

**RSA No.1621 of 1991 and
other connected cases**

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**RSA No.1621 of 1991 and
other connected cases
Date of Order: 12.05.2020**

Jasmal

..Appellant

Versus

Smt. Kamalbi and another

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Chetan Mittal, Sr. Advocate, with
Mr. Varun Issar, Advocate and
Mr. Tanvir Attariwala, Advocate and
Mr. Mazlish Khan, Advocate,
for the appellant.

Mr. Arun Jain, Sr. Advocate, with
Mr. Amit Jain, Advocate,
for the respondents.

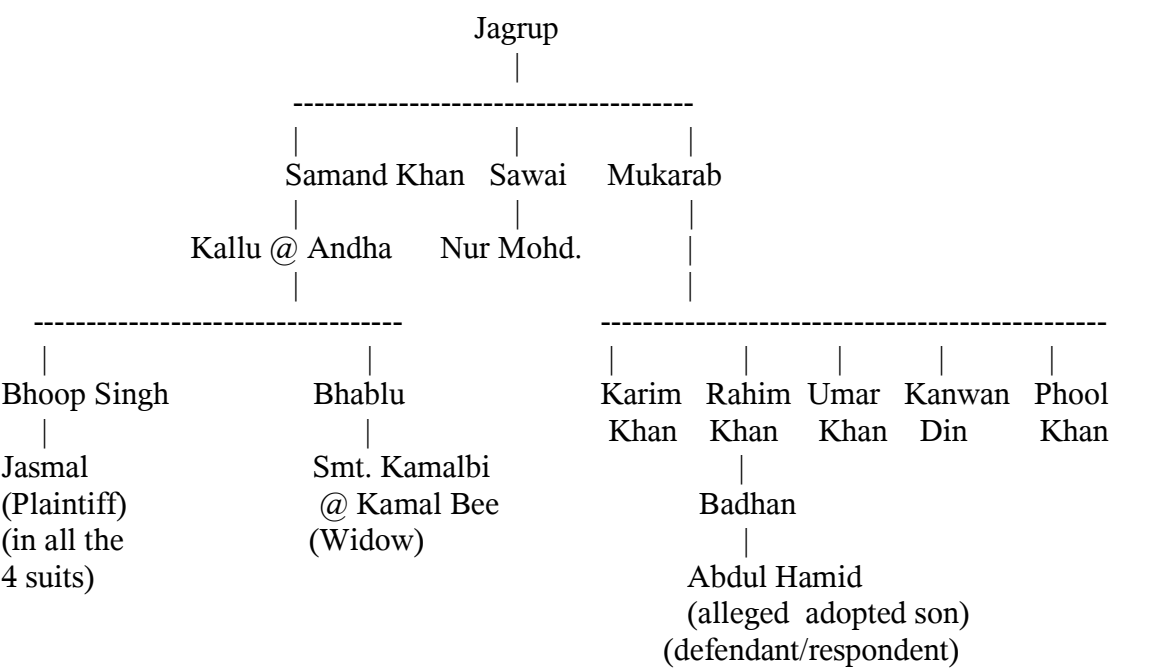
ANIL KSHETARPAL, J.

This judgment shall disposed of RSA Nos.1621, 1622, 1624 and 1625 of 1991 arising out from 4 different suits (later on consolidated) filed by the plaintiff-appellant and disposed of by a common judgment by the learned trial Court. Learned first appellate court also disposed of all the appeals by a single judgment. Learned counsels for the parties are also agreed that issues which need determination are identical. It may be noted here that the parties to the litigation are also more or less same.

In all these appeals question which needs consideration is "whether defendant-Abdul Hamid was validly adopted by Smt. Kamalbi (Kamal Bee) widow of Bhablu son of Kalu, caste Meo, resident of village Jamalpur, Tehsil Ferozpur Zirka, District Gurgaon".

Before proceeding with the matter, it would be apt to extract

pedigree table showing inter-se relationship between the parties. This pedigree table is Ex.D6/P.8 on the trial court record, correctness whereof is not disputed by learned counsels for the parties.



Jasmal-the appellant filed 4 suits against Smt. Kamalbi, Abdul Hamid and others. In Civil Suit No.494 of 18.05.1982 Jasmal son of Bhoop Singh claims that Kalu had two sons Bhoop Singh and Bhablu. Bhoop Singh died leaving behind Jasmal(son)-the plaintiff. Bhablu died issueless leaving behind his widow Smt. Kamalbi. On the death of her husband (Bhablu) she inherited ½ share of the total land measuring 693 kanals 19 marlas, which comes to land measuring 346 kanals 19½ marlas. The plaintiff-Jasmal claims to be nearest collateral of Bhablu. The parties are Meo(by caste) residents of District Gurgaon. It is the case of the plaintiff that Smt. Kamalbi became limited owner of the suit land on the death of her husband. The parties are governed by customary law as applicable to agriculturists of the area. They furnish Lambardars in the village and are proprietors of the village Jamalpur. According to the custom applicable governing Meos in the matter of alienation and succession, a widow

succeeds to the property of her husband as a limited owner having life estate. She cannot alienate the property inherited by her from her husband without the consent of reversioners and collaterals of her husband. The plaintiff asserts that Smt. Kamalbi is under the influence of some other persons of the village who are inimical to the plaintiff and she wants to deprive the plaintiff of the suit land.

In Civil Suit No.494 the plaintiff prays for decree of permanent injunction restraining the defendants from selling, mortgaging or disposing of the suit land in any manner without the consent of the plaintiff, who claims to be the nearest collateral and reversioner of her deceased husband.

In Civil Suit No.493 of 30.08.1982 the plaintiff prays for decree of declaration that Smt. Kamalbi inherited the property from her husband as a limited owner. She has executed a lease deed dated 19.07.1982 without the knowledge and consent of the plaintiff in favour of defendant no.1 Abdul Hamid and hence the same is illegal, null, void being without any legal necessity and consideration as also against customary law. The lease deed dated 21.07.1982 was also challenged.

Next suit filed by the plaintiff-Jasmal is Civil Suit No.501 of 12.05.1989. The plaintiff-Jasmal claiming to be nearest collateral of Bhablu has again challenged the correctness of the lease deed executed on 21.07.1982 in favour of defendant nos.1 to 17 which includes Abdul Hamid. It is claimed that Smt. Kamalbi was not competent to give the land on lease.

In yet another Civil Suit No.492 of 18.07.1983, the plaintiff has challenged the authority and competence of Smt. Kamalbi to adopt Abdul Hamid as her son vide adoption deed dated 18.02.1983. It is pleaded that

Abdul Hamid was never adopted by Smt. Kamalbi. In fact no ceremony of adoption took place on 28.01.1983. Abdul Hamid, being stranger to the family of Bhablu, could not be adopted and the alleged adoption deed dated 18.02.1983 does not bind the reversionary rights of the plaintiff to succeed to the estate of Sh. Bhablu on the death of Smt. kamalbi. It is also claimed that late Sh. Bhablu, the husband of Smt. Kamalbi, never authorized Smt. Kamalbi to adopt a boy nor the deceased Bhablu could authorize his widow to adopt a boy.

All the suits were contested by the defendants including Smt. Kamalbi and Abdul Hamid (alleged adopted son).

In all these four suits, separate issues were framed. Thereafter, both the learned counsels for the parties requested that civil suits No.493, 501 and 492 be consolidated with civil suit no.494 of 1982. On 24.01.1990, counsels for the parties made a statement to that effect and accordingly the suits were consolidated and the evidence was led by the parties in civil suit no.494 of 1982.

Learned trial court on appreciation of evidence decreed the suits. The court held that the parties are governed by customary law as applicable to the agriculturists of the area and a widow is entitled to adopt any one from relations of her husband. However, learned trial court held that since Abdul Hamid was not related to Sh. Bhablu, therefore, he could not be adopted. The court further held that authorization by late Sh. Bhablu in favour of Smt. Kamalbi to adopt Abdul Hamid is not proved. Actual adoption of Abdul Hamid is also not proved and Abdul Hamid was also not subsequently treated as adopted son of late Sh. Bhablu.

On the strength of aforesaid findings, the trial court decreed the

suits filed by the plaintiff.

At this stage, it would be relevant to note that the learned trial court has relied upon a judgment Ex.D7 passed by the civil court in the previous proceedings of like nature wherein it was held that a widow of Meo tribe can adopt a male member related to her husband, without the written or verbal consent of her husband but she has to adopt out of the male kindred of her deceased husband and if she wants to adopt any one out side the family of male relatives of her husband connected through males, then, she is required to get consent of the said relatives of her husband related through males. The judgment Ex.D7 is dated 04.06.1976.

Four appeals were preferred before the learned first appellate court. Learned first appellate court after re-appreciating the evidence has recorded following facts in para 23, correctness whereof is not disputed by learned counsels for the parties:-

“23. It will not be out of place to mention here that there is a judgment Ex.P10 available on the record between the parties, wherein it has been held that the parties are governed by agricultural custom and Smt. Kamalbi being the limited owner, could not alienate the property without legal necessity and consideration. It has also been held that the plaintiff is a collateral of Bhablu husband of Smt. Kamalbi within five degree and that the property in dispute is ancestral of Bhablu qua the plaintiff. In view of the judgment interse between the parties, S/Sh. R.A. Gupta and V.K.Maheshwari, Advocates, for the appellant made the following statement and they have only challenged the finding of the trial court qua adoption only:-

“In view of the judgment inter-se between the parties placed on record as Ex.P10, the following

points in all the four pending appeals have become redundant and are thus, not argued and given up:-

- 1. It has been held in the said judgment and the parties to the present litigation are governed by agricultural custom in the matters of alienation and succession. It has further been held that Smt. Kamalbi being a limited owner, could not alienate the property without legal necessity and consideration.*
- 2. It is not disputed and thus not argued that the plaintiff is a collateral of Bhablu husband of Smt. Kamalbi within five degrees.*
- 3. It is also not disputed and thus, not argued that the suit land is ancestral of Bhablu qua the plaintiff. We only challenge the finding qua adoption.”*

Learned first appellate court has accepted the appeals filed by the defendant-respondent resulting in dismissal of all the four suits filed by the plaintiff.

That is how these four appeals have come up for disposal.

This court has heard learned senior counsels for the parties at length and with their able assistance gone through the judgments and decrees passed by the Courts below and the record.

Learned counsel for the appellant has submitted that the defendant-Kamalbi had for the first time while contesting civil suit no.492 of 18.07.1983 has pleaded that she had adopted Abdul Hamid with the consent and wishes of her late husband Sh. Bhablu. He, hence, submits that such plea is clearly an after thought. He also drew attention of the court to the application filed under Order 41 Rule 27 CPC to contend that Abdul Hamid continues to be described as son of Badhan in the voter list,

mortgage deed and jamabandi and therefore, there was in fact no adoption. He further submitted that parties are governed by customary law as applicable to Meos of district Gurgaon. He drew attention of the court to a report published by J. Wilson, Settlement Officer, in the year 1883 while carrying out revision of the assessment of Gurgaon district in the State of Punjab. He drew attention of the court to Section 2 of Part-II of the Code of Triable Custom to contend that the plaintiff had a preferential right to be adopted as compared to more distant male relative. He further submitted that the adoption could take place with the consent of husband's male relatives and, therefore, also the adoption of Abdul Hamid is not valid. He further drew specific attention of the court to the information recorded in the questions and answers form by the author in the report. Specific attention of this court was drawn to Question No.5, Question No.6 at page 53 and thereafter to Question No.3 at page 54 of the report which are extracted as under:-

“Question 5. Can a woman adopt? State whether it is necessary to the validity of an adoption by a widow that she should adopt with the permission, written or verbal, of her deceased husband, or with the consent of his kindred?

Answer 5. A woman cannot adopt in her husband's lifetime.

A widow can, without the permission, written or verbal, of her deceased husband, adopt any one she pleases of her husband's male relatives related through males.

She cannot adopt any one else without the consent of her husband's male relatives related through males.

(All tribes which adopt, except that the Kayaths, Jat, Musalman, and Mallah say the widow must either have

her husband's express permission to adopt, or the consent of her husband's male relatives.)

The Dhusars say the husband's relatives are either bound to supply the widow with a son, or to allow her to adopt a daughter's son or other relative through a female.

Question 6. *In the event of death of a son adopted by a widow with the sanction of her husband, may the widow adopt another person without permission of her husband to that effect?*

Answer 6. *a widow can, without permission of her husband, adopt a second son if the son's first adopted have died unmarried or have left no son, son's son, or widow. (all tribes which adopt, so far as any custom can be discovered.)*

Note.- *The son's son or widow would be entitled to succeed, and would bar the second adoption; or the son's widow could adopt.*

Question 3. *Is there any rule by which it is required that the person adopted should be related to the person adopting; If so, what relatives may be adopted? Is any preference required to be shown to particular relatives? If so, enumerate them in order of preference. Is it necessary that the adopted son and his adoptive father should be (1) of the same caste or tribe, (2) of the same got?*

Answer 3. *The person adopted should be of the same family with the adopter or the adopting widow's husband. A preference is shown to the husband's elder brother's son or descendants, then to his younger brother's son or descendants; failing them, to the more distant male relatives related through males. The adopted person should be of a lower generation than the person adopting (whether one or two generations lower).*

The person adopted must be of the same caste with the adopter, and (except in the case of adoption of a daughter or sister's son) of the same got with the adopter or the adopting widow's husband. (Rajput, Banya, Dhusar, Kayath, Taga, Musalman, Jat, Agri).

The same, except that the descendants of the husband's elder brother have no prior claim, as compared with those of the husband's younger brother. The adopter may choose from either (Ahir, Meo, Brahman, Gujar, Jat, Gaurwa.)

Note.- *When a widow adopts, she is supposed to be adopting a son to her husband, and it is the relationship to him that is thought of. The adopted person is called the son of the widow's husband and succeeds to his property. It is most usual to adopt the husband's brother's son."*

On the reading of the aforesaid, learned senior counsel for the appellant has contended that the adoption of Abdul Hamid by Smt. Kamalbi is not valid.

On the other hand, learned senior counsel appearing for the respondent-defendant has strongly contested the stand of learned counsel for the appellant. He submitted that custom as noticed in the report cannot be read as a statute. Mere preference does not mean that any one adopted from amongst the persons figuring low in preference would be invalid. The adoption took place on 28.01.1983 which was recognized by subsequent registered memorandum on 18.02.1983. Smt. Kamalbi remained alive upto the year 1990 and she never disputed the correctness of the aforesaid adoption. Smt. Kamalbi has appeared in evidence in these suits as DW4 and clearly admitted that she adopted Abdul Hamid. Smt. Mehtabi, the natural mother of Abdul Hamid, has also appeared in evidence as DW10 and

proved the adoption. He also drew attention of the court to the registered lease deed executed by Smt. Kamalbi in favour of Abdul Hamid dated 21.07.1982 to prove that Smt. Kamalbi always wanted to appoint Abdul Hamid as heir.

Before this court proceeds to examine the arguments of learned counsels for the parties, it may be noted here that the customary law has been compiled by a celebrated author Sir W.H.Ratign in the book, CUSTOMARY LAW AS AT PRESENT ASCERTAINED. After 16th Edition published in the year 2007, the book was re-printed on revision by Dr. Hari Dev Kohli, in the year 2012. In the aforesaid book, Chapter-III deals with an appointment of an heir. It has been noticed that in the communities governed by customary law as applicable to agricultural tribes there is a notion prevailing amongst the agriculturists that the adoption is in no sense connected with religion, and partakes more of the character of appointment of heir. The author further noticed that in Punjab village communities, the institution of an heir is no doubt a mere substitute of adoption, the effect of which is to vest the succession in the instituted heir from the death of the testator or appointor. The author noticed the contrast between the Hindu Law and Custom. The author further noticed in para 39 which has also been quoted by the courts below that a widow cannot appoint or adopt an heir of her husband unless she has been expressly authorized by her husband to do so or has obtained the consent of her husband's kindred. Para 39 is extracted as under:-

“39. *A widow cannot appoint or adopt an heir to her husband unless:-*

(a) she has been expressly authorized by her husband to do so: or

(b) has obtained the consent of her husband's kindred.

In para 41, it has been noticed that authorization by the husband need not be in writing nor required to specify the name of the heir to be appointed. Para 44 provides that powers may be exercised at any time.

Now the stage is set for this court to examine the facts of the present case.

First of all, it must be noticed that the pleadings in the present case do not fulfill the requirements of law. Challenge to the correctness of adoption has been laid only in Civil Suit No.492 dated 16.07.1983. Para 4, 5 and 6 reads as under:-

“4. That it has come to the knowledge of the plaintiff about 2 months ago that the defendant No.1 executed and got registered an adoption deed on 18.2.1983 in favour of the defendant No.2 who is not in any way relative to Bhablu deceased, husband of Smt. Kamalbi defendant No.1. A copy of the adoption deed is attached herewith.

5. That the defendant No.1 never in fact adopted the defendant No.2. No ceremony of adoption on 28.1.1983 took place. The defendant No.1 could not take a boy in adoption under any law, personal law of the parties does not recognize adoption and the adoption is void. Even if the defendants allege custom which the plaintiff does not admit in matters of adoption. The adoption is illegal and not binding, the defendant no.2 being a stranger to the family of the Bhablu husband of the Smt. Kamalbi defendant No.1. The adoption deed dated 18.2.1983 is illegal, void and not binding upon the plaintiff.

6. That the adoption deed dated 18.2.1983 is not binding on the plaintiff and does not effect his reversionary rights of the plaintiff to succeed to the life estate of defendant No.1 on her death. The defendant No.1 Smt.

Kamalbi inherited the suit land stated in para No.1 from her husband Bhablu deceased as her life estate, hence the plaintiff is entitled to sue for declaration and plaintiff is entitled to get declared the adoption deed dated 18.2.1983 as illegal, void and not binding upon the plaintiff.”

It is well settled that a custom is required to be pleaded and proved. From para 4, 5 and 6, it is apparent that specific custom as is now sought to be projected has not been pleaded. Custom varies between community to community, area to area and district to district. The custom can be general as well as specific. A custom is a rule in a particularly family or in a particular class or community or in a particular district which has from long usage obtain the force of law. It must be ancient, certain and reasonable. It is also well established that the custom, being in derogation of/ at variance with law, has to be construed strictly. Hence, it is essential that it should be established by clear and unambiguous evidence enabling the court to be assured of its existence. The court must be in a position to record firm finding that it is ancient and the usage has been acted upon in practice for a long period. Custom cannot be deduced merely by analogy. It must be established specifically. Custom cannot be a matter of mere theory but always be a matter of fact. One custom cannot be deduced from another.

Keeping in view the aforesaid facts, now let's examine what are the precedents on this aspect lay down.

It may be noted here that the Hon'ble Supreme Court in **Hem Singh vs. Harnam Singh, AIR 1954, SC page 581** has held that adoption in the families, who are pre-dominantly dependent upon the agriculture is of

secular character and is more of a appointment of an heir rather than adopting a child. The Hon'ble Supreme Court has also held that custom giving preference to relations up to a particular degree is only directory and cannot be interpreted as mandatory so as to invalidate an adoption. The aforesaid judgment passed by the Hon'ble Supreme Court has been followed by two Division Bench judgments of this court in **Data Ram and another vs. Tej Singh, AIR 1959 Punjab, 428** and **Ranjit Singh vs. Pola Singh, 1960 (62) PLR,250.**

At this stage, it would be appropriate to notice that the defendants-respondents have produced on file various judgments passed by the courts deciding cases of adoption in the Meo community of the same area. First judgment in this regard is Ex.D2 passed in the case of Jasmal vs. Nabela, Civil Suit No.304 of 1954 decided on 19.08.1955. The court after examining *Riwaj-i-am* of district has held as under:-

“There are several instances quoted in the Riwayat-i-am of the District regarding Meo widows adopting male kindreds of the husband. The defendant Nabela is a male kindred of her husband; the consent of the other reversioners would not be necessary presumably, unless the presumption is repudiated by any positive and reliable evidence. The plaintiffs denied their institution of adoption among Meos in the plaint but the counsel for the plaintiff has clearly conceded that this position is altogether untenable. The entry in the Riwayat-i-am of the District regarding Meos as well as the numerous instances of adoption among Meos by males and females placed on record proves the custom of adoption even by widow, among the Meos. Besides the oral evidence we have got Ex.D2 a mutation of adoption by Mst. Nami. Ex.D3 is the mutation of adoption by Ahmad,

Ex.D4 is the jamabandi showing Jhen Khan as adopted son and Ex.D5 is the copy of the Pedigree table of the same Jhan Khan and Ex.D6 is the copy of Jamabandi regarding Samsher as adopted by Mst. Jiwni, Ex.D7 record the adoption by Mst. Razni and Ex.D8 is the copy of the pedigree table regarding both the adoption by Mst. Jiwani and Mst. Rzni and Ex.D10 to Ex.D12 are judicial instances upholding the custom of adoption among Meos. In Ex.D12 the adoption is by a widow. The plaintiff has not led any evidence to dis-prove this voluminous evidence. The onus lay on the plaintiff to displace the burden caste by the entry in the Riway-i-am that a widow could form among the male kindred without any authority from the husband and there is no condition added to the adoption from male kindred that it must be with consent of the collateral, just as is the case where the adoption is from outside of the family. The only question which remains now is whether the adoptee was from the male kindreds of her husband. The pedigree table placed on record by the plaintiffs, Ex.D1 shows that Nabela son of Dad Khan is a collateral of the same degree with Umrao, Rasuli's husband, as the plaintiff himself. The plaintiffs are the descendants of Malu and the adoptee is the descendants of Raj Khan both Malu and Raj Khan being the son of Johri son of Mehrab and both the plaintiffs and the adoptee are related to Umrao, husband of Mst. Rasoli in the 11th degree, the common ancestor being Addel. Therefore, the adoption of Nabela a male kindred of Umrao was perfectly valid under the custom.”

Still further, defendants have also relied upon various other judgments Ex.D7, Ex.D9, Ex.D11, Ex.D13, Ex.D15, Ex.D17 and others. In all these judgments, it has been held that the Meos of the area are governed

by custom and a widow is entitled to adopt a son out of collateral of her husband. It may be noted here that in these judgments even the effect of custom as noticed by Mr. Wilson and Mr. Ratigon have also been noticed and explained.

Now let's examine the arguments of learned counsel for the parties.

First argument of learned counsel that the plea of Smt. Kamalbi with respect to consent of her husband is an after thought cannot be accepted because in other suits filed by plaintiff-appellant, he never challenged the adoption of Abdul Hamid. The challenge to the adoption was laid in Civil Suit No.492 and in response thereto Smt. Kamalbi had pleaded that Abdul Hamid was adopted with the consent of her late husband Shri Bhablu.

Next argument of learned senior counsel is based upon application under Order 41 Rule 27 CPC for permission to lead additional evidence. However, even if the aforesaid additional evidence is taken into consideration, that would not itself be sufficient to discard valid adoption which was later on acknowledged by a registered document. In the present case, the adoptive mother as well as natural mother have appeared in evidence and proved adoption. In such circumstances merely because Abdul Hamid is recorded as son of Badhan in the voter list, mortgage deed or jamabandi would not be sufficient to dispel the overwhelming evidence of adoption.

Next argument of learned counsel is with respect to preferential rights of the plaintiff with respect to a report published by Sh.J. Wilson, Settlement Officer. It may be noted here that such preferential right cannot

be interpreted to mean that a collateral more closely related, can as a matter of right claim a preferential right to be adopted in comparison to other distant relatives. Such interpretation as is sought to be projected by learned senior counsel appearing for the appellant cannot be accepted because the adoptive mother has to be given a choice. This is what exactly has been held by the Hon'ble Supreme Court. Such preferential right as regards adoption has already been held to be not mandatory by the Hon'ble Supreme Court.

Further, it is proved on file that Abdul Hamid is also related to late Sh. Bhablu. Therefore, even as per the custom noticed by Sh. J. Wilson, a widow is permitted to choose and adopt from the relatives of her late husband.

In view of the aforesaid discussion, this court does not find any good ground to interfere with the findings of fact arrived at by the learned first appellate court.

Hence, all the appeals are ordered to be dismissed.

12th May, 2020
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned	: Yes/No
Whether reportable	: Yes/No