting, as a Hindu female owner, her husband's estate. She can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her.
25. In Harnath Prasad v. Mandil Das 27 C 379(Supra), referred to above, at p. 393* it was observed:There is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for distinction. We do not, however, consider that the two customs must stand or fall together. They seem to us quite independent. The custom by which the widow can adopt without her husband's permission does not in any way depend upon the nature of the estate which she takes from her husband. Whether she took an absolute or qualified estate, the evidence is uniform that the adopted son acquires the same right to the property as her husband had, although there is some slight difference of opinion as to the extent of the control which she may retain over it.

26. It may also be observed here that defendant No. 2, the widows has succeeded to both the ancestral and self-acquired property of her husband. As already stated, a suit (No. 213 of 1903) for partition was brought by Manohar Lal. One-fifth share was given to Musammat Beno. Before the final decree could be prepared Musammat Beno died. Badri Das claimed two-fifths share, one fifth allotted to him as his own share and one-fifth share of his mother, Musammat Beno, under an oral will. The final decree was prepared on June 18, 1909, which is printed on pp. 173 to 281. Musammat Beno's share was allotted to Badri Das as claimed by him under her oral will,

as would appear from the following, printed at p. 198:Under her oral will Lala Badri Das, defendant, is the exclusive owner (of her estate). Hence her share has been allotted to Lala Badri Das.

27. At the time of the decree according to the decision in *Sri Pal Rai v. Surajbali*[15] the share which was taken by the mother in a joint Hindu family upon partition of the family property was regarded as her stridhan which she was capable of alienating at her pleasure, and probably under this conception of the law as it then was understood, the property was conveyed to Badri Das by Musammat Beno under an oral will. Subsequently in 1911 their Lordships of the Privy Council held in Debi *Mangal Prasad Singh v. Mahadeo Prasad Singh*[16] According to the Mitakshara there is no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. Therefore the share which the mother in a joint family obtains after the death of the father on partition of joint family property between the mother and the son is not her stridhan but is given for her maintenance and on her death it devolves upon the heir of her husband and not upon her own heir.

28. So whether it may be looked at from the point of view of the decision in Sri Pal Rai v. Surajbali 24 A 82(Supra) or the decision in Debi Mangal Prasad Singh v. Mahadeo Prasad Singh 34 A 234 : 14 Ind. Cas. 1000 : 9 A L J 263 : 11 M L T 217 : 16 C W N 409 : (1912) M W N 324 : 14 Bom. L.R. 220 : 15 CLJ 344 : 22 M L J 462 : 39 IA 121 (PC), (Supra)the whole of the one-fifth share which was acquired by Badri Das over and above his one-fifth share which he got in his own right cannot be regarded as his ancestral property but was his self-acquired property. He got it under an oral will from Musammat Beno who had no right to dispose of it by will. Four-fifths of this one-fifth share should have gone to the other heirs. This four-fifths share which remained with Badri Das became his self-acquired property.

29. The next point that arises for consideration is whether in the absence of oral evidence it can be held in this case on the basis of the judicial decisions referred to above that the custom exists. A. custom that has been repeatedly brought to the notice of the Courts and has been recognised by them regularly in a series of cases attains the force of law and it is no longer necessary to assert and prove it. In *Jadu Lal Sahu v. Janki Koer*[17] the question was whether the plaintiffs who urged as Hindus were entitled to a right of pre-emption under Muhammadan Law under a custom prevailing in Bihar. This custom had been recognised in Fakir Rawot v. Emambaksh BLR Sup. Vol. 35(Supra). Their Lordships of the Privy Council observed in *Jadu Lal Sahu v. Janki Kuer 39 C 915 : 15 Ind. Cas 669 : 39 I A 101 :; 16 C W N 553 : 11 MLT 361 : (1912) MWN 486 : 15 CLJ 483 : 9 A L J 526 : 14 Bom. L.R 436 : 23 M.L.J 28 (PC) at p 922 Page of 39 (Supra)*C.-[Ed.]:In Fakir Rawot v. Emambaksh BLR Sup. Vol. 35, a Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of preemption among the Hindus of Bihar.... In their Lordships' judgment the decision in Fakir Rawot v. Emambaksh BLR Sup. Vol. 35 is conclusive on the point raised on behalf of the defendants.

30. In *Gangadhara Ramo Rao v. Rajah of Pittapur*[18] (at p. 785+ their Lordships of the Privy Council observed :No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari; That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in, each individual case.

31. 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.

32. The validity of the adoption has also been contested though not seriously on the ground of the execution of the deed of agreement under which defendant No. 2 is to remain in possession of the property during her life-time. The agreement is valid and does not affect the validity of the adoption. At one time it was questionable whether the natural guardian of the adopted son could enter into any agreement with the adopting widow so as to bind the adopted son. The matter has been conclusively decided by their Lordships of the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*[19] Their Lordships observe at pp. 263 and 264 Page of 54 I.A.-[Ed.]:It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decisions in the cases with the exception of the case in Jagannadha v. Papamma 16 M 400, that they are fairly entitled to come to the conclusion that custom has sanctioned such an angements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one sine qua non of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view of whether, in view of the adoption only being granted on condition of the arrangement, this is, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that if a natural father consented to give his son in adoption, he would only do it if it were reasonable, i.e., for the boy's benefit in the circumstances. Others lock at it from the point of view whether the adoption will put the boy in a reasonable position, i.e. not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way namely: that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

33. The appellants have not shown any corrupt or capricious motive on the part of the defendant No. 2 in making the adoption. The plea is based on the following passage in the *Collector of Madura v. Moottoo Ramalinga Sathupathy*[20] All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive.

34. What was meant by this passage has been explained by their Lordships in Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsayya 1 M 174 : 4 I A 1 : 26 W R 21 : 3 Sar. 669 at p. 13 Page of 4 I.A.-[Ed.](Supra):This being so, is there any ground for the application which the High Court has made of a particular passage in the judgment in Collector

of Madura v. Moottoo Ramalinga Sathupathy 12 MIA 397 : 10 WR 17 : 2 Bar. 361 : 2 Suther 135 (PC). The passage in question perhaps is not so clear as it might have been made. The committee, however, was. dealing with the nature of the authority of the kinsmen that was required. After dealing with the vexata quaestio which does not arise in this case, whether such an adoption can be made with the assent of one or more sapindas in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of a father-in-law would probably be sufficient, they said: 'It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is that there should be such evidence, not, be it observed, of the widow's motives but 'of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not bona fide attained.Their Lordships think it would be very dangerous to introduce into the consideration of these capes of adoption nice questions as to the particular motives operating on the mind of the Widow, and that all which this committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.

35. These cases are not applicable to the cases where no consent of kinsmen is required and no family council need be called or consulted. Whenever a widow has in herself full and free power to adopt without any person's permission, any inquiry into her motives must be irrelevant, for her action is that of a person who does what she has the right to do. The mere fact that the adoption puts an end to the expectations of the persons who would have succeeded to the property if no adoption had been made is not sufficient to constitute a corrupt or capricious motive as this result is bound to arise in each case of an adoption. The fact that adoption has in fact been made has not been challenged. We agree with the learned Subordinate Judge and hold that the adoption in question is valid. There is no force in the appeal. It is, therefore, ordered that the appeal be dismissed with costs.

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