Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheo Singh Rai v. *Mussumut Dakho and Moorari Lall, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered* 13*th April*, 1878.

Present:

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Judgment of the High Court of the North-West Provinces, which substantially affirmed a decree of the subordinate Judge of Meerut.

The suit was originally brought by the Respondent, Mussumat Dakho, the sonless widow of Ishq Lall, in her own name; Moorari Lall, her daughter's son, whom she had adopted, being afterwards added as co-Plaintiff. The Defendant (the Appellant) was a younger brother of Ishq Lall.

The family were Saraogi-Agarwalas, one of the divisions of the sect of Jains, whose laws and customs with regard to a widow's estate and her power of adoption differ, as the Respondents allege, from the ordinary law by which Hindoos are governed. This difference gives rise to the principal questions to be decided in the present suit.

Ishq Lall died in 1867. He left considerable property, including Government notes to the value of upwards of five lakhs of rupees. The widow took out the certificate of administration of his estate, and obtained possession of it.

It is admitted that the adoption by the Mussumat of her grandson was made without any authority expressly derived from her deceased husband, and

without the consent of his kindred—an adoption, therefore, which on that ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindoo law.

The immediate occasion of the suit arose in the following manner:—Ishq Lall, who had been an army contractor, received from the Government as a reward for services rendered during the mutiny a grant for his life of the Zemindari of Mouzah Nabali, in Pergunnah Baghpat, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the Mouzah to his widow, and she purchased it at the price of 6,206 rupees. It has been assumed that the purchase-money was paid out of the proceeds of her deceased husband's estate. It appears that whilst making up the Wajibulurz (a document called by the subordinate Judge "the village administration paper"), the Settlement Officer called upon the widow to name her successor to the Mouzah, with a view to enter the name in this paper; and that in answer to this requisition, she requested that the name of Moorari Lall should be recorded as her adopted son and successor. The Appellant objected to this being done, and the Settlement Officer thereupon ordered the following special entry to be made in the Wajibulara:—

"Para. IX. Regarding special tribes and customs of adoption, second marriage, or succession.

"Mussamat Dakho desired that Morari Lall, her daughter's son, whom she adopted, should succeed her after her death. But Sheo Singh Rai, the younger brother of her husband, on hearing this, objected that it is illegal that an adoption should take place without the permission of the husband's near relations. The Settlement Officer therefore passed the following Order on the 15th July, 1871: 'The parties may get this point decided by the Civil Court, and all points of this paragraph shall be decided by order of the Civil Court.'"

Both the Courts in India have stated that the Settlement Officer, in calling upon the Mussumat to name her successor, acted in excess of his powers. It has not been shown what is the precise object of the Wajibulurz, nor what are the regulations or orders under which it is made. The reference to "Paragraph IX. Regarding special tribes and customs of adoption, second marriage, or succession," seems to indicate that when these special customs

are found to exist, it is desired that they should be recorded for the information of the Settlement authorities. The Settlement Officer directed that the order he had made for the above entry should be communicated to the Mussumat by the Tahsildar, and that she should be advised to have the question of adoption settled by the Civil Court.

The present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it.

The Plaint (the widow being sole Plaintiff) asserts in a general and somewhat informal manner her claim to be maintained in possession "by establishment of Plaintiff's exclusive right of inheritance to the estate of her husband, composed of the Mouzah above described, and to uphold the adoption of Murari Lall, Plaintiff's daughter's son, as well as his right permanently to succeed her after her death, by voiding the Defendant's pretensions, under the usages and customs of the Sarogi religion." It then alleges that the Defendant during the progress of the late settlement, raised the objection that the widow cannot, unless with the consent of the relations of the family, make an adoption, and that the Plaintiff was referred to the Court by the Settlement Department.

The Defendant, in his written statement, after objecting to the suit on the grounds that the adopted son was not made a party to it, that the entry in the Wajibularz did not give a cause of action, and that the suit was unnecessary and premature, stated his defence on the merits as follows:—

"3rd. The law of inheritance applicable to the Jains is nothing different from the Shastras. They are all subject to the common Hindoo law. Therefore, both according to law and custom, the adoption of a daughter's son is invalid; moreover, the custom of adoption is not universally recognized among the people of this sect.

"4th. Among the Jains, a widow is not competent of herself to adopt a son, unless with the permission of her husband or the consent of the near heirs.

"5th. The Plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The Defendant, the brother of the deceased, is, under the Shastras as well as a verbal declaration of Ishq Lal, the owner and possessor of the whole of his estate. The Plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as

she lives, and then the Defendant will be entitled to it as reversioner."

Evidence having been taken respecting the customs and tenets of the Saraogi-Agarwala Jains, the subordinate Judge, without specifically deciding upon these customs, dismissed the suit on the ground that the Plaintiff, by adopting a son who, upon adoption, would become, if his adoption were valid, heir to his father, "had raised a barrier" to her own claim of absolute right. Upon appeal to the High Court, the Judges were of opinion that the subordinate Judge had not sufficiently inquired into and ascertained the special customs of the Jains, and that he was wrong in dismissing the suit. The Court, therefore, remanded the suit under section 351, Civil Procedure Code, and directed that an opportunity should be given for making the adopted son a party to the suit.

The following passage of the Judgment contains the view of the Court with regard to the nature and scope of the inquiry to be made by the subordinate Judge:—

"We are invited by the pleaders of the parties in this Court to give directions to the Court below on the questions of Jain law which are raised in this suit.

"The Jains 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, viz., Delhi, Muttra, and Benares. The questions to be addressed to these gentlemen would be the following:—

"'What interest does the widow take under Jain law in the moveable and immoveable 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 a 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? And if the Subordinate Judge considers that the verbal gift which the Respondent alleges is established by proof, he might further inquire whether such a gift is valid as against the widow?'"

Upon the suit being thus remanded, Moorari

Lall, the adopted son, was made a co-Plaintiff, the Mussumat being appointed his guardian.

Commissions to take evidence as to the customs of the Saraogi Agarwala Jains, were then issued to Delhi, Jeypore, Muthra, and Benares, and several leading members of that division of the Jain community were examined under them at each of these places. The Subordinate Judge has thus summarised their evidence :—

"With the exception of one from Delhi, the others unanimously declare that, in the absence of any son, a Jain widow succeeds to the estate of her husband, moveable and immoveable, in absolute right. 2nd. That she can deal with it at pleasure and without restriction. 3rd. That she can adopt her daughter's son, without requiring any consent or authority from her deceased husband, or relatives of such deceased husband; and that such adopted son would succeed to her deceased husband's estate in the same manner as her own begotten son would have done, with a slight restriction. 3rd. That a nuncupative will by her husband would not be valid as against her; but this last point does not at all bear on the case, seeing that there is no evidence as to any such will having been pronounced."

The Subordinate Judge then made a Decree in favour of the Plaintiff in the following terms :—

"That the Plaintiff is entitled to a Decree to be maintained in possession of the zemindari property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted grandson by her daughter, there being nothing to prevent his succession to the estate."

The Defendant again appealed to the High Court, one of his grounds of appeal being that the witnesses, except at Jeypore, had not been examined on oath. Another ground was, "That the finding of the Subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the Plaintiff in favour of the Appellant was incorrect."

On this Appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been irregularly taken, and being of opinion that it would not be proper to decide the important questions of Jain law involved in the case upon the evidence of the Jeypore witnesses alone, they determined, before finally disposing of the Appeal, to issue fresh Commissions from their own Court to Delhi, Muthra, and Benares. These Commissions

were accordingly issued, and under them the original and new witnesses were examined, whose testimony was given at greater length than on the first occasion.

Upon the return of these Commissions, the cause was finally heard by the High Court, and the Judgment now under Appeal pronounced. It contains the following general account of the history and religious tenets of the Jains :—

"The parties are Saraogi-Agarwalas, one of the numerous subdivisions of the sect of the Jains. What little is known of the history of that sect is to be found collected in the learned Judgment of the Chief Justice of Bombay in Bhugwan Dass Tejmal *v.* Rajmail, X Bombay, H. C. R., 241. For upwards of eleven and twelve centuries they have seceded from the creed of the Vedas, and their religious tenets have more affinity with the precepts of the Buddhists than with those of the Brahmins. They recognize the caste system of the Brahminical Hindoos, and in such ceremonies as they retain, generally avail themselves of the assistance of a Brahmin.

"They differ particularly from the Brahminical Hindoos 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 a merely temporal arrangement and has no spiritual object."

The Judges then proceed to an elaborate review of the decisions in India in which the laws and customs of the Jains have been considered. It appears to have been contended before them, to use the words of the Court, "that the applicability to Jains of the laws of the Brahminical Hindoos, or what is generally termed Hindoo law, had been established by so many rulings that the Court was bound to apply it to this case;" and further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that where these were satis-

factorily proved, effect ought to be given to them. The learned Counsel for the Appellant, who argued the case at their Lordships' Bar, felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable if it had appeared that in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindoo or Mahomedan, the Courts had denied to the large and wealthy communities existing among the Jains, the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise.

It no doubt appears from the Judgment of the High Court of Bombay delivered by Westropp, Chief Justice, in Bhagvandas Tejmal *v.* Raginal (10 Bombay, H. C. R. 241) that the Judges of that Court were not satisfied that in the Presidency of Bombay usages had been established to exist among the Jains at variance with ordinary Hindoo law. "Hitherto," they say, "so far as we can discover, none but ordinary Hindoo law has been ever administered either in this Island, or in this Presidency, to persons of the Jaina sect." This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. They also remark upon the impolicy of introducing departures from the general law. Their Lordships, however, do not understand the Judges to say that customs having such an effect may not lawfully be given effect to, if established by sufficient evidence. On the contrary, their Judgment contains this passage :—

> "But when amongst Hindoos (and Jains are Hindoo dissenters) some custom different from the normal Hindoo law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

Reference was also made to the observations of this Board respecting the proof required to establish customs in the case of Ramalakshun Ammal *v.* Sivanatha Perumal (14 Moore, I.A. 585).

The facts in the case before the High Court of

Bombay were, that after the death of both husband and wife, the brothers of the deceased husband, with the consent of the Puneh, chose a nephew of the husband, to be his son by adoption. The evidence given in support of such a custom of adoption was slight, and the Court held that it was not sufficiently proved. It is said in the Judgment, "not a single Yati, or Pundit, or Priest, or other expert, either in the lore of the Jainas or of the Brahmins, has been called to prove the alleged custom." Undoubtedly such a custom being, as the Judges point out, opposed to the spirit of the Hindoo law of adoption, would require strong evidence for its support, and such evidence appears to have been wholly wanting in that case.

In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit.

This evidence, particularly that taken at Delhi, is entitled to great weight, having regard both to the status of the witnesses, and to the consistent manner in which they describe the custom. It is stated in the Judgment below that "Delhi is the chief seat of the Jains in the north-west of India, and is the adjoining district to that in which the property is situate."

The manner in which the witnesses were called together to be examined, and their position in the Jain community, are thus described in the Judgment :—

"The Commissioner reports that on receipt of the Court's commission, he called upon the Deputy Commissioner to furnish him with a list of the names of the principal members of the Jain community residing in Delhi; that out of 125 persons whose names were so furnished, he selected 26 persons, whom he summoned to attend his Court, and that of the 26 he examined 6, of whom 2, Zora Mul and Ghyan Chund, were elders of the Council of the sect at Delhi, appointed to determine all questions of religious and social importance arising in the sect, while the other 4 persons selected were all of a rank that entitled them to admission to the Lieutenant-Governor's Durbar. Of these also, one Buldeo Singh, deposed he was a member of the Council before-mentioned. Furthermore, the Commissioner, at the instance of the Appellant, took the evidence of 2 others out of the 26 persons summoned. As all the witnesses so selected by the Commissioner must be presumed to have been impartial, and as either party was at liberty by the terms of the Commission to produce any witnesses

he desired should be examined, and the Appellant availed himself of this privilege only so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the Delhi Commission."

Their Lordships are relieved from an examination of this evidence in detail, since the learned Counsel for the Appellant felt constrained to admit that the conclusions drawn from it by the Court were in the main correct.

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 Agarwala takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindoo law to the widows of orthodox Hindoos; 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 to the guardianship of the adopted son and the management of the property during his 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."

The Court adds :—

"We do not, however, desire to be understood as ruling this point in this suit for the widow, and the adopted son has not been separately represented at the bar, and we have not had the benefit of such assistance from the bar on this point as on the other issues, there being at present no contest between the widow and the adopted son as to their respective rights. We shall affirm the Decree of the Subordinate Judge, declaring the validity of adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the Decree of the Subordinate Judge, so far as it declares the widow entitled to be maintained in possession as proprietor, by inserting the alternative, or as manager on behalf of her adopted son."

Their Lordships will advert hereafter to the form of the Decree.

They will now proceed to consider the objections raised to the suit on the ground that it is merely declaratory, and can lead to no relief.

It is scarcely necessary to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board, that section 15 of the Indian Act VIII of 1859 relating to Declaratory Decrees ought to receive the same construction as section 50 of the English Act, 15 and 16 Vic., c. 86, which is similarly worded, has received from the English Courts. In the last of these decisions the English and Indian cases on the subject were reviewed, and it was laid down that a Declaratory Decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court. (Strimathoo Moothoo Natchiar and others, *v.* Dorasinga Tever. L. R., 2 I. A., 169.)

The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to observe that a right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an Injunction against such obstructions, would be sufficient to sustain a declaratory Decree.

It was contended on behalf of the Respondents that the intervention of the Appellant in the proceedings of the Settlement Officer, and his objection to the entry on the Wajibulara of the name of Moorari Lall as the adopted son of the Mussumat on the ground that the adoption was illegal, was an act of obstruction against which they were entitled to relief; and if it had been shown that the entry thus objected to had been necessary to the settlement of the Mouzah, or the completion of the title, or the right to present possession, the contention might have been well founded. But this has not been shown. It would seem that the Mouzah had been already granted by the Government to the Mussumat, and she had been recorded as proprietor. The

object of the paper appears to be, as already stated, to record peculiar customs and rights for the information of the Settlement Officers; and although the Deputy Collector asked for information as to the Mussumat's successor, and upon the Appellants' objection to the entry of the adoption, placed his objection upon the Wajibulara, and referred the parties to a Civil Court, their Lordships would have felt great difficulty, to say the least, if it had been necessary to give a decision upon this point, in coming to the conclusion that these proceedings were such an obstruction to the title or right of possession as would sustain the Decree.

Another ground on which it was alleged the Plaintiffs were entitled to relief was that the Appellant had put forward a nuncupative will of his deceased brother, by which he was made the proprietor of the estate, and that the Plaintiffs were entitled, if they had asked for it, to a Decree annulling that will.

It would not probably be disputed that if a fictitious will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled, and their Lordships are not prepared to say that in cases where property may legally pass by an oral will an analogous right to have it declared null may not exist. A claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. The reasons, too, for giving such relief in the case of written wills would seem to apply to nuncupative wills, and one of them, the probable deaths of witnesses, with even greater force to the latter than the former.

It was, however, contended, on behalf of the Appellant, that relief against this Will was not one of the objects of the original suit, which was confined to the intervention of the Appellant in the settlement proceedings. Undoubtedly the plaint refers only to this intervention, and the assertion of this Will appears for the first time in the Defendant's Answer. But it will be found, on reference to the proceedings, that the claim was persisted in after Moorari Lall had been added as a co-Plaintiff, and indeed to the end of the suit. One issue framed at the first hearing of the cause was whether the verbal Will had been in fact made, and

one of the questions put to the witnesses examined upon the customs of the Jains was, whether a verbal gift is valid against the widow. The Commissions in which this question appeared were issued after the first remand to the subordinate Judge, and after Moorari Lall had been made a co-Plaintiff. In his Judgment, given after the return of these Commissions, the Subordinate Judge expressly finds on this issue that a nuncupative Will by the deceased husband would not be valid as against the widow; and although he adds that there was no evidence that such will had been "pronounced," the Defendant, in one of his grounds of appeal to the High Court, complains that this finding is not correct, and the High Court deals with the question of this Will in its final judgment.

The contention, then, on the part of the Appellant that his putting forward of this Will ought not to be regarded, is reduced to to the objection that it was not introduced into the original Plaint. It is, however, questionable whether, when Moorari Lall was made a Plaintiff, the suit ought not to be considered for this purpose as a new suit, and whether the Appellant, having before that time put forward the claim in question and persisted in it to the end, relief might not, if asked for, have been granted against it. It would not be necessary that the suit should have been in fact remodelled when Moorari Lall became Plaintiff, so as to ask for this relief, it is sufficient if it might have been so remodelled, and relief obtained.

Their Lordships, however, do not think it necessary to give a definitive judgment on this question, because they are of opinion that under the circumstances in which this Appeal to Her Majesty comes on to be heard, the Appellant ought to be precluded from insisting on his objection to the Decree on the ground of its being declaratory only.

In his petition to the High Court for leave to appeal to Her Majesty, the Appellant made no reference in the grounds of Appeal to this objection to the Decree. The leave granted by the High Court having become abortive, in consequence of the deposit for costs not having been made in due time, application to this Board for special leave to appeal was made. In the petition for this leave, again no reference was made to this objection, but

the application was based on the ground that important questions affecting a large community were involved in the decision sought to be appealed from.

This Petition, after fully stating the conclusions of the High Court upon the evidence relating to Jain customs, contains the following passage :— "The Petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance to the sect of the Jain community, to which the Petitioner belongs." Their Lordships having, on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the Appeal comes on to be heard, not to examine or consider the important questions thus indicated, but to reverse the Judgment on a ground which altogether excludes their discussion. Their Lordships do not by any means intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the whole course of the proceedings in the Court below, to which they have fully adverted, the importance of the questions upon which the Appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, they think the Appellant ought not, at this stage, to be allowed to insist that by reason of these objections the Decree appealed from should be reversed.

Exception has been taken to that part of the Decree of the High Court which varied the Decree of the Subordinate Judge, declaring that the widow was entitled to be maintained in possession as proprietor, by substituting the declaration that the widow is entitled to retain possession of the estate, either as proprietor, or as manager thereof on behalf of her adopted son, Moorari Lall. The substituted declaration, being in the alternative, is no doubt in one sense uncertain ; but it is independent of the other declarations which decide the rights of the parties as between the Plaintiffs on the one side, and the Defendant on the other, and repel the Defendant's pretensions. The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being Plaintiffs.

It is, no doubt, on this account that the Decree, whilst it declares the right of the widow to present possession as against the Defendant, is framed in a form which avoids prejudice to the rights of the Plaintiffs *inter se.*

In the result their Lordships will humbly recommend Her Majesty to affirm the Decree of the High Court with costs.

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