CASE NO.:
Special Leave Petition (civil) 1380 of 2002

PETITIONER:
Salekh Chand (Dead) by Lrs

RESPONDENT:
Satya Gupta and Ors

DATE OF JUDGMENT: 04/03/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. OF 2008
(Arising out of SLP (C.) No. 1380 of 2002)

Dr. ARIJIT PASAYAT, J

1. Second appeal filed by the defendants having been allowed by the learned Single Judge of the Allahabad High Court one of the plaintiffs Salekh Chand has filed this appeal. The legal heirs of the another plaintiff Om Prakash who died on 28.2.1998 (proforma respondent No.4) have been impleaded in this appeal. Om Prakash's widow Smt. Ram Kumari died on 2.6.1999 and, therefore, their son Munna Lal is proforma respondent no.4.

2. Background facts in a nutshell are as follows:

A suit filed by the plaintiffs Om Parkash and present appellant Salakh Chand was dismissed by learned Additional Civil Judge, Ghaziabad in Suit No.699/84. Learned Additional District Judge, Ghaziabad reversed the judgment and decree dated 5.3.1990 by judgment and decree dated 22.2.1998. The plaint averments refer to the following facts:

Om Prakash and Salekh Chand filed Suit No.699 of 1984 against Smt. Satya Gupta and one Brijesh Kumar. Shiv Om Banshal and Mahendra Kumar Banshal (Respondent Nos. 2 and 3 in this appeal) were impleaded as defendant nos.3 and 4. The plaint allegations were that House no.104 (old number) with its new numbers 175 and 176 described in the plaint belonged to one Pares Ram who had four sons namely, Jagannath, Dina Nath, Anand Swaroop and Battu Mal. The pedigree was as follows:

PEDIGREE

PARES RAM

| | | |
Jagannath Dina Nath Anand Swaroop Battu Mal
| (died issue-less) |
| |

Chandra Bhan (adopted son) — Surendra Kumar (son)

Smt. Shanti Devi

Chawali Devi (widow) — Satya Gupta (daughter) defendant no.1 — Brijesh Kumar (adopted son) defendant no.2

Dina Nath died issue-less out. During his lifetime he had sold his 1/4th share to Battu Mal. Surendra Kumar and his mother (widow of Anand Swaroop) had sold their 1/4th share to Smt. Satya Gupta by registered sale-deed. Brijesh Kumar defendant no.2 is the adopted son of Battu Mal. On the death of Jagannath his son Chandra Bhan succeeded to share of Jagannath in the suit property. On the death of Chandra Bhan his widow succeeded to the suit property. She executed a sale-deed dated 26.7.1979 of her share in the suit property. Thus the plaintiffs are co-sharers of 1/4th share in the suit property whereas defendant nos.1 and 2 are co-sharers of 3/8 share each in the suit property. It is alleged that Jagannath had no issue. He had adopted Chandra Bhan who happens to be the son of his real sister and the sister's husband's name was also Jagannath. Ceremony of adoption was performed in accordance with the customs of the community prevalent among the parties in the month of Flagun Samvat 1985. There was a custom in the community of the co-sharers to adopt sister's son and Smt. Shanti Devi was wife of Chandra Bhan. The plaintiffs wanted to get the suit property partitioned and have their separate 1/4th share in the suit property. On the above pleadings the relief claimed was that the suit property be partitioned by metes and bounds and the plaintiffs be given possession on the separate share allotted to them.

Defendant no.2 did not file any written statement and suit against him proceeded ex-parte. Defendant no.1 (present respondent no.1) and defendant nos. 3 and 4 contested the suit by filing separate written statements. Defendant no.1 in her written statement denied the claim of the plaintiffs and it was pleaded that plaintiff no.1 Om Prakash was tenant of Smt. Chawali Devi on part of the land of the disputed property at the rate of Rs.65/- per month as rent. He inducted plaintiff no.2 as subtenant. Smt. Chawali Devi, mother of defendant no.1 Smt. Satya Gupta succeeded to the share of Chawali Devi in the suit property. She filed suit no.31 of 1985 for ejectment of the plaintiffs, which was then pending. The family pedigree was accepted subject to the correction that Chandra Bhan and Shanti Devi were wrongly shown as son of Jagannath and widow of Chandra Bhan. Jagannath died issueless. Likewise Battu Mal had not adopted any son, Brijesh Kumar, and defendant no.2 Brijesh Kumar was not adopted son of Battu Mal. At the time of his death, Battu Mal was owner of the entire suit property and on his death his widow Smt. Chawali Devi became owner in possession and on Chawali Devi's death, defendant no.l Smt. Satya Gupta being her daughter became owner in possession of the entire suit property. The plaintiffs and other defendants have no share in the suit property. The sale-deed executed by Smt. Shanti Devi in favour of the plaintiffs is null and void. Jagannath had not adopted Chandra Bhan son of his sister and according- to the Hindu custom in 'Vaishya' community

sister's son cannot be adopted. No such custom was prevalent in the 'Vaishya' community of Hapur. Hence the alleged adoption was illegal. Jagannath died issueless about 50 years back and on his death Dina Nath, Anand Swaroop and Battu Mal alias Jagat Swaroop became owners in possession by survivorship and their names were mutated in the Municipal records on the application moved by Dina Nath and Battu Mal in the year of 1935. Thereafter Battu Mal has purchased the share of Dina Nath and Anand Swaroop and thus Battu Mal became sole owner of the suit property. Relevant entries were made in the Municipal records for the assessment years 1946-51. Battu Mal was murdered. One Surendra Kumar and Smt. Basanti Devi had no share in the suit property. But in order to avoid any dispute defendant Satya Gupta had purchased 1/2 share from Surendra Kumar and Smt. Basanti Devi. Battu Mal had never adopted Brijesh Kumar and Brijesh Kumar is son of one Shambhu Saran who was distantly related to Battu Mal. Brijesh Kumar was sentenced to life imprisonment for committing the murder of Battu Mal in the year 1956 and thus Brijesh Kumar was not entitled to succeed to the property of Battu Mal. One Sri Hari Shanker Bansal (father of Defendants no. 3 and 4) was tenant of Smt. Chawali Devi on part of the suit property for about last 25 years and he had constructed one pucca room on the land under his tenancy. Plaintiff No.1, Om Prakash was also given 7 x 7 feet land of suit property on rent by Smt. Chawli Devi on which a temporary wooden Khokha was kept by Om Prakash in which he was doing Crockery and Shamiyana business. It was also pleaded that Smt. Chawali Devi executed a will dated 21.6.1962 in favour of Defendant 1 in respect to her entire property. She died on 23.5.1980 and on her death defendant no.1 filed Testamentary Suit No.1/81 in the High Court on the basis of the will dated 21.6.1962 and she was granted Letters of Administration on 9.4.1984. Defendant no.1 is in possession of the suit property for last about 20 years and her name is entered in the Municipal Records as owner of the disputed property. Plaintiffs never objected to it. The answering defendant sold by a registered sale deed properties to Bansals (Defendants Nos. 3 & 4) and they are necessary parties to the suit.
Defendants Nos. 3 & 4 in their written statements adopted the pleadings of defendant no.1 and categorically, alleged that according to the Hindu custom sister's son cannot be adopted, hence alleged adoption of Chandra Bhan by Jagannath was against law.

Plaintiffs filed replication in which it was reiterated that in the Township of Hapur, where Jagannath, Anand Swaroop etc. lived, there was a custom prevalent among Vaish community to adopt son of sister. It was also pleaded that since only Battu Mal lived in Ghaziabad, he got his name mutated in the Municipal Records. In the sale deed executed by Surendra Kumar and Basanti Devi in favour of defendant No.l's 1/4th share is shown to have been sold as 1/3rd share to defendant no. l .

On the pleadings of the parties, the trial court framed a number of issues. Relevant issues are issues nos.1 and 2 which were as follows:

1. Whether a custom was prevalent in Vaish community to validly adopt son of the sister?
2. Whether Jagannath had legally adopted Chandra Bhan as a son, if so what is its effect?

Both the parties adduced oral as well as documentary evidence. The trial court on consideration of the evidence adduced before it and also on consideration of legal position recorded finding that the plaintiffs have failed to establish that Jagannath had legally adopted Chandra Bhan as his son. They have also failed to establish that in the Township of Hapur a custom was prevalent in Vaish community, to validly adopt son of sister. The trial court also recorded a finding of fact that the plaintiffs have failed to establish that the formalities of adoption were observed in accordance with law. On the other issue also the trial court recorded finding of fact against the plaintiffs. The trial court accordingly dismissed the suit.

The First Appellant Court reversed the findings and held that the custom of adoption was prevalent amongst community and, therefore, Chander Bhan was the legally adopted son of Jagannath in the suit property and on his death, widow of Chander Bhan had 1/4th share in the property. The plaintiff's suit was accordingly decreed. The High Court in the second appeal formulated the following questions for determination:

1. Whether the plaintiffs/respondents have successfully discharged the burden of proof to establish that there existed a custom in the Vaish community to which the lineal descendants of Paras Ram belonged, to adopt the son of sister?

2. Whether a Hindu belonging to the regenerated class could be adopted after performance of 'Janeu' ceremony?

3. Whether for proving the factum of adoption it was necessary to lead evidence of giving and taking of an adopted child at the time of ceremony of adoption?

4. Whether recital in a document regarding alleged adoption is sufficient for proving of the factum of adoption?

3. The High Court found that question no.3 as formulated above was not a substantial question of law but held that there was no prevalent custom permitting adoption of the sister's son and, therefore, the appeal was allowed.

4. In support of the appeal learned counsel for the appellants submitted that the custom was established. There was enough material to show that the family members treated Chander Bhan as the adopted son and, therefore, the First Appellate Court's judgment and decree should have been maintained. It was submitted that the Trial Court and the High Court should not have given any undue importance to the fact about the Jenau ceremony being held on the same day, overlooking the fact that the evidence was being given by the witness who was more than 80 years old. It is submitted that even if the defendants acquire any title because of the transaction with Anand Swarup his share was 1/4th and in any event the defendants cannot claim 1/3rd share. It is further submitted that even if the stand about the acceptance of Chander Bhan as an adopted son is to be accepted, that in

any event do away with the requirement to prove legality of adoption. It is to be noted that the adoption took place sometime in 1928-1929.

In response, learned counsel for the respondents submitted that the custom was not established. Evidence of PWs 1, 2 and 3 did not prove existence of custom.

The rival stands need careful consideration.

6. Since the alleged adoption took place prior to enactment of Hindu Adoptions and Maintenance Act, 1956 (in short the 'Act'), the old Hindu Law is applicable.

It would be desirable to refer to certain provisions of the Act, and the Hindu Code which governed the field prior to the enactment of the Act. Section 3(a) of the Act defines 'custom' as follows

"3. Definitions.- In this Act, unless the context otherwise requires, -
(a) the expressions, 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:
Provided that the rule is certain and not unreasonable or opposed to public policy; and
Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;"

Section 4 provides that any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act shall become inoperative with respect to any matter for which provision was made in the Act except where it was otherwise expressly provided. Section 4 gives overriding application to the provisions of the Act. Section 5 provides that adoptions are to be regulated in terms of the provisions contained in Chapter II. Section 6 deals with the requisites of a valid adoption. Section 11 prohibits adoption; in case it is of a son, where the adoptive father or mother by whom the adoption is made has a Hindu son, son's son, or son's son's son, whether by legitimate blood relationship or by adoption, living at the time of adoption. Prior to the Act under the old Hindu Law, Article 3 provided as follows

"Article 3-(1) A male Hindu, who has attained the age of discretion and is of sound mind, may adopt a son to himself provide he has no male issue in existence at the adoption.
(2) A Hindu who is competent to adopt may authorise either his (i) wife or (ii) widow (except in Mithila) to adopt a son to himself."

Where a son became an outcast or renounced Hindu religion, his father became entitled to adopt another. The position has not changed after enactment of Caste Disabilities Removal Act (XXI of l850) as the outcast son does not retain the religious capacity to perform the obsequial rites. In case parties are governed by Mitakshara Law, additionally adoption can be made if the natural son is a congenital lunatic or an idiot.

Relevant provisions relating to custom as defined in the Hindu Code are as follows:

"Custom defined.-- Custom is an established practice at variance with the general law.
Nature of custom.- A custom varying the general law may be a general, local, tribal or family custom.
Explanation 1.- A general customs includes a custom common to any considerable class of persons.
Explanation 2.- A custom which is applicable to a locality, tribe, sect or a family is called a special custom.
Custom cannot override express law -
(1) Custom has the effect of modifying the general personal law, but it does not override the statute law, unless it is expressly saved by it.
(2) such custom must be ancient, uniform, certain, peaceable, continuous and compulsory.
Invalid Custom \026 No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.
Pleading and proof of custom \026 (1) He who relies upon custom varying the general law must plead and prove it.
(2) Custom must be established by clear and unambiguous evidence."
(See Sir H.S. Gour's Hindu Code Volume 1, Fifth Edition.)
Custom must be ancient, certain and reasonable as is generally said. It will be noticed that in the definition in Cl. (a) of Section 3 of the Act, the expression 'ancient' is not used, but what is intended is observance of custom or usage for a long time. The English rule that ' a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' has not been strictly applied to Indian conditions. All that is necessary to prove is that the custom or usage has been acted upon in practice for such a long period and with such invariability and continuity as to show that it has by common consent been submitted to as the established governing rule in any local area, tribe, community, group or family. Certainty and reasonableness are indispensable elements of the rule. For determination of the question whether there is a valid custom or not, it has been emphasized that it must not be opposed to public policy. I shall deal with the question of public policy later on.
The origin of custom of adoption assumes great importance. The origin of custom of adoption is lost in antiquity. The ancient Hindu Law recognized twelve kinds of sons of whom five were adopted. The five kinds of adopted sons in early times must have been of very secondary importance, for, on the whole, they were, relegated to an inferior rank in the order of sons. Out of the five kinds of adopted sons, only two survive today; namely, the. Dattaka form prevalent throughout India and the Kritrima form

confined to Mithila and adjoining districts. The primary object of adoption was to gratify the means of the ancestors' by annual offerings and therefore it was considered necessary that the offerer should be as much as possible a reflection of a real descendant and had to look as much like a real son as possible and certainly not be one who would never have been a son. Therefore, the body of rules was evolved out of a phrase of Saunaka that he must be 'the reflection of a son'. The restrictions flowing from this maxim had the effect of eliminating most of the forms of adoption. (See Hindu Law by S. V. Gupte, Third Edition at pages 899-906). The whole law of Dattaka adoption is evolved from two important texts and a metaphor. The texts are of Manu and Vasistha, and the metaphor that of Saunaka. Manu provided for the identity of an adopted son with the family into which he was adopted. (See: Manu.Chapter IX, pages 141-142, as translated by Sir W. Jones). The object of an adoption is mixed, being religious and secular. According to Mayne, the recognition of the institution of adoption in early times had been more due to secular reasons than to any religious necessity, and the religious motive was only secondary; but although the secular motive was dominant, the religious motive was deniable. The religious motive for adoption never altogether excluded the secular motive. (See Mayne's Hindu Law and Usage, Twelfth Edition, page 329).

As held by this Court in V.T.S. Chandrashekhara Mudalie v. Kulandeivelu Mudalier (AIR 1963 SC 185), substitution of a son for spiritual reasons is the essence of adoption; and consequent devolution of property is mere accessory to it; the validity of an adoption has to be judged by spiritual rather than temporal considerations; and, devolution of property is only of secondary importance.

In Hem Singh v. Harnam Singh (AIR 1954 SC 581), it was observed by this Court that under the Hindu Law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules have therefore been held to be mandatory, and compliance with them regarded as a condition of the validity of the adoption. The first important case on the question of adoption was decided by the Privy Council in the case of Amarendra Mansingh v. Sanatan Singh, AIR 1933 PC 155. The Privy Council said

"Among the Hindus, a peculiar religious significance has attached to the son, through Brahminical influence, although in its origin the custom of adoption was perhaps purely secular. The texts of the Hindus are themselves instinct with this doctrine of religious significance. The foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites."

With these observations it decided the question before it, viz., that of setting the limits to the exercise of the power of a widow to adopt, having regard to the well established doctrine as to the religious efficacy of sonship. In fact the Privy Council in that case regarded the religious motive as dominant and the secular motive as only secondary.

This object is further amplified by certain observations of this Court. It has been held that an adoption results in changing the course of succession, depriving wife and daughters of their rights, and transferring the properties to comparative strangers or more remote relations. [See : Kishori Lal v. Chaltibai (AIR 1959 SC 504)]. Though undeniably in most of the cases motive is religious, the secular motive is also dominantly present. We are not concerned much with this controversy, and as observed by Mayne it is unsafe to embark upon an enquiry in each case as to whether the motives for a particular adoption were religious or secular and an intermediate view is possible that while an adoption may be a proper act, inspired in many cases by religious motives, courts are concerned with an adoption, only as the exercise of a legal right by certain persons. The Privy Council's decision in Amarendra Mansingh's case (supra), has reiterated the well established doctrine as to the religious efficacy of sonship, as the foundation of adoption. The emhasis has been on the absence of a male issue. An adoption may either be made by a man himself or by his widow on his behalf. The adoption is to the male and it is obvious that an unmarried woman cannot adopt. For the purpose of adoption is to ensure spiritual benefit for a man after his death by offering of oblations and rice and libations of water to the manes periodically. Woman having no spiritual needs to be satisfied, was not allowed to adopt for herself. But in either it is a condition precedent for a valid adoption that he should be without any male issue living at the time of adoption."

6. In Mookka Kone v. Ammakutti Ammal [AIR 1928 Mad 299 (FB)], it was held that where custom is set up to prove that it is at variance with the ordinary law, it has to be proved that it is not opposed to public policy and that it is ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy. It is not disputed that even under the old Hindu law, adoption during the lifetime of a male issue was specifically prohibited. In addition, I have observed that such an adoption even if made would be contrary to the concept of adoption and the purpose thereof, and unreasonable. Without entering into the arena of controversy whether there was such a custom, it can be said that even if there was such a custom, the same was not a valid custom."

It is incumbent on party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. It must be established inductively and not by a priori methods. Custom cannot be a matter of theory but must always be a matter of fact and one custom cannot be deduced from another. It is a well established law that custom cannot be enlarged by parity of reasoning.

Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the alleged custom should be forthcoming. A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case. Where, however a custom is repeatedly brought to the notice of the courts, the courts, may hold that the custom was

introduced into law without the necessity of proof in each individual case.

Custom is a rule which in a particular family or a particular class or community or in a particular district has from long use, obtained the force of law. Coming to the facts of the case P.W.1 did not speak any thing on the position either of a local custom or of a custom or usage by the community, P.W.2, Murari Lal claimed to be witness of the ceremony of adoption he was brother-in-law of Jagannath son of Pares Ram who is said to have adopted Chandra Bhan. This witness was 83 years old at the time of deposition in the Court. He did not speak a word either with regard to the local custom or the custom of the community. P.W.3 as observed by the lower appellate Court was only 43 years' old at the time of his deposition where as the adoption had taken place around 60 years back. He has, of course, spoken about the custom but that is not on his personal knowledge and this is only on the information given by P.W.2, Murari Lal. He himself did not speak of such a custom. The evidence of a plaintiff was thus insufficient to prove the usage or custom prevalent either in township of Hapur and around it or in the community of Vaish. The evidence of D.W.3 refers only to one instance. From his evidence it cannot be inferred that Om Prakash had adopted Munna Lal who was his real sister's son. As already pointed out above, the trial court found that the evidence of D.W.3 was not so clear and unambiguous as to lead to no other conclusion except that Munna Lal was son of real sister of Om Prakash. Besides, this solitary instance of adoption of his sister's son cannot amount to long usage, which has obtained the force of law. Mulla has categorically commented that where the evidence shows that the custom was not valid in numerous instances, the custom could not be held to be proved. A custom derives its force from the evidence from long usage having obtained the force of law.

All that is necessary to prove is that usage has been acted upon in practice for such a long period with such invariability as to show that it has, by consent, been submitted so as to establish governing rules of a particular locality or community.

A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.

A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Riwaj-i-am or Manual of Customary Law.

In yet another decision reported in Hem Singh and another v. Hakim Singh and another (AIR 1954 SC 581), this Court observed that the custom recorded in the 'Riwaj-i-am' is in derogation of the general custom and those who set up such a custom must prove it by clear and unequivocal language. Similarly, when a custom is against the written texts of the Hindu Law then, one who sets up such a custom must prove it by a clear and unequivocal language. It may also be pointed out that the settled law is that for a valid adoption, not only the person adopting should be capable of lawfully taking in

adoption; but the person giving must be capable of lawfully giving in adoption and the person adopted must be capable of being lawfully taken in adoption. It is necessary that all these three conditions should be satisfied and that it is not sufficient that one of them be satisfied. In the case of Hem Singh (supra) this court quoted with approval of some of the observations in Mulla's Principles of Hindu Law at Page 541 of XI Edition with such observations in paragraph 434 to the following effect:

"It has similarly been held that the texts which prohibit the adoption of an only son, and those which prohibit the adoption of an only son, those which enjoin the adoption of a relation in preference to a stranger, are only directory; therefore, the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid; that in cases such as the above, where the texts are merely directory, the principle of factum valet applies, and the act done is valid and binding."

But just thereafter the following observations occurred in the same paragraph :

"But the texts relating to the capacity to give, the capacity to take, and the capacity to be the subject of adoption are mandatory. Hence the principle of factum valet is ineffectual in the case of an adoption in contravention of the provisions of those texts."

So far as the evidence adduced is concerned, reliance was placed on the evidence of three witnesses. As noted above PW 1 did not speak about any custom. Similarly, PW 2 did not speak about any custom though he claimed to be present at the time of adoption. The present appellant was PW 3. He is outsider of the family. He also accepted that he did not have personal knowledge about the custom. He only stated that PW2 told him about the custom. Significantly PW2 did not speak about any existence of any custom. Appellant PW 3 also accepted that he did not find out as to what was the custom if any and also that he does not know any other instance. Though the Appellate Court had referred to evidence of DW3 to hold that he had accepted that the custom was in existence. As a matter of fact, his evidence is contrary to and is specific that there was no custom. The First Appellate Court had relied on the evidence of Munna Lal to conclude that the son of Reba Saran was given in adoption. Munna Lal specifically stated that the son of Jagannath who was taken in adoption is not the son of sister of Saran.

8. In view of the aforesaid factual situation and the principles of law enumerated above, the inevitable conclusion is that the appeal is sans merit, deserves dismissal, which we direct.