CASE NO.:
Appeal (civil) 5689 of 2006

PETITIONER:
Bhimashya and Ors.

RESPONDENT:
Smt. Janabi @ Janawwa

DATE OF JUDGMENT: 11/12/2006

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P (C) No. 26558 of 2005)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Karnataka High Court dismissing the Second Appeal filed by the appellants who are defendants in the suit filed by the respondent as plaintiff. In the impugned judgment the High Court held that the stand taken by the defendants that defendant No.1 was the adopted son of one Fakirappa, was not established. However, it granted relief in respect of property at item No.3 in the schedule to the plaint, which the first Appellate Court had held to be ancestral property of Fakirappa. High Court held that the said property is the self acquired property of defendant No.1 and the plaintiff is not entitled to any share in the said property. The parties are described in the manner they were arrayed in the suit filed by the plaintiff.

The factual position, in a nutshell, is as follows:

The plaintiff filed the suit for partition and separate possession of her half share in the suit properties and for mesne profits averring that one Fakirappa, the propositus died on 19.3.1965. He had two wives, namely: Bhimawwa, the first wife and Basawwa, the second wife. Basawwa, died about 35 years before filing of the suit. Fakirappa had two daughters namely, Kallawwa, who was born to Bhimawwa, the first wife and Janabi, the plaintiff who was born to the second wife Basawwa. The said Kallawwa is the wife of defendant No.1 while defendants 2 and 3 are the sons of defendant No.1. It is further averred that the suit properties are the ancestral and joint family properties and since Fakirappa died leaving behind the plaintiff and the wife of the defendant No.1 and defendant Nos. 2 and 3 are the sons of the 1st defendant, after the death of Fakirappa, the plaintiff is entitled to half share in the suit schedule properties.

The defendant No.1 resisted the suit by filing the written statement averring that the defendant No.1 is the validly adopted son of the deceased Fakirappa. He has been wrongly described in the plaint. Fakirappa and his wife, Bhimawwa had validly adopted the defendant No.1 on 28.3.1960 by observing and performing all the necessary customary and

religious ceremonies including giving and taking and they have also executed a registered adoption deed in favour of the defendant No.1. Suit house properties were not of the ownership of the deceased Fakirappa. They are the self acquired properties of defendant No.1 and the plaintiff cannot claim any share in the same. Averment made in the plaint that the plaintiff is the daughter of Fakirappa through the second wife, is not correct and the plaintiff is put to strict proof of the same. Since the death of Fakirappa, the defendants have been in exclusive possession and enjoyment of the suit properties openly and without anybody's obstruction as exclusive owners thereof. The plaintiff has been ousted from the enjoyment of the suit properties since the death of Fakirappa. The plaintiff having not taken any step towards asserting her right in respect of the suit properties is not entitled to any relief in the suit.

The trial Court framed 11 issues and came to hold that defendant No.1 is the adopted son of Fakirappa. The present appeal does not relate to the other issues and, therefore, we are not dealing with those issues in detail. Questioning the conclusion of the trial Court that defendant No.1 was the adopted son of Fakirappa, an appeal was filed. The First Appellate Authority held that the claim of adoption of defendant No.1 is untenable and even when there was a registered deed of adoption, the same was of no consequences and the adoption, if any, had no sanctity in the eye of law. It also held that the property described as Item No.3 was ancestral property. The defendants preferred an appeal under Section 100 of the Code of Civil Procedure, 1908 (in short 'the CPC') questioning correctness of the First Appellate Court's conclusions. The High Court, by the impugned judgment, as noted above, granted partial relief.

So far as the question of adoption is concerned, it was held that appellant No.1 was married to the daughter of Fakirappa, the adoption was claimed to have been made on 28.3.1960 and the adoption deed was registered on 31.3.1960 which was at a time when The Hindu Adoption and Maintenance Act, 1956 (in short 'the Act') was in operation. The defendant No.1 was more than 15 years of age and, therefore, could not have been adopted and, therefore, his adoption, if any, cannot be recognized in law. Relief was granted in respect of Item No.3 property.

In support of the appeal, learned counsel for the appellant submitted that though the Act was in operation when the adoption took place, it is really of no relevance because according to the customs prevalent in the area and the families of appellants, the adoption is clear, legal and proper.

There is no appearance on behalf of the respondent in spite of notice.

It is to be noted that no issue regarding custom was framed by the Trial Court. But because of the finding recorded by the trial Court, the First Appellate Court dealt with it. The High Court has categorically noticed that there was no pleading regarding custom and no evidence in that regard was led. Learned counsel for the appellant, with reference to certain observations made by the Trial Court, submitted that the question was very much in the minds of the parties and though no specific issue was framed, yet, the evidence laid clearly established the claim regarding adoption. It is

submitted that judicial notice can be taken note of the fact that in the area to which the parties belong there is no prohibition on adoption in the manner done and it is recognized and permissible under the custom to make an adoption, as has been done in the present case.

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 (Hindu Code) Article 3 provides as follows:

"Article 3\027-(1) A male Hindu, who has attained the age of discretion and is of sound mind, may adopt a son to himself provided he has no male issue in existence at the date of 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."

Therefore, prior to the enactment of the Act also adoption of a son during the lifetime of a male issue was prohibited and the position continues to be so after the enactment of the Act. 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 1850), as the outcast son does not retain the religious capacity to perform the obsequies 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. The question, therefore, is whether by custom, the prohibition

could be overcome. Relevant provisions, therefore, is whether by 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 custom 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 called a special custom.

Custom cannot override express law.\027

(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 - 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 HS. Gour's Hindu Code, Volume I. 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 of 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.

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 from prevalent throughout India and the Kritrima for 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 has 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. Gupta. Third edition at pages 899 - 900). 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\027142, 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 only dominant, the religious motive was undeniable. 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 Mudalier v. Kulandeivelu Mudalier (AIR 1963 SC 185), substitution of a son for spiritual reason 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 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 dominant 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 Amerendra Mansingh's case (supra) has reiterated the well established doctrine as to the religious efficacy of sonship, as the foundation of adoption. The emphasis 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 need to be satisfied, was not allowed to adopt for herself. But in either case it is a condition precedent for a valid adoption that he should be without any male issue living at the time of adoption.

Under the old law, 'male issue' was indicated and it was held at it was to be taken in the wide sense peculiar to the term in Hindu Law to mean three direct descendants in the male line. (See Mayne's Hindu Law and Usage referred to above at page 334). Even if for the sake of argument in the instant case, it is accepted that a custom was prevalent authorising adoption in the presence of a male issue, yet it being contrary to the very concept of adoption cannot be said to have any force. Adoption is made to ensure spiritual benefit for a man after his death. Public policy is not defined in the Act. However, it connotes some matter which concerns the public good or the public interest. No strait-jacket formula can be laid down to hold what is for the public good or for the public interest, or what would be injurious or harmful to the public good or public interest. What is public good must be inconsonance with public conscience. Speaking about 'public policy', Lord Atkin said, "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds. (See Fender v. St. John Mildmay 1938 AC 1). The observations were quoted with concurrence in Gherulal v. Mahadeo Das, (AIR 1959 SC 781). Though it cannot be disputed as a general proposition that a custom may be in derogation of Smriti law and may supersede that law where it is proved to exist, yet it is subject to the exception that it must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom or generally makes exception in favour of rules of customs. (See: Mulla's Principles of Hindu Law, Fifteenth Edition, at pages 67-68). Nothing has been shown to me that an exception of this nature existed in the old Hindu Law. The ancient texts provide for a custom, but imperate it not to be opposed to Dharma, that means as already pointed

out it should not be immoral and opposed to public interest.

It is well established principle of law that though custom has the effect of overriding law which is purely personal, it cannot prevail against a statutory law, unless it is thereby saved expressly or by necessary implication. (See The Magistrate of Dunbar v. The Duchess of Roxburgha (l835) 6 ER 1642), Noble v. Durell (1789)100 ER 569). A custom may not be illegal or immoral; but it may, nevertheless, be invalid on the ground of its unreasonableness. A custom which any honest or right-minded man would deem to be unrighteous is bad as unreasonable. [See: Paxton v. Courtnay (1860)2 F & F 131)].

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.

A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. A custom to be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin, and, fourthly, it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. (See HALSBURY, 4th Edn., Vol. 12, para 401, p.2 & para 406, p.5).

Is a law not written, established by long usage, and the consent of our ancestors? No law can oblige a free people without their consent: so wherever they consent and use a certain rule or method as a law, such rule etc., gives it the power of a law and if it is universal, then it is common law: if particular to this or that place, then it is custom. Custom is one of the main triangles of the laws of England; those laws being divided into Common Law - Statute Law, and Custom. India is a land where there are very many customs appropriate to certain areas of territory; families or castes.

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 so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian Conditions. (See Thakur Gokalchand v. Parvin Kumari AIR 1952 SC 231).

"A custom is local Common Law. It is Common Law because it is not Statute Law; it is Local Law because it is the law of a particular place, as distinguished from the general Common Law. Local Common Law is the law of the country (i.e., particular place) as it existed before the time of legal memory" (per Jessel, M.R., Hammerton v. Honey, 24 WR 603).

Custom implies, not that in a given contingency a certain course would probably be followed, but that contingency has arisen in the past and that a certain course has been followed, and it is not at all within the province of Courts to extend custom by the process of deduction from the principles which

seem to underline customs which have been definitely established.

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life: fashion is arbitrary and capricious, it decides in matters of trifling import: manners are rational; they are the expressions of moral feelings. Customs have more force in a simple state of society.

Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by imitation or prescription: the practice of gaming has always been followed by the vicious part of society; but it is to be hoped for the honour of man that it will never become a custom.

There was no specific plea relating to custom though some vague and indefinite statements have been made in the plaint and that too in a casual manner. No issue was framed and no evidence was laid to prove custom.

That being so, the High Court's order does not suffer from any infirmity to warrant interference. The appeal fails and is dismissed but, in the circumstances, without any order as to costs.