APPELLATE CIVIL

Before I. D. Dua, J.

RAM NARAIN,—*Appellant*

versus

MADAN LAL AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 1032 of 1956

Hindu Law as modified by Custom in the Punjab—Cousin sister's son—Adoption of—Whether valid—Observance of religious rites and formal giving and taking of the child—Whether necessary—Cousin—Meaning of—Custom—proof of—Special instances—Whether essential to be proved—Pleadings—Construction of.

1959

Feb., 18th

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Held, that Hindu Law as modified by Custom in the Punjab permits the adoption of sister's son and hence it will be most anomalous, incongruous, arbitrary, unjust and inequitable to impose a disability in this respect on a cousin sister's son. There does not exist any precise rule of Hindu Law, consistent with the above custom, which would disqualify a cousin sister's son from being adopted.

Held, that in the Punjab, even among the Hindus of non-agricultural tribes, religious rites are not always necessary to constitute valid adoption. Some unequivocal manifestation of the adopter's intention to confer upon the adoptee, the legal status of his son is a good substitute for the formal giving and taking of the child. Hence according to the rules of custom in the Punjab, the strict proof of formal giving and taking is not an essential, mandatory of principal requisite of a valid adoption.

Held, that the term "Cousin" has no precise meaning. It is a word of very vague import and it may mean, in its popular sense, relationship of a degree, however, remote, both from the mother's and from the father's side.

Held, that custom can be proved by oral evidence. Customs must be proved, in the first instance by calling

witnesses acquainted with them unless the particular custom has become so notorous that the Courts take judicial notice of it. Custom can properly be proved by general evidence given by the members of the family or tribe without proof of special instances.

Held, that it is absolutely necessary that the determination of a cause should be founded upon the case to be found in the pleadings or involved in or consistent with the case thereby made. Pleadings in this Country may not be construed narrowly and the attitude of the Courts towards them should not be too rigid, but at the same time it is of primary importance that decisions of cases should, generally speaking, be confined to the points raised in the pleadings or issues so that parties concerned are not taken by surprise.

Case law discussed.

Second Appeal from the decree of the Court of Shri Brijinder Singh Sodhi, Additional District Judge, Narnaul, dated the 8th day of October, 1956, reversing that of Shri Joginder Singh Sekhon, Sub-Judge, II Class, Dalmia Dadri, dated the 1st May, 1956, and decreeing the plaintiffs' suit with no order as to costs.

C. L. LAKHANPAL, for Appellant.

D. C. GUPTA and N. N. GOSWAMI, for Respondents.

JUDGMENT

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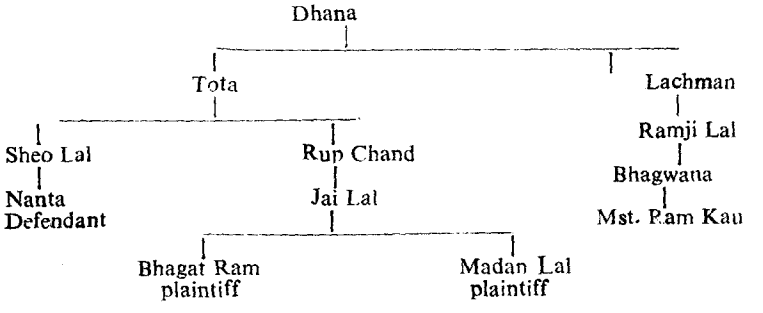
DUA, J.—The following pedigree-table will show the relationship between the plaintiffs and the defendant :—



Nanta originally impleaded as defendant No. 1, but who has since died, did not marry and therefore

adopted Ram Narain, a minor. On the 21st of January, 1954, he executed a formal deed of adoption which was got duly registered. Madan Lal and Bhagat Ram sons of Jai Lal feeling aggrieved instituted the present suit for the usual declaration attacking the said adoption on the ground that the adopter was governed by custom in matters of adoption, that the estate held by him was ancestral *qua* the plaintiffs and the adopter, and that the alleged adoption being a fictitious transaction should not affect their rights of reversion. The suit was opposed by the adoptee as well as the adoptive father. On the pleadings of the parties the following issues were framed.—

(1) Whether the property in dispute is ancestral *qua* the plaintiffs ?

(2) Whether the parties are governed by custom and what that custom is?

(3) Whether the adoption is valid?

(4) Whether the plaintiffs are not entitled to inherit the property of Nanta and as such plaintiffs have no *locus standi* to file this suit?

(5) Relief.

The trial Court held that (1) the property in dispute was partly ancestral and partly non-ancestral; (2) the parties to the litigation being high caste Brahmans were governed by the principles of Hindu Law and not by agricultural custom; (3) the adoptee being a cousin sister's son could not be validly adopted, the defendant having failed specifically to prove the validity of such an adoption; and (4) the adoption in question amounts almost to an alienation under Hindu Law and therefore

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being a sole surviving co-parcener Nanta, the adoptor, could alienate his property in anyway he liked and therefore none of his relatives had any right to control his alienation during his lifetime. It would be helpful to reproduce the finding of the learned Subordinate Judge on the third point in his own language. "After hearing the arguments on both the sides I have come to the conclusion that the defendant has not specifically proved that a cousin sister ('cousin sister' appears to be a typing mistake and the Court presumably intended 'cousin sister's son') could be adopted. I do not agree with the contention of the learned counsel that if an exception has been given to the daughter's son and a real sister's son then that exception can also include cousin sister's son, therefore, I hold that the adoption was not valid and hence this issue is decided against the defendant." With these findings the trial Court dismissed the plaintiffs' suit.

On appeal, the learned Additional District Judge held that the character of property had no bearing on the fate of the suit as the parties were not governed by custom. The finding that the parties being Brahmans were governed by their personal law was affirmed. On the question of the factum of adoption the lower appellate Court disbelieved the evidence in support of the ceremony of giving and taking and held that the scanty evidence led in the case did not constitute a safe basis for upholding the factum of adoption. Relying on para 480 (3) of Mulla's Hindu Law, the Court also observed that the defendant had not shown that the adopter could legally marry his cousin sister, the mother of the adoptee. With these observations the appeal was allowed and the plaintiffs' suit decreed. It may also at this stage be mentioned that the appellate Court repelled the further argument that the transaction should be construed as

an alienation and the adoptee should be held entitled to take the property of his adoptive father although the adoption was not valid. The learned Judge observed that once an adoption is held to be invalid under the strict rule of Hindu Law, the adoptee could not acquire any rights in the adoptive family.

The present appeal has been preferred by Ram Narain minor-adoptee.

Mr. Lakhanpal on behalf of the appellant has submitted that the pleadings of the parties show that they are governed by custom in Jind State and not by personal law. In para 1 of the plaint, it is asserted that the plaintiffs and defendant No. 1 (who is the adoptive father) are the collaterals (*yak jaddis*) of Nanta and that defendant No. 1 being issueless the plaintiffs as his collaterals (*warrsan baz-gasht*) are entitled to succeed to his estate. In para 3 of the plaint it is pleaded that the deed of adoption is collusive and fictitious and that in fact defendant No. 2 was never adopted and the ceremony of giving and taking was not performed; it is also expressly asserted in this para that defendant No. 2 was not the sister's son of defendant No. 1 but was a stranger. Then comes the sentence that the above adoption is contrary to Dharam Shastra and Riwaj. It is noteworthy that it is nowhere pleaded that the adoption in question is invalid on the ground that the natural mother of the adoptee, in virgin state, could not, under Hindu Law, get married to the adoptive father being, his cousin sister; indeed such a plea would be destructive of and inconsistent with the plea that the adoptee is a stranger. In para 5 of the plaint it is again emphasized that defendant No. 2 (adoped) is a stranger and has a different *got* from that of the plaintiffs and defendant No. 1, the

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got of both of whom is Bans. It is then expressly asserted that the parties are agriculturists and are governed by custom which lays down that the adoptee must belong to the same got. It is no doubt generally stated in the last sentence that even according to Hindu Law the adoption would be invalid, but this general and vague plea cannot be considered to connote the defence that the adoption is invalid on the ground that the adoptive father could not have under the Hindu Law lawfully married the natural mother of the adoptee in her virgin state. In other words this general plea cannot, in my opinion, be construed so as to destroy or negative the positive assertion contained in the earlier portion of the same para of the written statement, namely, that the adoptee is a stranger; the defence based on the ground of the aodptor not being able under Hindu Law to marry the natural mother of the adoptee in her virgin state, cannot thus be spelt out of this broad and general plea. Indeed, this view also finds support from the contents of para 6 of the plaint in which again great emphasis is laid on the plea that the parties belong to the erstwhile Jind State where according to custom only a person belonging to the same got as that of the adoptor could be validly adopted. The modification of strict Hindu Law by custom in the territory around Delhi has also been mentioned in this para and it is again repeated in express language that only agnates could be validly adopted; it was for these reasons that the impugned adoption was claimed to be invalid. From the reading of the plaint. in my opinion, it is clear that the plaintiffs' case as disclosed in the plaint could not be construed so as to include the plea that the adoption in question was invalid on the ground that the natural mother of the adoptee being related to the adoptor within the prohibited degree could not be lawfully married to him in her virgin state; such a plea

should be precise and specific. It would thus appear that the defendant was not called upon, on the pleadings, to meet the case which has been made out by the Court below. I need hardly emphasize the absolute necessity of the determinations in a cause to be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. [*See Kanda, etc.* v. *Waghu* (1)]. It is urged on behalf of the plaintiff-respondent that pleadings in this country should not be construed too narrowly. I agree that the attitude of the Courts towards pleadings should not be too rigid, but at the same time it is of primary importance that decisions of cases should, generally speaking, be confined to the points raised in the pleadings or issues, so that the parties concerned are not taken by surprise. If the plaintiff wanted to avoid the impugned adoption on the plea that the adoptee was the son of a cousin sister of the adoptor, and his natural mother and the adoptive father could not be lawfully married to each other, then the plaint should have been got amended and this case should have been set forth with particularity and exactness so that the defendant could meet it. In this view of the matter, the lower appellate Court appears to me to have gone wholly wrong in making out an entirely new case for the plaintiffs and in holding that being high caste Brahmans, they are governed by the principles of strict Hindu Law of the Mitakshara School. It may be noticed that neither the plaintiffs nor the defendant pleaded that the parties were governed by strict Mitakshara School of Hindu Law and indeed no issue was framed on the question of the applicability of strict Hindu Law and its effect on the adoption in question; it being nobody's case that the parties were governed by strict Hindu Law with regard to adoption; on the present state of

(1) A.I.R. 1950 P.C. 68

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pleadings if the plaintiffs had failed to show the invalidity of the adoption according to the custom as laid in the plaint their suit should have been dismissed.

Apart from this aspect of the case, it appears to me that the Courts below have also misdirected themselves in holding that there was nothing to show that a cousin sister's son could be adopted. though a custom permitting the adoption of a daughter's or a sister's son had ben deposed to by some witnesses for the defendant. The term 'cousin' has no precise meaning. It is a word of very vague import and it may mean, in its popular sense, relationship of a degree, however, remote both from the mother's and from the father's side. The deed of adoption having been registered and the adopter having actually confirmed the adoption even in the course of the present litigation, it is rather difficult to understand how the failure of the natural father of the adoptee or of the adoptee himself to come in the witness-box, could prejudice the defendant's case. The plaintiff relied in the plaint on custom and not on strict Hindu Law. P.W. 1 Lokram and P.W. 3 Ganeshi expressly depose that real sister's son can be validly adopted. To the same effect is the evidence of D.W. 1 Rati Ram and D.W. 2 Nanta (the adoptor). Bhagat Ram plaintiff does not controvert it. There is no plea and no evidence that the parties are governed by the strict rule of Hindu Law in matters of adoption. The Courts below have thus as stated above, gone wholly wrong in making out an entirely new case for the plaintiffs which is not warranted by the pleadings or the evidence on the present record. The evidence on the question of the existence of custom permitting adoption of sister's son has not been disbelieved by the Courts below. The trial Court has, while dealing with

this aspect expressed its disagreement with the contention, that if an exception had been engrafted on Hindu Law with respect to the adoption of a sister's son, then a cousin sister's son could not be considered to be a disqualified person for being adopted. The learned Subordinate Judge has given no reasons for his disagreement. In my opinion, the view of the trial Court is not correct. The prohibition against the adoption of a sister's son is based on the theory that the adopted boy must bear the reflection of a son, to which a gloss has been appended, that the child should be capable of having been begotton by the adoptor through Niyoga, etc. In this view of the matter, it is difficult to understand how a cousin sister's son could be under a greater disability than a real sister's son. The learned Additional District Judge seems to have fallen in the same error, when he says that the defendant's witnesses have not deposed that the adoption of a cousin sister's son is sanctioned by custom. The Courts below have approached the consideration of the case from a wholly erroneous point of view and have missed the real question which arose for determination on the pleadings of the parties and on the evidence on the record. Having failed to appreciate and determine the real point which vitally affected the issues raised on the pleadings, the Court below has, in my opinion, failed to perform the duty imposed on it by law.

There can hardly be any doubt that custom can be proved by oral evidence. Section 48 of the Indian Evidence Act, 1872, lays down that when the Court has to form an opinion as to the existence of any general custom or right, the opinion, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant. Similarly by virtue of section 49

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of the Indian Evidence Act the opinion of persons having special means of knowledge is relevant when the question relates to the usages and the tenets of any body of men of family. In *Ahmad Khan and others* v. *Mst. Channi Bibi* (1), the Judicial Committee of the Privy Council observed as follows at page 511:—

> "As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.
>
> There is a large body of oral evidence establishing the custom, wholly unrebutted by the defendants who have relied exclusively on the riwaj-i-am. The Judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them."

In *Vaishno Ditti* v. *Rameshri and others* (2), again their Lordships of the Privy Council at page 102 observed as follows:—

> "This is a question with which their Lordships consider it unnecessary to deal, because, in their opinion, the plaintiff is

(1) I.L.R. 6 Lah. 502
(2) I.L.R. 10 Lah. 86

entitled to succeed on another ground. As already stated, the District Judge found on 3rd issue that the plaintiff was entitled to succeed to her mother's share independently of the compromise, but based this decision on grounds of alleged equity rather than custom, because in his opinion the plaintiff's evidence as to custom did not help her case as the witnesses were unable to quote any instances in support of their deposition, while the Judicial Commissioner reversed this finding on the ground that the plaintiff had no right to succeed to her mother's share as under Hindu Law it passed to her sisters by survivorship.

Having regard to the conditions existing in this part of India, both the lower Courts erred, in their Lordships' opinion, in disregarding the unrebutted evidence of custom which was given by the plaintiff as to her right to succeed to her mother's share because it was unsupported by instances."

In *Effuah Amissah* v. *Effuh Krabah and others* (1), also Lord Maugham observed that the material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them.

In *Sohan Singh* v. *Mst. Naraini and others* (2), a Division Bench of the Lahore High Court laid down that custom could be properly proved by general evidence given by the members of the

(1) A.I.R. 1936 P.C. 147
(2) A.I.R. 1936 Lah. 540

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family or tribe without proof of special instances. To the same effect is the decision in *Mohammad Alam, etc.*, v. *Mst. Hafzan, etc.*, (1); In *Panna Lal* v. *Chiman Parkash, etc.*, (2), Mahajan, J. (as he then was) observed that a custom could properly be proved by general evidence given by members of that community without proof of 'specific instances; *Vaishno Ditti* v. *Rameshri and others* (3), and *Basant Singh and others* v. *Brij Raj Saran Singh and others* (4), were relied upon in support of this dicta. If this be the correct legal position, then the witnesses on behalf of both the plaintiffs and the defendant, who have not been disbelieved on the point, having deposed to the existence of the custom that a sister's son could be adopted, this custom must, on the existing record be held to be fully established; more so when there is no evidence in rebuttal to the contrary, not even the statement of the plaintiffs. In these circumstances, I fail to see how a cousin sister's son could, consistently with the above custom, be considered to be disqualified and be incapable of being adopted. In *Sultan* v. *Mst. Sharfan and others* (5), *Sir Shadi Lal*, Chief Justice, while delivering his judgment dealt with the Code of Tribal Custom prepared by Mr. Talbot at the last Settlement of Lyallpur District. In this connection the learned Chief Justice considered the absurdity of the married daughters not inheriting even the self-acquired movable property of her father. In *Feroze-Khan* v. *Umar Hayat and others* (6), the learned Judges were influenced by the injustice of the custom which excluded daughters from inheriting acquired property of their father. In *Hashmat Ali*

(1) A.I.R. 1934 Lah. 351
(2) A.I.R. 1947 Lah. 54
(3) I.L.R. 10 Lah. 86
(4) I.L.R. 57 All. 494
(5) I.L.R. 10 Lah. 249
(6) A.I.R. 1934 Lah. 791 at p. 793

ind another v. *Mst. Nasib-un-Nisa* (1), Sir Lawrence Jenkins while delivering the judgment of the Judicial Committee observed as follows at page 123:—

> "But then it is said that no instance is proved of an actual succession by a brother's daughter, and, therfore, it is argued, the necessary custom that precisely covers this case has not been proved. But, if there be a rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and their Lordships hold that the High Court rightly decided in Nasib-un-Nisa's favour."

Applying the reasoning of *Hashmat Ali's case* (1,) to the present case, the custom permitting the adoption of a sister's son having been proved, it is most anomalous, incongruous, arbitrary, unjust and inequitable to impose a disability in this respect on a cousin sister's son.

In *Data Ram, etc.*, v. *Teja Singh, etc.*, (2), a bench of this Court, of which Falshaw, J. and I were members, had an occasion to deal with the question of merely advisory and mandatory nature of the provisions in the customary rules dealing with the subject of adoption. In that case, after considering the relevant case law, including *Basant Singh and others* v. *Brij Raj Saran Singh and others* (3), *and Hem Singh and others* v. *Harnam Singh and another* (4), we repelled the

(1) I.L.R. 6 Lah. 117
(2) R.S.A. 679 of 1953
(3) A.I.R. 1935 P.C. 132
(4) A.I.R. 1954 S.C. 581

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contention that the adoptee under the Punjab Customary Law must necessarily be of the same *got* as the adoptor, and held that the direction laying down that the adoptee and the adoptor should be of the same got was only recommendatory and the rule of *factum valet* would be properly attracted, even where the adoptor's choice goes outisde his got. It was further laid down in that judgment, that once the power to adopt is conferred on a person, whether it relates to the question of the degree of relationship or of the adoptee being a kinsman of the adoptor or belonging to a particular *got*, caste or creed, is a matter, the regulation of which should not, generally speaking, be considered to be mandatory. The matter of choice depends on various considerations of detail, which the adoptor alone can properly weigh and determine. In *Data Ram's case* (1), also the fact that the adoptor had been treating the adoptee as his validly adopted son was considered to be a factor of considerable importance. In the instant case the adoptor has even in the course of the present litigation supported the adoption.

The counsel for the respondents then referred me to a circular of the erstwhile Jind State which says that Hindus are governed by Hindu Law and Mohammadans by the Mohammadan Law and that custom has to be alleged and proved. This contention has really been answered above, inasmuch as the plaintiff has himself come into Court on the basis of a custom (and the defendant has also not pleaded Hindu Law as governing the parties) and if he fails to substantiate his plea and prove the precise custom as contained in the plaint, in my opinion, he must fail. It is noteworthy that the above circular to which reference has been made

(1) R.S.A. 679 of 1953

was not in force at the time of the impugned adoption in 1954 and, therefore, its direct applicabality to the instant case is out of question, and indeed has not even been pleaded or relied upon in the arguments. The circular has only been mentioned for showing that the custom relied upon by the defendant could not have developed within a short span of a few years after the abrogation of the above circular in 1948. This contention on the pleadings of the present record has only to be stated to be rejected. Parties have themselves pleaded custom and besides, custom has been amply established by oral testimony which has not been disbelieved by the Courts below. No bar, legal or otherwise, had been created by the circular to the establishment of a custom like the one in question.

Reliance on behalf of the respondents has also been placed on *Bhirkha Ram* v. *Munshi*, etc. (1), a decision of the Jind High Court, where it was observed that a person who relies on custom must allege and prove it and merely because a person belongs to an agricultural tribe it does not necessarily follows that he is governed by agricultural custom. These observations do not advance the respondents' case to any appreciable degree. I have also been referred to *Mst. Gaudami* v. *State* (2), for the view that an adoption made outside Jind State without obtaining a Sanad according to the rules of succession in force in the State is not valid so far as succession to property in the State is concerned. This authority is also of no assistance in the decision of the question arising in the present case.

The counsel for the respondents next contended that the lower appellate Court has held that

(1) II Jind High Court Rulings 106
(2) III Jind High Court Rulings 93

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the ceremony of giving and taking has not taken place, and that these ceremonies being essential, the adoption should be held to be invalid. In support of this submission, reliance has been placed on *Gopi Chand* v. *Mst. Malan and others* (1), *Balak Ram High School and others* v. *Nanu Mal* (2), and *Fanindra Dev Raikat* v. *Rajeswar Das and others* (3). The first two cases deal with rules of strict Hindu Law and are, therefore, not helpful, while dealing with the question of Punjab Custom. *Fanindra Dev Raikat's case* (3), deals with a case from Baikantpur in Bengal and is, therefore, hardly of any assistance. As against this, it may be noted that custom in the Punjab is in its essence Non-Brahmanical. Brahmans in this State have seldom been the depository of Customary Law. To ascertain the custom the popular source has generally been the triable council or the Jirga or the elders of the tribe. The rules formulated by Manu may connote the ideal of what should be the law but it can hardly throw much light on the rules of custom prevailing amongst the agriculturists in the Punjab even though the parties may be Brahmans by caste. As observed in *Hem Singh and another* v. *Harnam Singh and another* (4), under the Customary Law in the Punjab adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selection have to be held to be directory, and adoptions made in disregard of them are not invalid. In *Ramji Dass Chandu Mal* v. *Firm Mangal Sen-Kirpa Ram and another* (5), a Division Bench of the erstwhile Pepsu High Court held that for an adoption in the Punjab to be legal, no ceremonies are necessary. It was held particularly so in the

(1) A.I.R. 1918 Lah. 344(2)
(2) A.I.R. 1930 Lah. 579
(3) I.L.R. 11 Cal. 463
(4) A.I.R. 1954 S.C. 581
(5) A.I.R. 1954 Pepsu 66

Nabha State. For an adoption to be valid under Hindu Law, however, the formal giving and taking, according to this authority, is insisted upon so that there may be no mistake, either in the mind of the natural father of the adoptee or that of the adoptor, that the child was going out of his natural family and transplanted in the adoptor's family and also that there may be publicity of this fact. It has to be borne in mind, in this connection, that customary appointment of heir does not, generally speaking, entail transplantation of the adoptee in the adoptive family; *Gainda and another* v. *Mst. Jai Devi and another* (1).

The erstwhile Jind State, along with Patiala and Nabha States, formed the group, known as Phulkian States, by virtue of the common ancestor Phul. From Phul's eldest son descended the families of Nabha and Jind and from his second son the Patiala family. In 1809 these three States, along with Faridkot, came under British protection. After the independence of the country in 1947 the new union of six Punjab States including Jind State was formed in July, 1948. There is no suggestion that the rules of general agricultural custom, as in vogue in the area constituting the erstwhile Jind State, have been, in any way, matrially different from those in vogue in the Punjab. The people inhabiting the territory constituting Jind State in the areas adjoining the British Punjab come from the same stock of ancestory, with similar culture, habits, and religious conviction, and the artificial barriers based on sovereignty of Indian Princes in the nineteenth or the twentieth century do not appear, as such, to have given rise to difference in the general customary rules governing them. The erstwhile Jind State had in 1908 an

(1) I.L.R. 1944 Lah. 519 (F.B.)

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area of about 1,332 square miles only (*vide* Imperial Gazeteer of India: Punjab: Volume II) and comprised of about three tracts corresponding to the three Tehsils of Sangrur, Jind and Dadri. This area was surrounded by the districts of Karnal, Delhi and Rohtak. This would clearly suggest that the rules of custom governing the agriculturists of the territory in question, could hardly be materially different in essential particulars, from those prevailing in the areas comprising of Karnal, Delhi and Rohtak. In the Punjab there are judicially decided cases showing, that even among the Hindus of non-agricultural tribes, religious rites are not always necessary to constitute valid adoption. (*See* in this connection *Chiman Lal* v. *Hari Chand* (1). In *Mussammat Rattan Devi* v. *Muno* (2), the head note thus:—

> "Although in the Punjab the performance of an elaborate ritual or religious ceremony is unnecessary to the validity of an adoption there must be a formal giving and taking of the child to be adopted and mere treatment is insufficient. In other words the law requires from the adoptor a manifestation of his unequivocal intention to clothe the adopted with the legal *status* of his son. Such a manifestation of the adoptor's intention can be made either by a formal document combined with proper treatment, or by a formal giving and taking of the child."

From the last portion of this quotation it is obvious, that some unequivocal manifestation of an adoptor's intention to confer upon the adoptee, the legal status of his son, is a good substitute for

(1) 102 P.R. 1913 (P.C.)
(2) 117 P.R. 1918

the formal giving and taking of the child. In *Prabhu Dial and others* v. *Kahan and others* (1), it is observed that all that is required for a valid adoption is unequivocal declaration of the fact of adoption accompanied with a treatment of the adoptee as son. In this case the agriculturists Brahmans of Kangra District were held to be governed by such custom. In *Jiwan Singh and another* v. *Pal Singh and another* (2), Shah Din, J. sitting with Beadon, J. upheld the validity of an adoption, by a regisetered deed, of a collaterals in the 9th degree in the presence of near collaterals among Randhawa Jats of Mauza Bhangali, Tehsil Amritsar. Addison and Backett, JJ., in *Chanan Singh* v. *Buta Singh and others* (3), observed that what is essential for adoption is some unequivocal declaration of the appointment, which may be manifested by a formal declaration before the brotherhood, by a written declaration or by a long course of treatment, The performance of ceremonies is not essential. In the reported case the adoptor had made a statement in Court alleging the appointment or adoption in question. The next day he celebrated the marriage of the boy as his son, and thereafter he looked after his education and allowed the boy to describe himself as his adopted son or appointed heir, and the boy lived with him as his son; on these facts it was held that it was immaterial whether there was or there was not a gathering of the brotherhood at the time. In *Panna Lal's case* (4), adoption of an orphan without the ceremonies of giving and taking, according to strict Hindu Law, in Ambala District was upheld by Rahman and Mahajan, JJ. In *Phuman Singh and others* v. *Manu and others* (5), a Division Bench

(1) 78 P.L.R. 1912
(2) 22 P.R. 1913
(3) A.I.R. 1935 Lah. 83
(4) A.I.R. 1947 Lah. 54
(5) A.I.R. 1939 Lah. 62

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of the Lahore High Court observed that a mere declaration of adoption and general treatment as a son are considered sufficient amongst Jats in village Hans, Tehsil Jagraon, District Ludhiana, and that no other formalities were considered necessary. In *Gurbachna and others* v. *Bujha and others* (1), the head note reads as follows:—

> "In a case where the power of customary adoption by a sonless proprietor is not disputed, all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention by the execution and registration of a deed of adoption coupled with a clear declaration in Court and subsequent treatment as adopted son."

This dictum was approved by M.C. Mahajan, J., (as he then was) in an unreported case: *Jit Singh* etc. v. *Jamadar Mewa Singh* (2), where the learned Judge also, in this connection, relied upon *Mehan Singh* v. *Kehar Singh* (3), and *Tota* v. *Mukha* (4). The following observations of Chevis, J., in *Tota's case* (4), were approvingly quoted by Mahajan, J:—

> "Where one person makes a gift in favour of another alleging that the latter is his adopted son, a declaration to that effect made at the time of mutation and repeated subsequently in the course of a suit brought by the collaterals of the

(1) 42 P.R. 1911
(2) R.S.A. 1549 of 1943
(3) 6 L.L.J. 39
(4) 60 I.C. 448

> donor to contest the validity of the gift is sufficient proof of adoption."

In this connection, it would not be out of place, also to quote the following passage from *Jit Singh's case* (1):—

> "Another fact that affected the decision of the Senior Subordinate Judge is that Mukhtar Singh inherited land in his natural family along with his brothers. From that no inference can be drawn that he is not the adopted son of Jit Singh. It may be that there was no ceremony of adoption as recited in the adoption deed eighteen years ago, but that does not affect the question. It is open to Jit Singh to make the adoption at any time and his declarations during the course of the present suit and his conduct in instituting the appeals constitute enough declaration on his part. This is all that is required to make the customary appointment of an heir in this Province."

It would thus be obvious that according to the rules of custom in the Punjab the strict proof of formal giving and taking is not an essential and mandatory principle requisite of a valid adoption. It is significant as already noticed that the adoptive father, in the present litigation also, is supporting the adoptee and has asserted the factum and validity of the adoption, thus making his intention fully manifest. Before concluding on this point, it would be relevant to observe that as held in *Waryam Singh* etc. v. *Jiwan Singh* etc. (2),

(1) R.S.A. 1549 of 1943
(2) 205 P.L.R. 1913

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where the custom of adoption prevails in the parties' tribe the onus of proving that a particular adoption is invalid, by reason of any restrictive custom, lies upon the person who says that it is invalid. In *Thakur Gurdial Singh* v. *Mt. Tej Kaur and others* (1), Tek Chand, J, sitting with Abdul Rashid, J., made the following pertinent observations:—

> "It is settled law that among parties ostensibly governed by Custormary Law, if on a particular matter no definite rule of custom is proved to exist, the parties are entitled to fall back on their 'personal' law: 110 P.R. 1906. If the 'personal' law also does not contain any definite rule applicable to the case, it must be decided according to equity, justice and good conscience.'

The custom permitting adoption of a sister's son being admitted and also fully established, there does not appear to exist any precise rule of Hindu Law, consistent with the above custom, which would disqualify a cousin sister's son from being adopted. It is, therefore, legitimate to hold according to 'equity, justice and good conscience' that a cousin sister's son can also be validly adopted.

There is only one more aspect of the case, which may also be noticed. As held in *Gainda and another* v. *Mt. Jai Devi and another* (2), in most essential features the customary appointment of an heir closely resembles a gift and the only principle difference between the two is that in the case of a gift the property passes to the donee immediately, whereas the appointed heir does not

(1) A.I.R. 1937 Lah. 742
(2) A.I.R. 1944 Lah. 90

get the property till the death of the adoptive father If a formal gift of non-ancestral property could not be challenged by the present plaintiffs, it may be argued that insofar as the adoption in question affected the non-ancestral property of the adoptive father, the plaintiffs had no *locus standi* to assail the adoption in dispute; or at least they are not entitled to claim the equitable and discretionary relief of declaration. However, in view of my decision on the first point, it is not necessary to further pursue this aspect of the case and to express any considered opinion on it.

For the reasons given above, the appeal is allowed and setting aside the judgment and decree of the learned Additional District Judge dated 8th of October, 1956, I would hold that Ram Narain was a validly adopted son of Nanta and dismiss the plaintiffs' suit. In the peculiar circumstances of this case, however, I would leave the parties to bear their own costs througout.

K.S.K.

CIVIL WRIT.

Before G. D. Khosla, and Bishan Narain, JJ.

GIAN SINGH,—*Petitioner.*

versus

THE DISTRICT AND SESSIONS JUDGE, DELHI AND ANOTHER,—*Respondents.*

Civil Writ No. 523-D of 1958.

1959

Feb., 19th

Fundamental Rule 56(b)(i)—Meaning of—Age of retirement—Whether 55 or 60—Retirement at 55—Whether requires compliance with Article 311 of the Constitution.

Held, that Fundamental Rule 56(b)(i) fixes the age of compulsory retirment at 55 years. It is, however, laid