11. The committee will be deemed to have entered the office after the election when it takes steps for electing the office-bearers or coopted the members or transacted business of the society.

12. In the present case, the election of the managing committee of the society was held on March 15, 1984. There was no impediment in the way of the committee from entering the office. There were no such circumstances as pointed out in the *State of Punjab* v. *The Managing Committee of the Patti Primary Cooperative Land Mortgage Bank Ltd.* (supra) Consequently, the committee will be deemed to have entered the office on March 15, 1984, and the period of three years has to be reckoned from that date which will expire on March 14, 1987. If for any reason, the committee has delayed the election of the office-bearers or the cooption of members it will not mean that the committee has not entered the office. The committee was in a position to enter the office. Resultantly, the order issued by the Assistant Registrar, Cooperative Societies, Punjab, holding that the term of the society expired on March 14, 1987, is upheld and the appointment of administrator for holding fresh elections is in conformity with the mandatory provisions of section 26(1-D) of the Act. We do not find any infiirmity in the order. The writ petition is accordingly dismissed. However, in the circumstances of the case, we leave the parties to bear their own costs.

13. A copy of this order be sent forthwith to the Registrar, Cooperative Societies, Punjab, for taking such steps as are necessary for holding fresh elections to the managing committee of the Society.

*R.N.R.*

*Before V. Ramaswami, CJ.*

MAYA RAM,—*Appellant.*

*versus*

JAI NARAIN,—*Respondent.*

*Regular Second Appeal No.* 1981 of 1978

August 26, 1988.

*Hindu Adoption and Maintenance Act* (78 of 1956)—*Ss.* 4 *and* 10(*iii*) *and* (*iv*)—*Hindu Jats-custom of Adoption—Adoption of married man recognised—Validity of such custom—Adoption of married man—Legality of such adoption.*

*Held*, that Section 4 of Hindu Adoption and Maintenance Act, 1956 gives the provisions of the Act an over-riding effect by stating that save as otherwise expressly provided in the Act, any custom or usage as part of Hindu Law in force immediately before the commencement of the Act shall cease to have effect with respect of to any matter for which provision is made in the Act. Provision having been made in the Act prescribing conditions to be fulfilled by a person to be capable of being taken in adoption, the custom relating to the same shall cease to have any effect. Conditions No. 3 and 4 in Section 10, however, provide that those conditions shall apply 'unless there is a custom or usage applicable to the parties which permits person who is married' and 'persons who have completed the age of 15 years' being taken in adoption. Thus, though generally under Section 4 custom shall cease to have any effect but by virtue of specific provision in conditions No. 3 and 4 of Section 10, if there is a custom permitting a person above the age of 15 years and a person who has been married being taken in adoption that shall continue to be in force.

(Para 8)

*Held*, that there is no doubt and it is well settled law in this part of the country that there was a definite and recognised custom among Hindu Jats of adopting married men irrespective of their age. This will, therefore, squarely come within the excepted custom provided in conditions No. 3 and 4 of Section 10 and, therefore, adoption in this case was quite legal and valid.

(Para 9)

*Regular Second Appeal from the decree of the Court of the Additional District Judge, Rohtak, dated the 31st day of August, 1978 reversing that of the Senior Sub-Judge, Rohtak, dated the 30th September, 1975 and dismissing the suit of the plaintiff, leaving the parties to bear their own costs.*

O. P. Hoshiarpuri, Advocate, *for the Appellant.*

JUDGMENT

*V. Ramaswami, C.J.*

(1) The plaintiff is the appellant. He filed a suit for declaration that the registered adoption deed dated June 16, 1970 executed by

him adopting the defendant, respondent herein, is illegal and not binding on the plaintiff. Two of the main contentions raised by the plaintiff were (i) that the execution of the document was vitiated by fraud and mis-representation and (ii) the defendant who was a married man with a three years' old child at the time of adoption, could not have been adopted by the plaintiff.

(2) The factum of adoption is not in dispute. On the first question the concurrent finding of the Courts below is that there is no evidence of any mis-representation or fraud and that the registered adoption deed is not vitiated by any fraud or mis-representation. On the second question, the trial Court was of the view that though there is evidence of custom to show that there was no restriction of age for the person to be adopted and even after marriage a person can be adopted but the custom is that no person who has a son can be adopted. However, in appeal the learned Additional District Judge, Rohtak, held that the evidence of custom showed that the adoption of a married person with a child or children is permitted. He was further of the view that even if it is to be answered that the custom only permitted adoption of a married person but not adoption of a married person with a child or children, that portion of the custom which did not recognise adoption of a married person with a child is no longer in force in view of Section (4) read with Section 10 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as 'the Act'). In that view he allowed the appeal, set aside the judgment and decree of the trial Court and ultimately dismissed the suit of the plaintiff.

(3) In this appeal, the only point for consideration is whether in the presence of the entries in the *Rawaj-i-am* which is marked as P 2 in this case, that a person having a son cannot be adopted, the view of the lower appellate Court was justified in law. The parties are Hindu Jats and applicability of the Act 78/1956 to them is not in dispute. The adoption having taken place in the year 1970 after the Act came into force, the same will have to be inconformity with the provisions of the Act. Section 5 of the Act provides that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in Chapter (II) of that enactment and that any adoption made in contravention of the said provisions shall be void. Section 4 provides for the over-riding effect of the Act and states that in respect of any matter dealt to in the Act, any custom or usage which have the force of law immediately before the commencement of the Act shall

cease to have effect with respect to any matter for which provision is made in the Act save as otherwise expressly provided in the Act itself. Section 10 specifically deals with the qualifications of the person who may be adopted. Therefore, any custom or usage which was in force could not be invoked as against the provisions of Section 10. However, we find in clauses (iii) and (iv) of Section 10, the custom or usage applicable to the parties is prescribed to the extent mentioned therein and those clauses read as follows:—

> "10. No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—
>
> (i) **
>
> (ii) **
>
> (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
>
> (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption".

Section 3, clause (a) of the Act defines 'custom' and 'usage' as signifying 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. Exhibit P. 2 which is a copy of the *Rewaj-i-am* of Tehsil Rohtak for the year 1909-10 refers to certain customs amongst Jats and states that there is no restriction of age for the person to be adopted and even after the marriage a person can be adopted but no person who has a son can be adopted. The later portion of the answer given in this case that no person who has a son can be adopted, was considered as not binding and only indicatory and not mandatory, on the ground that that was not in answer to a direct question by the Settlement Officer and it was not safe to rely upon the same to hold the invalidity of the adoption. Certain other direct authorities were also relied upon in support of the contention that adoption of a married person with children is also valid.

(4) It is a well settled proposition in this part of the country that if the revenue authorities have not put a direct question on

the point from the person from whom custom was ascertained, it is not safe to make any presumption in favour of the custom to which the entry relates,—*vide Chuhar Singh* v. *Ram Chand* (1). A similar view was also expressed by Justice Tek Chand in *Jawala* v. *Dewan Singh* (2), wherein with reference to the entries in *Riwaj-i-am,* the learned Judge observed after referring to certain earlier judgments that the entry is only indicatory and not mandatory. The Supreme Court in *Hem Singh and another* v. *Harnam Singh and another* (3) with regard to entries in the *Riwaj-i-am* had made the following observations:—

> "Whether a particular rule recorded in the *Riwaj-i-am* is mandatory or directory must depend on what is the essential characteristic of the custom. 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. On the other hand, 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".

This Court in *Datt Ram and others* v. *Teja Singh and another* (4), observed that in the matter of choice, the regulation or custom should not generally speaking be considered mandatory.

(5) There are certain decisions also which have directly held that a married man with children may be adopted. Reference may be made to *Chanda and others* v. *Akbar and others* (5), wherein it was held that among Lohars of Tehsil Amritsar the adoption at the age of 26 of a married man, with children was held not invalid by custom. Again in the same volume at page 472 (95 PR 1909) in another case relating to Jains of Delhi, it was held that a married man with children may be adopted.

(1) 1957 P.L.R. 263.
(2) A.I.R 1936 Lahore 237.
(3) A.I.R. 1954 S.C. 581.
(4) 1959 P.L.R. 857.
(5) 49 Punjab Record 1909.

(6) In the Digest of customary Law for the Punjab, by Sir W. H. Rattingan at page 228, para 36 in relation to adoption it is stated that there are no restrictions as regards the age or the degree of relationship of the person to be appointed and some of the authorities cited there have held adoption of married men with children as valid by custom.

(7) Since these decisions do not relate to Hindu Jats, it is not safe to rely on them to prove custom among them. But the above discussion clearly shows that there was a definite custom among the Hindu Jats of adopting married men irrespective of their age. The evidence or the reports do not, however, conclusively establish that there was or was not a custom among Hindu Jats of adopting married man with child or children. In the light of this position on custom let us examine the provisions of the Hindu Adoption and Maintenance Act, 1956.

(8) As already noticed, no adoption shall be made after the commencement of the Act by a Hindu except in accordance with the provisions contained in Chapter II. Section 6 provides that no adoption shall be valid unless amongst the other requisites mentioned the person adopted is capable of being taken in adoption. Section 10 states that no person shall be capable of being taken in adoption unless the conditions mentioned therein are fulfilled. If the conditions are fulfilled, there is no other disqualification for a person being taken in adoption. In other words, the conditions referred to in that section are exhaustive and we cannot import any other or further condition for the validity of adoption. Section 4 gives the provisions of the Act an over-riding effect by stating that save as otherwise expressly provided in the Act, any custom or usage as part of Hindu Law in force immediately before the commencement of the Act shall cease to have effect with respect of to any matter for which provision is made in the Act. Provision having been made in the Act prescribing conditions to be fulfilled by a person to be capable of being taken in adoption, the custom relating to the same shall cease to have any effect. Conditions No. 3 and 4 of Section 10, however, provide that those conditions shall apply 'unless there is a custom or usage applicable to the parties which permits person who is married' and 'persons who have completed the age of 15 years' being taken in adoption. Thus, though generally under Section 4 custom shall cease to have any effect but by virtue of specific provision in conditions No. 3 and 4 of Section 10, if there is a custom permitting a person above the age of 15 years

and a person who has been married being taken in adoption that shall continue to be in force.

(9) Whatever doubt there may be regarding the custom permitting adoption of married man with children, as already stated, there is no doubt and it is well settled law in this part of the country that there was a definite and recognised custom among Hindu Jats of adopting married men irrespective of their age. This will, therefore, squarely come within the excepted custom provided in conditions No. 3 and 4 of Section 10 and, therefore, adoption in this case was quite legal and valid.

(10) In the result second appeal fails and it is hereby dismissed. There will, however, be no order as to costs.

*P.C.G.*

*Before G. R. Majithia, J.*

DARSHAN RAM AND ANOTHER,—*Appellants.*

*versus*

NAZAR RAM,—*Respondent.*

*Regular Second Appeal No. 2036 of 1987*

August 29, 1988.

*Code of Civil Procedure (V of 1908)—Order XXXIX, Rls. 1 and 2—Tort—Public nuisance—Installation of furnace—Emission of abnoxious smell and harmful gases causing discomfort and inconvenience to plaintiff neighbour—Such nuisance—Whether actionable —Permanent injunction—Whether can be issued.*

*Held,* that the defendant cannot be permitted to use their property in a manner which creates nuisance to their neighbour. The working of the furnace has caused nuisance to the plaintiff. Hence permanent injunction can be granted.

(Para 8).

*Code of Civil Procedure (V of 1908)—O. 6, Rls. 2 and 4—Pleadings —Suit framed for permanent injunction restraining defendant from committing attempted nuisance—Proof that nuisance was caused— Use of word 'attempted' in plaint—Effect of use of word.*

*Held,* that it is a settled rule of law that the averments made in the pleadings drafted in the *Mufissal* has to be liberally construed. In the evidence plaintiff has proved that as result of working of the furnace recently installed by the defendant he and his family members are worst affected. Thus infact it is not the case of attempted nuisance but a case where nuisance has resulted from an accomplished fact. Merely because a particular word was not used in the plaint is in-consequential. It is well settled that if the parties knew that a point arises in a case and they produce evidence on it, though