(1983) 01 BOM CK 0043

Bombay High Court (Aurangabad Bench)

Case No: Second Appeal No. 1063 of 1973

Anirudh Jageorao		APPELLANT
	Vs	
Babarao Irbaji and Others		RESPONDENT

Date of Decision: Jan. 20, 1983

Acts Referred:

- Hindu Adoptions and Maintenance Act, 1956 - Section 10, 3, 4

Citation: AIR 1983 Bom 391 : (1983) ARBLR 304 : (1983) MhLj 379

Hon'ble Judges: Madon, C.J; Pendse, J; Mehta, J

Bench: Full Bench

Advocate: G.D. Deshpande, A.G. Mukhedkar and A.M. Dabir, for the Appellant; B.S. Deshmukh, for the Respondent

Judgement

Madon, C.J.

This second appeal is filed against the Judgment and decree in first appeal of the District Judge, Nanded, from the decree in a suit decided by the Joint Civil Judge. Junior Division, Nanded. When this second appeal reached hearing before Masodkar, J., in view of the fact that an earlier second appeal being Second Appeal No. 619 of 1''971 in which an identical question of law was raised has been referred to a Division Bench By S. K Desai, J., Masodkar, J., also passed an order directing that this second appeal should be heard along with Second Appeal No. 619 of 1971. The said Second Appeal No. 619 of 1971 reached hearing before a Division Bench consisting of Chandurkar and Bhonsale, JJ., who, in view of the conflict between the judgments of two different Division Benches of this High Court, framed a question of law and referred it for decision by a larger Bench. Parties to the said Second Appeal No. 619 of 1971, however, compromised the said appeal. Meanwhile, the present appeal reached hearing before Shah and S. J. Deshpande, JJ., who, in view of the aforesaid order of reference to a Full Bench made by Chandurkar and Bhonsale, JJ., also referred the present appeal to the Full Bench framing an identical question of law.

2. The question of law which has been referred to the Full Bench in this appeal is as follows:---

"Whether the word ''custom'' or ''usage'' occurring in Section 10(iii) and Section 10(iv) of the Hindu Adoptions and Maintenance Act, 1956, read along with Section 3(a) of the said Act includes within its sweep the rules of the Bombay School of Hindu law (Mayukha) or interpretation of the text thereof by the Courts."

3. The facts which have given rise to this question of law may now be stated. One Irbaji, who was a Hindu belonging to Maratha community, residing appurtenant Nanded, died leaving him surviving four sons, namely; Narayan, Baburao, who is the first respondent before us and was the original first plaintiff of the suit, Hiraman and Jagdevrao, who is the fourth respondent before us and was the first defendant in the suit. Narayan had married one Ambubai and died without any issue. Hiraman also died leaving behind him one son, Bhujang, who too died leaving behind him two sons, Manika and Shankar, who are second and third respondents before us and were second and third plaintiffs to the suit, Jagdevrao, who is the fourth respondent before us and was the first defendant to the suit, has a son named Anirudh. Anirudh is the appellant before us and was second defendant to the suit. In the suit the plaintiffs contended that a plot of land situated appurtenant village Vishnupuri,l Taluka Nanded; was partitioned about 25 years prior to the date of the suit which was filed on December 7, 1967 and that Narayan had died prior to the partition. The plaintiffs'' case was that Ambubai, Narayan''s widow, was given a portion of the said land for her maintenance for life. This portion nears survey No. 81/B. Ambubai died on Oct. 23, 1967 and the plaintiffs thereafter filed the suit out of which the present appeal arises being Regular Civil Suit No. 219 of 1967 in the Court of the Joint Civil Judge, Junior Division, Nanded, for partition and possession against the first defendant Jagdevrao contending that he was in possession of the said property. Anirudh, the appellant, was joined as second defendant to the said suit on an application made by him as he claimed that he had been adopted by Ambubai by a registered deed of adoption dated March 2, 1966. The defendants resisted the said suit claiming that the said survey No. 81/B was given to the share of Ambubai and not merely for her maintenance and that on the coming into force of the Hindu Succession Act, 1956, by reason of the operation of Section 14 of that Act Ambubai had in any event became the absolute owner of the said plot of land. It was further contended that Ambubai having adopted the appellant, on Ambubai''s death the said plot devolved by succession upon the appellant. The appellant also pleaded that there was a custom among the Maratha community to which the parties belonged to take in adoption any person even above the age of 15 years and even though such adopted person was married. It may be mentioned that on the date of adoption the appellant was both above age of 15 years as also was married.

4. The trial Court held that the factum of adoption was proved. It also held that the defendants had proved the custom which was alleged by the appellant. In view of

these findings the trial Court dismissed the suit. The plaintiffs then filed an appeal in the District Court at Nanded being Appeal No. 30 of 1971. The learned District Judge accepted the finding of the trial Court that the factum of adoption was proved. The learned District Judge also held that after the coming into force of the Hindu Adoptions and Maintenance Act, 1956, (hereinafter referred to as "the said Act"), a custom could be invoked only if it was in conflict with the provisions of the Shastrik Law and as School of Hindu law prevailing in Bombay Presidency and which was admittedly. applicable to the parties recognized adoption of boys over 15 years of age as also of married persons, it was not open to the appellant to set this up by way of custom. The learned District Judge also found that the oral evidence of custom led by the appellant was insufficient. The learned District Judge accordingly held that the adoption of the appellant by the said Ambubai was, therefore, invalid. On this basis he reversed the decree of the trial Court and gave declaration that the first plaintiff and the first defendant were each entitled to a one-half share in the said plot of land and directed partition of the said plot of land. He, however, dismissed the plaintiffs'' claim for the value of their shares of the crops and grass standing on the said plot of land at date of Ambubai''s death on the ground that there was no evidence to support this claim. The appellant approached this High Court in second appeal.

5. In order to appreciate the question of law which has been referred to us and the arguments advanced at the bar, it is necessary now to set out the relevant provisions of the said Act. The said Act came into force on December 21, 1956. As its long title show, it was an Act to amend and codify the law relating to adoptions and maintenance among Hindus. Section 3 is the interpretation clause. Clause (a) of Section 3 defines the expressions "custom" and "usage". The said clause provided as follows:--

"Definitions:---

3. 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 given an overriding effect to the provisions of the said Act unless otherwise expressly provided in the said Act. Section 4 is in the following terms:

"Overriding effect of the Act:--

4. Save as otherwise expressly provided in this Act:

(a) 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 this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Section 10 prescribes which persons can be validly adopted. Section 10 is in the following terms:

"Persons who may be adopted:---

10. No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:--

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(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."

It will be noticed that u/s 10 of the said Act, before a person can be taken in adoption four conditions prescribed by that section have to be fulfilled, namely, (1) the person who is desired to be taken in adoption must be a Hindu whether such person is a male or female, (2) the said person should not have been already adopted, (3) the said person should not have been married unless there was a custom or usage applicable to the parties which permits persons who are married being taking in adoption, and (4) the said person must not have completed the age of 15 years unless there is a custom or usage applicable to the parties which permits persons who have completed the age of 15 years being taken in adoption. It will be noticed that out of these four conditions the first two are absolute and admit of no exception while the other two are subject to any contrary rule being prevalent by reason of custom or usage applicable to the parties concerned. It may be mentioned that Clauses (iii) and (iv) of Section 10 which contain these conditions with respect to the marital status and the age of the person to be taken in adoption are the only provisions in the said Act in which an exception has been carved out in favour of custom or usage and that by reason of the provisions of Section 4 all other provisions of the said Act, apart from those contained in Clauses (iii) and (iv) of Section 10, override all texts, rules or interpretations of Hindu law and all customs and usages as part of that law in force immediately before the coming into

operation of the said Act. The intention of Parliament in making exceptions in the case of custom and usage relating to the marital status and age of the person to be taken in adoption was to preserve any custom or usage contrary to the conditions prescribed by Clauses (iii) and (iv) of the said Section 10 intact provided it was applicable to the parties concerned and was in force prior to the date of the coming into force of the said Act, namely, prior to December 21, 1956. As stated earlier, the expressions "custom" and "usage" have been defined in Clause (a) of Section 3. The question which falls for our consideration is whether the definition of the terms "custom and "usage" given in the said Clause (a) is that same which these expressions hear in ordinary law or whether it would include within its scope any text or rule of the Bombay School of Hindu Law known as Mayukha. Unlike statutory definitions which we generally find in statutes, the words used for defining the expressions "custom and "usage" is not "mean" or "include" nut is "signify". The meaning of the word "signify" as given in the Oxford English Dictionary is: "To be a sign or symbol of ; to represent, betoken, mean." A further meaning given in the said Dictionary is : "Of words, etc,: To have the import or meaning of; to mean denote." A yet further meaning given is. To make known, intimate, announce, declare." Thus the word "signify" as used in the said Clause (a) of Section 3 means very much the same as it would have meant had the word "mean" been used. Clause (a) of Section 3 must, therefore, be held to be an exhaustive definition. In Butterworths''s Words and Phrases Legally Defined, Second Edition, Volume I, at page 392 under the heading "Custom" it is'' inter alia, stated:

"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. As regards the matter to which it relate, a custom takes the place of the general common law, and is in respect of that matter the local common law within particular locality where it obtains."

A little later, a distinction between the terms "custom" and "usage" has been brought out. It is stated (Para 393):

"The terms "custom" and "usage" are often used interchangeably. Strictly speaking, there is a clear technical distinction between the two. Usage represents the twilight stage of custom. Custom beings where usage ends. Usage is an international habit of action that has not yet received full legal attestation. Usages may be conflicting, custom must be unified and self-consistent. Viner''s Abridgment, referring to custom in English law, has the matter in a nutshell: ''A custom, in the intendment of law, is such a usage as the hath obtained the force of a law" (Starke''s International Law (6th Edn. 34)." Clause (a) of Section 3, however, does not preserve this distinction between custom and usage but places both on the same footing by defining each of these expressions in the same terms. What is required to make an act or conduct amount to custom or usage within the meaning of Clause (a) of Section 3 is that it

must be a rule which, having been continuously and uniformly observed for of law among Hindus in any local area, trible, community, group or family, provided that this 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. The question of family does not arise in the present case. The evidence led by the appellant to prove custom has been held to be insufficient and the finding of fact on this point is against the appellant. The appellant''s case is really based either upon a custom which has become a part of the Bombay School of Hindu Law or on the relevant text of the Bombay School of Hindu law declaring or setting out a custom which prevailed in the region to which it applies. Before we go on to consider further the expressions "custom" and "usage" in Clause (a) of Section 3, it will be now convenient to see how this definition has been interpreted 713 of 1964 Dattatraya Bapu Jadhav v. Anubai Bapu Jadhav decided on June 15, learned Judge referred to Clause (a) of Section 3 and to Section 4 of the said Act. He then proceeded to hold that there was no doubt whatever that in the part of the country to which the Bombay School of Hindu law applied a person of any age was capable of being taken in adoption even though he may be older than the adoptive mother or father and though he may be a married person having children or grandchildren. The learned Judge further observed:
"The adoption of a married person or of a person who is older than the adoptive father or mother has been regarded as valid in some of the decided cases on the ground that there is no prohibition in the Hindu law against such adoption. The adoption of a person of any age is also accepted as valid on the same ground as also on the ground that such adoptions have taken place and accepted as valid on the basis of a long established custom." (The emphasis has been supplied by us).

6. The point next arose for consideration by Nain, J., in Housabai and Others Vs. Jijabai Baba Powar and Others, . The question there was of the validity of adoption of a boy more than 15 years of age. Parties resided in Satara District. It was contended that the adoption was void u/s 10 of the said Act. The lower appellate Court placed reliance upon two instances of such adoption and certain oral evidence in order to come to the conclusion that such custom prevailed in the district in which the parties resided and was applicable to the parties. Referring to this evidence Nain, J. observed (Pare 99):

". ... ... These instances may not be sufficiently ancient to establish a custom. But what Section 10(iv) of the Hindu Adoptions and Maintenance Act, 1956, talks of is not only custom, but also usage. The instances and the evidence would be sufficient to establish a usage. However, this sufficiency of evidence for establishing a custom or usage loses all importance in territories which were formerly part of State of Bombay , such as Satara District. Even prior to the passing of the Hindu Adoptions and Maintenance Act in 1956, the Hindu Law applicable to the Bombay State was that a person may be adopted at any age even though he may be older than the

adopter and even though he may be married and had children. It is wellknown that Hindu Law in India is derived from various texts and commentaries some of which have by custom held the field in various parts of India. Hindu law, therefore, is by itself customary law, except to the extent to which it has been subsequently codified. In my opinion, therefore, the prohibition contained in Section 10(iv) against the person adopted who has completed the age of 15 years has no meaning in relation to male persons adopted in the territories which were comprised in the former State of Bombay which include the District of Satara from where this appeal comes. The custom or rule of Hindu law prevailing in these territories permitting adoption of males over the age of 15 years us expressly saved by S. 10(iv). The position with regard to the adoption of females may be different as there was no rule of Hindu law permitting adoptions of females prior to the Hindu Adoptions and Maintenance Act, 1956." (The emphasis has been supplied by us).

7. For the first time, a discordant note about the interpretation of Clause (a) of Section 3 of the said Act was struck by Malvankar, J., in Second Appeal No. 1444 of 1965 Bhimrao Vithu Khandagale v. Chandru Savala Khandagale decided on April 24, 1972 (unreported). In that case, Malvankar, J., held that the expression "custom" as defined in Clause (a) of Section 3 did not include any text or interpretation of Hindu law. He opined that the argument advanced by the appellant that the definition included also the text or rule or interpretation of Hindu law would render meaningless S. 4 of the said Act inasmuch as every text or rule of Hindu law can be interpreted to mean congeries of custom and, therefore, would be saved wherever there was an express provision to that effect in the said Act, included in Clause (iv) of Section 10. There are certain points which require to be noticed with respect to the judgment of Malvankar, J. The judgment of Nain, J., in Housabai and Others Vs. Jijabai Baba Powar and Others, referred to above, was not brought to his notice nor was the judgment of V. S. Desai, J. in Second Appeal No. 713 of 1964 also referred to above. Further, the interpretation that Malvankar, J., gave to Clause (a) of Section 3 was based upon a concession made by the Advocate for the appellant. In that case the appellant had not specifically pleaded any custom in the plaint nor was any issued framed regarding the existence of a custom. Some evidence, however, was led on the point, but that evidence was not sufficient to prove any custom. What was, therefore, argued on behalf of the appellant before Malvankar, J., was that there were a number of decisions of the Bombay High Court recognizing the custom permitting persons of more than 15 years of age to be taken in adoption and it was not necessary either to plead such custom specifically or to lead any evidence to prove the same. The advocate for the appellant, however, conceded that if the adoption of a person more than 15 years of age was permissible under any text, rule or interpretation of Hindu law before the said Act came into force and was not in accordance with any custom, then the appellant would be out of Court. Malvankar, J., therefore, proceeded to consider the earlier decisions of this High Court and opined that none of them was based upon any custom but all were based upon the

rule as laid down in Vyavahara Mayukha. There was thus no discussion before Malvankar, J., whether the definition in Clause (a) of S. 3 would also include any text, rule or interpretation of Hindu law. What Malvankar, J., did, was to accept the concession made by the appellant''s advocate. He opined that that concession was fairly made. He further went on to say that if clause (a) of Section 3 were to include any text; rule or interpretation of Hindu Law, it would render meaningless the provisions of Section 4 inasmuch as every text or rule of Hindu Law could be interpreted to mean congeries of custom and therefore, would be saved wherever there was any express provision in the said Act as in clause (iv) of S. 10. It was, however, not brought to the notice of Malvankar, J., that apart from clauses (iii) and (iv) of Section 10 there was no other provision in the said Act where there was a saving in respect of custom and usage and the question of rendering meaningless S. 4 of the said Act in the sense that Malvankar, J., opined did not, therefore, arise. So far as the conclusion reached by Malvankar, J., with respect to the earlier decisions of the High Court is concerned, we will deal with it later.

8. The next decision in order of time is of a Division Bench of this Court consisting of Nathwani and N. B. Naik, JJ., in First Appeal No. 137 of 1966, Ramchandra Tukaram Alai V. Mahadu Tukaram Alai, decided on Nov. 29 1974 (unreported). The judgment of Malvankar, J., was cited before the Division Bench with particular reference to what Malvankar, J., had said about the earlier decision of this High Court on the question of there being a custom which enabled a boy of over 15 years of age to be taken in adoption. The Division Bench took the view that Malvankar, J., had not correctly read the decision of this High Court in Nathaji Krishnaji v. Hari Jagoji (1871). 8 Bom HCR (ACJ) 67. The Division Bench pointed out that the decision in that case was not based solely either on Hindu Law or custom but the Court had taken the view that looked at from either view the adoption of a married person was valid. The Division Bench stated that it was unable to agree with Malvankar, J., that the decision in Nathaji''s case was based not on any custom but on the text, rule or interpretation of Hindu Law, namely, Vyavahara Mayukha. According to the Division Bench Nathaji''s case would show that since before 1871 the validity of an adoption of a person of over 15 years of age in come castes was sustainable on the ground of custom, if not as per the text, rule or interpretation of Hindu Law. The Division Bench in Ramchandra Tukaram Alai v. Mahadu Tukaram Alai, however, did not consider the true interpretation to be placed upon clause (a) of S. 3.

9. We have next the decision of Vaidya, J., in Ramchandra Vasudeo v. Baburao Appaswami Pillay, 1976 Mah LJ 125. Vaidya, J., held that in determining whether the plaintiff had established the custom or usage among the members of the Pillay community to which he belonged which permitted persons who have completed the age of 15 years to be taken in adoption, the Court must take into consideration, the most ancient law-giver, the public opinion of the community. If such public opinion showed that a boy of 18 years could be adopted in the community and the rule regarding such adoption to be valid was continuously and uniformly observed for a

long time, the customary rule acquired the force of law within the meaning of clause (a) of Section 3 of the said Act. The learned Judge then quoted a passage from Dr. Kane''s History of Dharmasastra, Volume III, at page 680 , and on the basis of the said passage Vaidya, J., observed as follows (page 130):--

"It is, therefore, clear that notwithstanding what was stated in the aforesaid Dharmashastra books, the Bombay School of Hindu Law never recognised any age limit for adoption. That is the legal custom and lex loci relating to adoption in this part of the country within the meaning of the definition of ''custom'' under the Hindu Adoptions and Maintenance Act. A person may be, therefore, adopted of any age in Maharashtra State unless it is proved that it is prohibited by the custom of the community."

The view of Malvankar, J., was, however, accepted by a Division Bench of this High Court consisting of Vimadalal and N. B. Naik, JJ., in Laxman Ganpati Khot and Others Vs. Anusyabai and Another, . There question fell for decision fell for decision in that appeal, namely: (1) whether in view of the provisions of Sections 4 and 10(iv) read with S. 3(a) of the Hindu Adoptions and Maintenance Act, 1956, it was open to the first defendant to prove that there was a custom or usage applicable to the parties which permitted persons who were over the age of fifteen to be taken in adoption; (2) whether any such custom or usage had been proved in that case; and (3) whether the first defendant had succeeded in proving the factum of the adoption on which he relied. Vimadalal, J., with whom Naik, J., agreed, took the view that by reason to the factum on the third question relating to the factum of adoption it was not really necessary to decide the first two questions. However after holding against the appellant on the question of the factum of adoption and after reiterating what he had stated earlier that it was not necessary for the Court to deal with the other questions, Vimadalal, J., in Housabai and Others Vs. Jijabai Baba Powar and Others, as also to the judgment of Malvankar, J., in Second Appeal No. 1444 of 1965. After setting out what was held in those two cases Vimadalal, J., stated (para 271) :---
"..... In my opinion, the position as laid down by Malvankar, J., in his judgment, in the said case, to the extent stated above, and as conceded before him by the learned advocate for the appellant, is the correct position in law as it now stands."

He further stated that he did not approve of the view taken by Nain, J., in so far as he had held that not merely a custom; but even a rule of Hindu Law prevailing in those territories would be expressly saved by Section 10(iv). Vimadalal, J., has given no reason why he preferred the view taken by Malvankar, J., to that taken by Nain, J. The very same argument as was advanced before Malvankar, J., was also advanced before Division Bench in the case of Laxman Ganpati Khot and Others Vs. Anusyabai and Another, , namely, that there being a series of decisions of the Bombay High Court recognising the custom permitting persons more than 15 years of age to be taken in adoption, it was not necessary to plead such custom specifically much less to lead any evidence to prove the same. On this aspect of the case, Vimadalal, J.,

referred to the Supreme Court decision in R. B. S. S. Muninalal v. S. S. Rajkumar AIR 1962 Second 1493. In that case it was held (page 1498) :---

"..... It is well settled that where a custom is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom introduced into the law without the necessity of proof in each individual case."

After citing this case Vimadalal, J., proceeded to hold as follows (page 271) :---

"..... The position, therefore, is that where the custom in question has been repeatedly recognised by Courts of law, the Court may, in another case, hold that custom as proved without the necessity of independent proof in that case, but even where the case law relied upon falls short of that, a judicial decision in which such a custom has been recognised can certainly be regarded as affording corroboration of the evidence of the witnesses who have deposed to the same in another case".

As mentioned earlier, Naik, J., agreed with Vamadalal, J., The decision of the Division Bench consisting of Nathwani and Naik, JJ., in First Appeal No. 137 of 1966, Ramchandra Tukaram Alai v. Mahadu Tukaram Alai decided on Nov. 29. 1974, was not brought to the notice of the Court deciding the case of Laxman Ganpati Khot and Others Vs. Anusyabai and Another, , and a curious situation arose that while sitting with Nathwani, J., Naik, J., agreed in not accepting the view taken by Malvankar, J., but while sitting with Vimadalal, J., he agreed with him in holding that the view taken by Marvankar, J., was the correct one.

9-A The question of the true meaning to be given to the expressions "custom" and "usage" in se 3 of the said Act came to be exhaustively considered by another Division Bench of this Court consisting of Vaidya and Shimpi, JJ., in Haribai Vs. Baba Anna and Another, . Vaidya and Shimpi, JJ., overruled the decision of Malvankar, J. The Division Bench of Vaidya and Shimpi, JJ., held that the law as stated by Malvankar. J., was not correct and the law as stated by V. S. Desai. J., Nain, J., and Vaidya, J., was a true view of the law on the point particularly having regard to the provisions of the definition of "custom" and "usage" in clause (a) of S. 3 and of clause (iv) of Section 10 of the said Act and the uniform and continuous recognition and enforcement of the law regarding the limits on the age of the boy to be adopted, as part of the lex loci applicable generally to Hindus domiciled in this part of the country. With specific reference to the definition given in clause (a) of S. 3 the Division Bench held (pp. 293-294) :---

"The definition gives importance not to any particular custom or usage as opposed to Dharmashastra Text but to any rule which, having been continually and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family. It does not speak of any rule not based on any text or based on custom. It may be a rule having its origin or the genesis in a text or in a decision of the Court of law. If in any particular local area, the rule has been continuously and uniformly observed for a long time, it must be considered as

the ''custom'' and ''usage'' for the purpose of the Hindu Adoptions and Maintenance Act.

The definition in a way gives effect to the well known legal maxim "Via Tritia Via Tuta". (The beaten way is the safe way). The definition which Malvankar, J. with great respect, appears to have assumed to apply made distinction between a rule founded on custom and a rule founded on Vyavahar Mayukha or other Hindu Dharma Shastras or the text. Such a distinction is not germane to the definition of the word ''custom'' in S. 3(a). All that is required for purposes of that definition is that a rule must have been continuously and uniformly observed for a long time; and it must have obtained the force of law among Hindus in any local area, tribe, community, group of family. Whether it was based on a book of Dharma Sastras like Vyavahara Mayukha or any other text was irrelevant to the definition of ''custom'' under the Act."

The said Division Bench also disagreed with the view taken by Malvankar, J., as to the ratio of the decision in Nathaji Krishnaji v. Hari Jahoji (1871) 8 Bom HCR (ACJ) 67.

10. The last case which need be referred to, before we turn to the true scope of clause (a) of Section 3 is the decision of Joshi, J., in Balkrishna Raghunath Gharat Vs. Sadashiv Hiru Gharat, . Unfortunately, the judgment of Vaidya and Shimpi, JJ., in the case of Haribai Vs. Baba Anna and Another, was not brought to the notice of Joshi, J., and he, therefore, followed the view taken by the Division Bench of Vimadalal and Maik, JJ., in '' Laxman Ganpati Khot v. Anusuyabai AIR 1976 Bom 364.

11. Before us two contentions were urged on behalf of the appellant. It was urged that clause (a) of Section 3 does not make any distinction between a text, rule or interpretation of Hindu Law and any custom or usage which has become part of Hindu Law and that by reason of the saving clause in Section 4 read with clauses (iii) and (iv) of Section 10 rules of the Bombay School of Hindu Law, namely, Vyavahara Mayukha or interpretation of the text thereof by the Courts were included in the expressions "custom" and "usage". In the alternative, it was urged that Vyavahara Mayukha which is the prevailing authority for the Bombay School of Hindu Law applied, and, therefore, even if any text, rule or interpretation of Hindu Law was to be excluded from clause (a) of Section 3, the rules laid down in Vyavahara Mayukha would apply as custom or usage and such custom and usage relating to adoption having been uniformly recognised in judicial decisions of this Court were not required either to be pleaded or proved by leading independent evidence. On the other hand, on behalf of the respondents, it was urged that the whole purpose in enacting the said Act was to do away with all texts, rules and interpretation of Hindu Law and customs and usages as part of that law so as to provide for all Hindus a uniform code with respect to adoptions and maintenance, unless there was a specific provision preserving such customs and usages, and what was intended was merely to preserve local customs and usages and not what has been recognised by Courts of law and, therefore, independent proof by leading evidence of such local

custom or usage was required in each case.

12. We have already set out earlier the provisions of clause (a) of S. 3 and s. 4 of the said Act. The definition of the expressions "custom" and "usage" contained in clause (a) of S. 3 refers to a 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. The words used are "any rule which ..... has obtained the force of law among Hindus". The first question which strikes one is, why was this definition enacted in the said Act? The answer is, because the expressions "custom" and "usage" occur in three other places in the said Act, namely, in clause (a) of S. 4 and in clauses (iii) and (iv) of Section 10. Section 4 was enacted to abrogate all conflicts prevailing in different parts of India with respect to the texts, rules and interpretation of Hindu Law as also any custom or usage as part of that law which were in force immediately before the commencement of the said Act as also all other laws immediately before the said date in so far as they were inconsistent with any of the provisions contained in the said Act. As mentioned earlier, the only matters in respect which a saving has been made with respect of custom or usage are those specified in clauses (iii) and (iv) of S. 10. But for the saving provisions of clauses (iii) and (iv) there would have been no necessity for Parliament to define the expressions "custom" and "usage". Further, the definition given in clause (a) of Section 3 speaks of a rule which by having been continuously and uniformly observed for a long time has obtained the force of law amongst Hindus, that is, it has become a rule of Hindu Law. The word "rule" used in the said clause (a) per se cannot and does not draw a distinction between a rule which as obtained the force of law amongst Hindus by continuous and uniform observance either because that course of conduct was founded upon custom or usage as understood in the ordinary sense or where such course of conduct was founded upon any text, rule or interpretation of Hindu Law. What is also pertinent to note is that even under clause (a) of Section 4 what is abrogated is, apart from any text, rule or interpretation of Hindu Law, "any custom or usage as part of that law", namely, of Hindu Law. Therefore, the custom or usage which is saved by Section 4 wherever it is so provided in the said Act, that is, in clauses (iii) and (iv) of Section 10, is a custom or usage which has become a part of Hindu Law and it is that expression "custom" and "usage" in S. 4(a) which Clause. (a) of Section 3 has defined. The intention of Parliament was to preserve custom or usage where such express provision in that behalf was made in the said Act. Section 4 opens with the words "Save as otherwise expressly provided in this Act". These words govern both the expressions occurring in clause (a) of S. 4, namely, "any text, rule or interpretation of Hindu Law" as also "any custom or usage as part of that law". If the expression "custom or usage" was used in contradistinction to the expression "any text, rule or interpretation of Hindu Law", since nowhere in the whole of the said Act is there any express saving provision with respect to any text, rule or interpretation of Hindu Law, it was meaningless for Parliament to have made the opening words of Section 4 apply to

both the said expressions in clause (a) of Section 4. On well settled principles of interpretation of statutes a legislative intent to enact a redundancy cannot be attributed to Parliament or any other legislative body. By deliberately saving not only all custom and usage but also all texts, rule and interpretation of Hindu Law wherever so provided in the said Act and by defining the expressions "custom" and "usage" in clause (a) of S. 3 in the manner in which Parliament has done, it must be held that the word "rule" in clause (a) of S. 3 refers to what is set out in clause (a) of S. 4, namely, to any text, rule or interpretation of Hindu Law or any custom or usage as part of that law.

13. As mentioned earlier, what is saved by Section 4 is "any custom or usage as part of" Hindu Law in force immediately before the commencement of the said Act. The expression "Hindu Law" has been defined, or rather described, by Mayne in his "Treatise on Hindu Law and Usage", Eleventh Edition, at page 1, as "the law of the Smritis as expounded in the Sanskrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the Courts". At pages 7 and 8 of the same book, Mayne has stated :--

"From the researches of scholars as well as from the Smritis themselves it is now abundantly clear that the rules of Vyavahara or civil law, relating to marriage, adoption, partition and inheritance in the Smritis were, in the main, drawn from actual usages then prevalent, thought, to an appreciable extent, they were modified or supplemented by the opinions of Hindu Jurists."

As pointed by various jurists and scholars of the Hindu Law as also by Mayne (on pages 39 and 40), Smrities did not cover the whole ground of law and even such of the rules as they laid down were not always expressed in sufficient detail and there were conflicts and obscurities in them. Naturally, the law as contained in the Dharmasastras, therefore, formed the subject of frequent exposition by learned Hindu lawyers and Pandits in the form of either Commentaries on particular Smrities or Nibandhas or Digests of the entire body of Smriti material. The work that was done by the authors of the Commentaries or Digests is described by Mayne (at page 40) as follows :--

"..... The authors of the Commentaries and Digest assume that the Smrities constitute a single body of law, one part of which supplements the other, and every part of which, if properly understood, is capable of being reconciled with the other. They discarded what had become obsolete either with a simple statement to that effect or on the ground that they were so longer admissible in the present Kali age ("Law and Custom" by Dr. Julius Jolly, p. 96). They modified and supplemented the rules in the Smrities in part by means of their own reasoning and in part in the light of usages that had grown up Jogdamba v. Secretary of State (1889) ILR 16 Cal 367, 375; Chandika Buksh v. Muna Kunwar (1902) 29 Ind App 70 : ILR (1902) All 273; Minakshi v. Ramanada ILR (1888) Mad 49."

(The Emphasis has been supplied by us.) Thus, according to Mayne, Commentaries and Digests were books which modified and supplemented the rules in the Smrities, which themselves were based upon usages prevailing at the time when the Smrities amendment to be written, partly by means of the reasoning of the authors themselves and partly in the light of the usages which had subsequently grown up. It is difficult to distinguish clearly at this point of time which parts of the Commentaries and Digests were based upon the reasoning of their authors and which upon prevailing usages. Some of these Commentaries and Digests acquired great authority in different parts of India and in those parts of India where a particular Commentary or Digest was accepted as being authoritative and binding, the people followed and observed the rules came to acquire the force of law and were judicially recognized and enforced by Courts of law. Neither the Smritis nor any Commentary or Digest by themselves legislate in the sense in which we understand that term. They acquired the authority of law because people accepted what was stated in them, considered them in part as divinely inspired and in part as laying down what they themselves and their ancestors had been practising for years on end and looked upon what was stated in them as binding rules of conduct and practice. In the Introduction to the Fifteenth Edition of Mulla''s Principles of Hindu Law at page 47 it is stated :--

"..... The Commentators (that is, the authors of Commentaries and Digests) did not at any time arrogate to themselves the position of law-makers. Many of the commentators with refined amenity of style disavowed all intention to make innovations. Their sole claim was that their works gave critical interpretations of the textual law of the Smritis and collated and declared the established textual and customary law."

(The Emphasis has been supplied by us.) A little later, at page 48 in the same introduction it is stated :--

"..... The commentators, although they rested their opinions on the Smritis, were explaining, modifying, enlarging and even at times departing from the letter of the lax-script a in order to keep the law in harmony with their environments and the prevailing notions of justice and to suit the felt necessities of times. The law was basically and essentially traditional law and rooted in custom with the result that the process of development and assimilation continued and the law had to be gathered not merely from the ancient texts, nor solely from the commentaries but mainly from the latter and always having regard to rules of conduct and practices reflected in approved usage."

(The Emphasis has been supplied by us.)

In AIR 1935 57 (Privy Council) the Judicial Committee of the Privy Council observed with respect to the Commentaries as follows (page 143) :--

"..... It must be remembered that the commentators, while professing to interpret the law as laid down in the Smritis, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and that it is the opinion the provinces where their authority is recognised. As observed by this Board in Collector of Madura v. Moottoo Ramalinga Sathupathy (1868) 12 Moo Ind App 397, the duty of a Judge ''is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law, clear proof of usage will outweigh the written text of the law''. Indeed, the Mitakshara ''subordinates in more than one place the language of texts to custom and approved usage''. Bhyah Ram Singh v. Bhyah Ugur Singh (1870) 13 Moo Ind App 373. It is, therefore, clear that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted."

In an earlier case, Balwant Rao v. Baji Rao AIR 1921 PC 59, the Judicial Committee with reference to the Commentaries stated (at page 61) :--

"..... They do not enact, they explain and are evidence of the congeries of customs which form the law."

In the Collector of Madura v. Moottoo Ramalinga Sathupathy (1868) 12 Moo Ind App 397 , the Judicial Committee pointed out how different schools of Hindu Law originated. Their Lordships of the Judicial Committee said (at pages 435-436) :

"The remoter sources of the Hindu Law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The Commentator put his own gloss on the ancient text: and his authority having been received in one and rejected in another part of India; Schools with conflicting doctrines arose. Thus the Mitakshara, which is universally accepted by all the schools, except that of Bengal, as of the highest authority, and which in those yielding only to the Daya Bhaga in those points where they differ, was a commentary on the Institutes of Yajnawalkya; and the Daya Bhaga, which, wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yajnawalkya. In like manner there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that Treatise, but are not received by all. This very point of the widow''s right to adopt in an instance of the process in question. All the schools accept as authoritative the text of Vasishta, which says : ''Nor let a woman give or accept a Son unless with the assent of her Lord.'' But the Mithila School apparently takes this to mean that the assent of the Husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaka form. at all. The Bengal School interprets the text as requiring an

express permission given by the Husband in his lifetime, but capable of taking effect after his death; whilst the Mayukha and Koustubha, Treatises which govern the Mahratta School, explain the text away by saying, that it applies only to an adoption made in the Husband''s lifetime, and is not to be taken to restrict the widow''s power to do that which the general law prescribes as beneficial to her Husband''s soul. Thus upon a careful review of all these writers, it appears, that the difference relates rather to what shall be taken to constitute, in case of necessity, evidence of authority from the Husband, than to the authority to adopt being independent of the Husband."

In the above passage, the Judicial Committee has referred to the Mitakshara as a commentary on the Code or the Institutes of Yajnawalkya. This Code was written in the latter part of the eleventh Century by Vijnaneshwara. As pointed out by the Judicial Committee, in turn there were glosses and commentaries written upon the Mitakshara and the Mitakshara is now sub-divided into four Schools, namely, (1) Banaras School; (2) Mithila School; and (3) Maharashtra or Bombay School; and (4) Dravida or Madras School. So far as the Bombay School is concerned, the Judicial Committee in the case of Balwant Rao v. Baji Rao AIR 1921 PC 59 stated :--

"..... .... It is the fact that in the Presidency of Bombay the dominating commentary is the Mayukha, which is a supplementary commentary to the Mitakshara."

The Mayukha or, to give it its full title, the Vyavahara Mayukha, was written by Nilakantha Bhatta in the beginning of the seventieth century. Its authority prevailed not only in the Bombay Presidency but in other parts of India as well.

14. It is unnecessary to lengthen out this judgment in order to catalogue the places to which the Vyavahara Mayukha applies by referring to different text-books and case law on the subject. So far as the parties before us are concerned, it is an agreed position that they are governed by the Bombay School of Hindu Law, namely Vyavahara Mayukha. Irbaji, the ancestor of the parties, was a resident of Nanded in the Marathwada region which formerly formed part of the Dominion of the Nizam of Hyderabad. All the parties to the suit also belong to Nanded. So far as the Marathwada region is concerned, we have been referred to a decision is concerned, we have been referred to a decision of a Seven Judge Bench of the Hyderabad High Court of the old Nizam State in Sheshadri v. Venubai 37 D L R 244 , decided on 1355 Fasli (1945-46 A. D.). That decision, however, is in Urdu, but since all learned Counsel appearing before us are conversant with that language and can read it, we have had the benefit of being informed by them what that decision has laid down. They are unanimously agreed that, in that case by majority -- two holding contrary view -- it has been held that in the Marathwada area in the Nizam''s State of Hyderabad. adoption of a married person was valid and that Hindus in the Marathwada area were governed by the Mayukha or the Bombay School of Hindu law. In Second Appeal No. 1036 of 1962 decided by Gatne, J., on August 13, 1962 (unreported),

Gatne, J., referred to another decision of the Judicial Committee of the Nizam''s State of Hyderabad in Sambhaji v. Hanamanta, 34 Deccan Law Report 664, in which it was held that in the Marathwada area Hindus were governed by the Mayukha and not by the Mitakshara and on the basis of that authority came to the conclusion that the parties before him who were from Basmatnagar Taluka in Parbhani District, a part of the Marathwada area, were governed in matters of adoption by Mayukha. The rules relating to adoption laid down in the Mayukha are clear. So far as we are concerned, a widow can take a boy over 15 years of age in adoption as also a married person. It may be mentioned, as pointed out by Dr. Kane in his History of Dharmasastra, Volume 111, at page 664, that the Mitakshara contains only a few lines on the topic of adoption and that it is only in such late works (belonging to the 17th century and later times) like the Vyavahara Mayukha, the Dattaka Chandrika, that the Dattaka or the adoption has received an elaborate treatment. In that passage Dr. Kane has set out variance of opinion among the later commentators. Apart form the Mayukha, the custom of taking a married person in adoption also prevailed in other parts of India, for instance, among the Jats from Punjab (see Mathura Dass Vs. Ram Piari, as also among the Dhakad Community (see Nathu v. Hiraji AIR 1955 NUC (MB) 5944.

15. The adoption of a boy belonging to one family into another family carries with it important civil consequences with respect to inheritance and a share in the joint family property. The divergence of opinion among the various commentators and as a result thereof in the judgments given by High Courts in different States appears to have induced Parliament not to upset the settled notions of people in different parts of the country and not to disturb the long practice and usage founded either upon local custom or observance of the rules laid down in Commentaries and Digests, but instead to preserve them intact so far as the taking of a person over 15 years of age or a married person in adoption was concerned. It must also be borne in mind that a large number of people who take children of other families in adoption are villagers and not likely to know the change in the law which have been enacted and, therefore, would take a boy of over 15 years of age or a married person in adoption when as they had known people around them having done so and in some cases when they themselves had probably been taken in adoption in this fashion. In such cases, for people suddenly to find the question of succession not only in their family but also in the family of the adopted boy being unsettled by reason of the adoption being contrary to the provisions of the said Act would be a calamity. It was in order not to bring about such disastrous consequences upon unknowing people that Parliament in these two instances seems to have induced expressly to preserve the texts, rules and interpretation of Hindu law as also customs and usages of Hindu law in this behalf intact and to make exceptions in this behalf in Cls. (iii) and (iv) of S. 10 of the said Act. This practice of taking married persons and boys over 15 years of age in adoption in the regions which are governed by the Bombay School of Hindu Law has been consistently recognised by the Bombay High Court. The cases which

have done so are numerous and many of them have been set out by Vaidya, J., who spoke for the Bench in the case of Haribai Vs. Baba Anna and Another, . In Lala Rup Chand v. Jambu Parshad, LR (1909-10) 37 Ind App 93, (103), the Judicial Committee of the Privy Council held that under the general Hindu Law applicable to twice born class, a boy could not be adopted after his marriage, but that there were two exceptions to this rule, namely, (1) in the case of persons governed by the Mayukha, and (2) where there was a custom to that effect. The parties before the Privy Council in that case were Agarwal Jains who were not governed by the Mayukha and, therefore, a question arose whether there was such a custom which had been proved, and the Privy Council held that the evidence was insufficient to prove such special custom. In Kaliamma Vs. Janardhanan Pillai and Others, amongst the Krishnanvaka community found mainly in the Kanyakumari district of Tamil Nadu, there was a custom under which a man dies leaving two wives and had sons by each of them, the property was divided according to number of wives he had rather than on per capita basis. This before the Supreme Court what had happened was that the deceased had left behind him one daughter form his first wife and a son from his second wife. The daughter claimed partition and possession of half share in all her father''s property. Her claim was based on the allegation that in the community to which the parties belonged there was a custom of a special kind of Pathmibahagam. On behalf of the appellant reliance was not placed on the evidence led to establish the alleged custom, but the argument as simply based on certain earlier decisions regarding the prevalence of the alleged custom. The Supreme Court held that the rule of Pathmibahagam was prevalent in various parts of the country and had been recognised and affirmed in a series of decisions and that a custom which ahd been recognised and affirmed in a series of decisions each of them based on evidence adduced in the particular case may become incorporated in the general law, not requiring proof in each case. In the case before the Supreme Court, however, what was pleaded was not the ordinary Pathmibahagam but a special Pathmibahagam and the decisions relied upon did not bear out this special custom. In S.S. Munna Lal Vs. S.S. Rajkumar and Others, , also it has been held that it is well-settled that where a custom is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom introduced into the law without the necessity of proof in each individual case.

16. For the reasons given above, were hold that the expressions "custom" and "usage" as defined in Clause (a) of Section 3 of the said Act include not only customs and usages in the ordinary sense which have obtained the force of law among Hindus in any local area, tribe, community, group or family, but also texts rules and interpretation of Hindu Law which have been continuously and uniformly observed and have obtained the force of law among Hindus in any local area, tribe, community, group or family. In view of the interpretation we have placed upon Clause (a) of Section 3 of the Act, it is unnecessary for us to determine whether the earlier cases of this High Court relating to the question with which this Second

Appeal is concerned were decided upon the basis of custom or upon the text of the Vyavahara Mayukha. We, however, wish to point out that the reading by Malyankar, J., in Second Appeal No. 1444 of 1965 of the judgment of this High Court in Nathaji Krishnaji v. Hari Jagoji (1871) 8 Bom HCR (ACJ) 67, is not correct. In that case, the judgment of the Court was delivered by Melvill, J. The question before the Court was whether the adoption of a Shudra who was married at the time of his adoption as valid if the adoption person was a sogtra of the person adopting. The Court held that such an adoption would be valid. Melvill J., who spoke of the Court, after referring to various authorities, stated as follows (at pages 72-73) :

"..... Independently of the Hindu law, we think that there is sufficiently authority for holding that such adoptions are in the Dakhan recognised by the custom of the country. Mr. Steele (Law and Custom of Hindu Castes in the Dekhan), page 44, says, speaking of the law:

"The Poona Sastrees do not recognise the necessity that adoption should precede Moonj and marriage,"

though subsequently, speaking of existing customs, he says the adoptee ''should be adopted previously to the performance of his Moonj or marriage at least if not a near relation''."

Malvanklar, J., in Second Appeal No. 1444 of 1965 was held, in spite of what Melvill, J., has stated, that that decision was not based on any custom but on the text, rule or interpretation of Hindu Law, namely, the Vyavahara Mayukha. In our opinion, this was not a correct reading of the judgment of Melville, J. that this practice is a custom recognised or founded upon the Vyavahara Mayukha has been stated in a number of cases to which reference has been made in case of Haribai Vs. Baba Anna and Another, ; by V. S. Desai, J., in Second Appeal No. 713 of 1964, Dattatraya Bapu Jadhav v. Anubai Bapu Jadhav, and by Nathwani and Naik, JJ., in First Appeal No. 137 of 1966, Ramchandra Tukaram Alai v. Mahadu Tukaram Alai.

17. In our opinion, the correct view of the provisions of Clause (a) of Section 3 and of Section 4 and Clauses (iii) and (iv) of Section 10 of the said Act was taken by Vaidya and Shimpi, JJ., in Haribai Vs. Baba Anna and Another, . We accordingly accept that view and overrule the view taken by Malvankar, J., in Second Appeal No. 1444 of 1965, Bhimrao Vithu Khandagale v. Chandru Savala Khandagale; by Vimadalal and Naik, JJ., in Laxman Ganpati Khot and Others Vs. Anusyabai and Another, and by Joshi, J., in Balkrishna Raghunath Gharat Vs. Sadashiv Hiru Gharat,

18. For the reasons set out above, we answer the question referred to the Full Bench in the affirmative.

19. We may observe that apart from the controversy which has formed the subject-matter of the debate before us, no other question between the parties survives for determination and in view of the answer given by us to the question

referred to us, this second appeal must be allowed and the appellate decree appealed against set aside and the decree of the trial Court restored. We, therefore, direct that this second appeal should be placed before the learned single Judge hearing second appeals for final disposal in accordance with our judgment.

20. Appeal allowed.