

THE HIGH COURT OF TRIPURA
AGARTALA

RSA No.38 of 2009

Smti. Kajal Rani Noatia,
 wife of Shri Shyam Pada Noatia,
 resident of Village Manai Pathar,
 P.S. Jatrapur,
 District - West Tripura

..... **Plaintiff-appellant**

- Vs -

1. Sri Raybahadur Tripura,
son of late Shital Tripura,
 2. Sri Mahi Kumar Tripura,
son of Sri Sumanta Tripura,
 3. Sri Chandan Tripura,
son of late Tirtharoy Tripura,
 4. Sri Krishna Manal Tripura,
son of late Arjun Tripura,
- all are the residents of Village-Hetalia,
 P.S. P.R. Bari,
 South Tripura District

..... **Defendant-Respondents**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the Plaintiff-appellant	: Mr. A. Dasgupta, Advocate
For the Defendant-respondents	: Mr. S. Deb, Sr. Advocate Mr. B. Debnath, Advocate
Date of hearing	: 05.02.2015
Date of delivery of judgment & order.	: 26.02.2015
Whether fit for reporting	: YES

JUDGMENT & ORDER

This appeal filed under Section 100 of the CPC has been questioning the legality of the judgment and decree dated 26.06.2009 and 04.07.2009 respectively, delivered in Title Appeal No.05 of 2009 by the Addl. District Judge, South Tripura, Belonia, reversing the judgment and decree dated 24.03.2009 and 31.03.2009 delivered in

Title Suit No.20 of 2007 by the Civil Judge, Junior Division, Belonia, South Tripura.

02. The plaintiff filed the suit for declaration of title and for permanent injunction in respect of the suit land as delineated in the plaint. The crux, which is essential for appreciating the challenge, is that having found one Sadhu Charan Tripura homeless and landless and on possession of the suit land, the competent authority allotted the said land in his favour and in due course of time his name had been recorded under khatian No.1878 of mouja-West Pipariakhola, Barpathari pertaining to the plots No.4169/4161 measuring 4.44 acres. Sadhu Charan Tripura had four daughters and all the daughters were married when Sadhu Charan Tripura died in the year 2001. He had no other legal heirs except his daughters. According to the plaintiff, the daughters of Sadhu Charan Tripura sold the entire property to her on consideration of Rs.1,36,000/- by a sale deed No.1-933 dated 11.05.2007 and thus the plaintiff came into possession over the said land which has been shown in the schedule-A of the plaint. On 30.05.2007 the respondents attempted to intrude into the possession of the plaintiff. Hence, the suit has been instituted along with an ancillary petition seeking temporary injunction.

03. The defendants by filing the written statement has stated that the provisions of Hindu Succession Act, 1956 so far inheritance of Sadhu Charan Tripura is concerned, shall not apply. They have categorically denied that the daughters of Sadhu Charan Tripura can be the owner and possessor of the suit land and thus the so-called transfer of the suit land by those daughters are entirely unsustainable. In the suit, those daughters for obvious reasons were not impleaded

because the dispute relates entirely to the possession over the land and the overt act attributable to the defendants. The defendants have stated that during enquiry, which emerged out of P.D. Case No.514 of 2006, the daughters of Sadhu Charan Tripura could not identify the land of their father. According to them the registered sale deed dated 11.08.2007 is a product of well-knit conspiracy and as such, based thereon no title can be declared in favour of the plaintiff. Further case that has been projected is that the defendants had planted rubber trees over the suit land and that plantation was aged about 8 years at the time of institution of the suit and they also indicated in their written statement that they had been possessing the suit land for more than 12 years.

04. The trial court framed the following issues on consideration of the pleadings.

- "(1) *Is the suit maintainable in its present form?*
- (2) *Has the plaintiff any cause of action?*
- (3) *Is the story of threat is true?*
- (4) *Is the plaintiff in possession of the suit land?*
- (5) *Has the plaintiff right, title and interest over the suit land?*
- (6) *Is the plaintiff entitled to have a decree as prayed for?*
- (7) *What other relief or reliefs the parties are entitled to get?"*

The plaintiff examined herself along with two other witnesses to probablise her case and the defendant No.1 and another witness were also examined in support of their claim. The plaintiff introduced (1) khatian No.1478 of mouja-West Pipariakhola (Exbt.1), (2) Original sale deed dated 11.05.2007 (Exbt.2), (3) Certified copy of map of Mouja–West Pipariakhola, Sheet No.8 (Exbt.3), (4) Original death certificate of Sadhu Charan Tripura (Exbt.4), (5) Survival certificate of Sadhu Charan Tripura issued by the Sub-Divisional

Magistrate (Exbt.5), (6) Notice in the name of Smti. Swapna Debi Noatia issued by the Tahashilder, Barpathari T.K. (Exbt.6) and (7) Extract copy of the order dated 30.11.2007 passed by the Sub-Divisional Magistrate (Exbt.7).

From the side of the defendants, the documents as undernoted have been introduced in the evidence.

(1) Certified copy of the khatian No.1478 of mouja-West Pipariakhola (Exbt.A), (2) Certified copy of khatian No.330 of mouja-West Pipariakhola (Exbt.B) and (3) Original map sheet No.8(P) (Exbt.C)

05. On appreciation of the evidence led by the parties during the trial, since the suit was found maintainable, the trial court decided the issues No.3, 4, 5 and 6 together and observed as under:

"The plea of the defendants on the other hand is that since the year 1972 they are holding possession over the suit land by plantation of rubber trees. It is also claimed that Rubber Board extended all help to them for the said purpose. The defendants denied the right of Lt. Sadhu Charan Tripura and his four daughters on the suit land and on the basis of that raised doubt on the legality of Exbt.-2 while referring to Section 2(2) of Hindu Succession Act.

The fact Lt. Sadhu Charan Tripura got allotment of the suit land in his name finds support from Exbt.-1 and Exbt.-A which are certified copies of Khatian No.-1478. Exbt.-1 or Exbt.-A are the finally published khatian which is a documentary proof about the allotment of the suit land in the name of Lt. Sadhu Charan Tripura. Exbt.-5 is the Survival Certificate of Lt. Sadhu Charan Tripura which says that Lt. Sadhu Charan Tripura left the four daughters as only survivors and by virtue of being the heirs of their late father they became owner and possessor of the suit land. Exbt.-2 is the Sale Deed which the four daughters executed in favour of the plaintiff and thereby sold the suit land. P.W.-3 Chiranjib Chakraborty is the scribe of Exbt.-2 which is not disputed by the defendants.

The principle contention of the defendants is regard to the right of the four daughters on the suit land after expiry of their father and defendants referred to Section 2(2) of Hindu Succession Act to buttress it. The defendants plea is that as per section 2(2) of Hindu Succession Act people belonging to

Schedule Tribe community are not governed by the Hindu Succession Act until a notification to the effect is made by the Union Government and so the property of Lt. Sadhu Charan Tripura can't devolve on his four daughters. Accordingly the four daughters had no right to sale the suit land. It is so contended that for the above cause the sale of the suit land was illegal and so the plaintiff has no right on the suit land. The defendants claimed their right over the suit land by virtue of possessing it since the year 1972.

Firstly let us take up the right of the defendants on the suit land. The claim of the defendants on the suit land is limited to mere verbal facts. The defendants failed to adduce any documentary proof to support the fact that since the year 1972 or at least for the last 12 years they are possessing the suit land. The claim that the Rubber Board extended all help to the defendants to do rubber plantation on the suit land is also confined to mere verbal facts. The defendants failed to adduce any official of the Rubber Board or at least any documentary proof to support the above claim. So it is hard to reach the level of probability for conclusion that the defendants ever possessed the suit land.

The bar in section 2(2) of Hindu Succession Act is not disputable as no notification of the Union Government is available with us. It is also not disputable that customary law of the Schedule Tribe community of Tripura is yet to come in effect. So, in such a situation the question is that who will owner of the suit land after the death of Sadhu Charan Tripura. At this juncture we need to appreciate the fact that law is nothing but common sense. We also need to understand the law of inheritance at this juncture. The absence of an existing law both at Union or State level cannot mean that the property of the deceased male of Schedule Tribe community will become the property of State while the daughters of deceased are alive. The property will automatically go in the name of daughters in absence of male heirs by law of inheritance and the daughters shall have every right to dispose the property as per their convenience. So, it is to be assumed that the execution of Exbt.2 was very much legal and valid.

Hence in conclusion of the above discussion it is evident that the plaintiff has right over the suit land and she is also in possession of the suit land. It is also evident from the above discussion that the defendants tried to dispossess the plaintiff from the suit land."

06. The defendants, the respondents herein, challenged that finding as returned by the trial court in the appeal filed under Section 96 of the CPC being Title Appeal No.05 of 2009. The appellate court after re-appreciation has observed that:

"Sub-Section-2 of Section-2 of Hindu Succession Act, 1956 runs as follows:-

"Notwithstanding anything contained in Sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of Clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

Admittedly, late Sadhu Charan Tripura was a member of Schedule Tribe Community. There is a clear ban under sub-section-2 of section-2 of Hindu Succession Act for application of Hindu Succession Act to the member of Schedule Tribe Community for the purpose of Succession of the property. But the Central Government by notification may withdraw the ban. In other words the Central Government may by notification withdraw the ban allowing the member of Schedule Tribe Community to be governed by Hindu Succession Act. At this stage it is the duty of the respondent to show the provision of law by virtue of which the four daughters inherited the property of late Sadhu Charan Tripura. But the respondent side has failed to produce any such notification of the Central government withdrawing the ban and application of Hindu Succession Act to the member of the Schedule Tribe Community. In absence of any such notification of Central Government I have no other opinion except to hold that the Hindu Succession Act is not applicable to late Sadhu Charan Tripura and his daughters for the purpose of Succession/inheritance. As such, the daughters being the actual legal heirs of late Sadhu Charan Tripura could not inherit the suit land and as such they also could not derive any title of the suit land. At best the member of Schedule Tribe Community may be guided by their Customary law. Unfortunately there is no coded Customary law having legal sanction by the State of Tripura. In such a horrible situation in my opinion the State Government either codify the customary law of inheritance of Schedule Tribe Community or the Central Government should withdraw the ban applying Hindu Succession Act to the Member of the Schedule Tribe Community in Tripura as originally they are the followers of Hindu religion.

In outcome of the observation I hold that the daughters of late Sadhu Charan Tripura being the members of Schedule Tribe Community could not inherit the suit land left by their father and as such could not derive any title. Consequently the respondent also by virtue of her purchase could not acquire any title and is not entitled to get any declaration of title. Other points raised by the appellants side about non-production of allotment order and illegality of the preparation of khatian is not required to be discussed further.

8. In view of the above observation I am of the opinion that the learned court below has committed error in declaring the title of the respondent over the suit land. The order of permanent injunction also appears to be untenable.

In the result, the appeal is allowed."

(Emphasis supplied)

07. Mr. A. Dasgupta, learned counsel appearing for the appellant has submitted that even though at the time of admitting this

appeal, the substantial questions, as undernoted, have been formulated by this Court but the principal ground of objection is that whether the respondents do have any locus to question the inheritance or for that matter the transfer of the land by the legal heirs of Sadhu Charan Tripura. The substantial questions of law as formulated by this Court by the order dated 26.10.2009 are as follows:

- "i. *Whether the plaintiff appellant who is the member of Schedule Tribe within the meaning of Clause 25 of Article 366 of the Constitution of India has got right, title and interest to institute the suit in its present form to resist the action of the defendant/respondents?*
- ii. *Whether the defendants/respondents not being in any way related to the predecessor-in-interest of the plaintiff who was the original owner of the suit property, has got right to resist the claim of the plaintiff?*
- iii. *Whether the learned first appellate court erred in law in reversing the judgment passed by the learned trial court?"*

08. Mr. S. Deb, learned senior counsel assisted by Mr. B. Debnath, learned counsel appearing for the respondents has submitted that the respondents' case is primarily based on their possession through Madhai Ch. Noatia whose name has been recorded as rayat in possession in khatian No.330, Exbt.B. As such, there is no infirmity in the impugned judgment and order. Apart that, he has submitted that in view of Section 2(2) of the Hindu Succession Act, 1956 the daughters of Sadhu Charan Tripura cannot claim inheritance over the suit land. Only the male members are entitled to inherit the property in terms of the customary laws. He has also emphatically submitted that even the old principles of Succession in the old Hindu law will have no application in the present case.

09. Having regard to the submission made by the learned counsel for the parties, this Court finds that the land described in the Schedule-A of the plaint relates to khatian No.1478 of mouja–West Pepariakhola under Tahasil Barpathari and it does not relate to khatian No.330 as referred by Mr. Deb, learned senior counsel.

10. From scrutiny of both the khatians, it appears that khatian No.330 was published on 15.06.1966 whereas the khatian No.1478 was published finally on 30.09.1988. In khatian No.1478, the old plot No.924/3030 has been recorded as the new plot No.4160 and 924/3091 and 924/3032 have been recorded as the new plot No.4161. The said plot No.924 appears though in the khatian No.330 but the defendants have not stated anything about this aspect in their written statement or in the deposition. As such, this plea as raised by Mr. Deb, learned counsel cannot be accepted by this Court at this stage of appeal. For purpose of further elucidation, what defendant No.1 as DW-1 has stated is material and may be quoted for reference:

"That the suit land is Govt. khas land. No allotment has been given to late Sadhu Charan Tripura by the competent authority.

As per Rule 10(a) of Tripura Land Revenue and Land Reform (Allotment of land) Rules, 1962 the allottee must be the permanent resident within eight K.M. from the land allotted and the allottee must be a Jumia. The said Sadhu Charan Tripura is a resident of Sonamura Sub-Division (Manai Pathar) at a distance of 10/11 K.M. from the suit land. On the other hand Sadhu Charan Tripura a Jotedar having Jote land as such he is not Jumia. So Sadhu Charan Tripura did not get any allotment for the suit land.

During Survey Operation Sadhu Charan Tripura any way managed to record his name in a khatian No.1473 for the land measuring 4'44 acres comprised in R.S. Plot No.4160 and 4161. By this record of rights Sadhu Charan Tripura did not and cannot acquire any right, title land interest over the suit land."

11. But from the khatian No.1478, it appears that in column No.15 the status of the rayat in possession has been described as

allottee. Mere oral statement cannot have the precedence over a documentary evidence unless such entry is rebutted by adequate evidentiary materials. As such, the presumption shall be drawn that Sadhu Charan Tripura was allottee of the suit land. On the face of the admission made by the defendants that the land was a khas land, the contention of Mr. Deb, learned senior counsel does not hold any substance at all and as such it is discarded without any further consideration. The other question that has been raised whether the daughters of Sadhu Charan Tripura can inherit the land or can acquire the competence to transfer the said land to the plaintiff or not. It should not have taken seriously, but for purpose of ascertaining the title, the trial court as well as the appellate court has considered this aspect. The first appellate court while purportedly appreciating the finding of the trial court has un-ceremoniously discarded that finding that the absence of any existing law both in the Union or the State level cannot mean that the property of the deceased male of a scheduled tribe community will become the property of the State, when the daughters of deceased are alive. The property will automatically go in the name of the daughters in absence of the heirs by law of inheritance and the daughters shall have every right to dispose the property as per their customary laws.

12. The defendants did not adduce any evidence to show the customary law in contrast to that finding of the trial court. Apart that the trial court has categorically observed that the plaintiff was in the possession of the suit land, whereas the appellate court has not dwelled upon the possession at all. Therefore, the said finding

returned by the trial court remained unaffected by the impugned judgment.

13. This Court finds the reasons given by the trial court are in conformity to the principles of justice, equity and good conscience that in absence of the male successor the land would devolve to the female heirs of the male deceased 'in terms of the customary law'. Hence this Court is constrained to hold that the finding as returned by the first appellate court without discussing that aspect of the matter is wholly unwarranted and unsustainable. Moreover, the defendants does not have any *locus standi* to question the validity of the title inasmuch as they are entirely strangers to that property and when they have failed to prove that they are in possession over the land beyond the period of prescription for acquiring the possessory right on adverse possession. Even the plea of adverse possession has not been raised in the written statement. On ramification of the provisions of Sub-section 2 of Section 2 of the Hindu Succession Act in the country, whose constitutional goal is to achieve egalitarian society, the apex court in ***Madhu Kishwar and others vs. State of Bihar and others*** reported in **(1996) 5 SCC 125** has developed and analysed the law from the constitutional vantage point and the human rights perspective, which is inalienable component of the rule of law. At the risk of incisive extracts for resonating the undying principles of justice, equity and fairness, ***Madhu Kishwar and others vs. State of Bihar and others*** is revisited.

THE HUMAN RIGHTS FOR WOMAN, INCLUDING GIRL
CHILD ARE, THEREFORE, INALIENABLE, INTEGRAL
AND INDIVISIBLE PART OF UNIVERSAL HUMAN RIGHTS.

Human rights are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Vienna Convention on the Elimination of all forms of Discrimination Against Women (for short "CEDAW") was ratified by the U.N.O. on December 18, 1979. The Government of India who was an active participant to CEDAW ratified it on June 19, 1993 and acceded to CEDAW on August 8, 1993 with reservation on Articles 5(e) 16(1) 16(2) and 29 thereof. The Preamble of CEDAW reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of women is a handicap. Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc. Article 1 defines discrimination against women to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Article 2(b) enjoins the state parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women" to take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause (C) enjoins to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that "the State parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women". Article 14 lays emphasis to eliminate discrimination on the

problems faced by rural women so as to enable them to play "in the economic survival of their families including their work in the nonmonetized sectors of the economy and shall take...all appropriate measures...." Participation in and benefit from rural development in particular, shall ensure to such women the right to participate in the development programme to organize self groups and cooperatives to obtain equal access to economic opportunities through employment or self-employment etc. Article 15(2) enjoins to accord to women equality with men before the law, in particular, to administer property....

Parliament has enacted the Protection of Human Rights Act, 1993, Section 2(b) defines human rights to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international Conventions and enforceable by courts in India". Thereby the principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

IT IS, IMPERATIVE FOR THE STATE TO ELIMINATE OBSTACLES, PROHIBIT ALL GENDER BASED DISCRIMINATIONS AS MANDATED BY ARTICLES 14 AND 15 OF THE CONSTITUTION OF INDIA. BY OPERATION OF ARTICLE 2(F) AND OTHER RELATED ARTICLES OF CEDAW, THE STATE SHOULD BY APPROPRIATE MEASURES INCLUDING LEGISLATION, MODIFY LAW AND ABOLISH GENDER BASED DISCRIMINATION IN THE EXISTING LAWS, REGULATIONS, CUSTOMS AND PRACTICES WHICH CONSTITUTE DISCRIMINATION AGAINST WOMEN.

Article 5(a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2(f) denudes its effect and enjoins to implement Article 2(f) read with its obligation undertaken under Articles 3 14 and 15 of the Convention vis-a-vis Articles 1 3 6 and 8 of the Declaration of Right to Development. Though the directive principles and fundamental rights provide the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW, the State should by appropriate measures including legislation, modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

**EVERY WOMAN IS ENTITLED TO ELIMINATION OF
OBSTACLES AND DISCRIMINATION BASED ON GENDER
FOR HUMAN DEVELOPMENT. WOMEN ARE ENTITLED
TO ENJOY ECONOMIC, SOCIAL, CULTURAL AND
POLITICAL RIGHTS WITHOUT DISCRIMINATION AND ON
FOOTING OF EQUALITY.**

Article 15(3) of the Constitution of India positively protects such Acts or actions. Article 21 of the Constitution of India reinforces "right to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to the person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally, in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51A(h) and (j) of the constitution of India, not only facilities and opportunities are to be provided for, but also all forms of gender based discrimination should be eliminated. It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights.

**LEGISLATIVE ACTION SHOULD BE DEVISED SUITABLY
TO CONSTITUTE ECONOMIC EMPOWERMENT OF WOMEN
IN SOCIO-ECONOMIC RESTRUCTURE FOR ESTABLISHING
EGALITARIAN SOCIAL ORDER. LAW IS AN
INSTRUMENT OF SOCIAL CHANGE AS WELL AS THE
DEFENDER FOR SOCIAL CHANGE.**

Bharat Ratna Dr. B.R. Ambedkar stated, on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to, and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in part IV and the Preamble of the Constitution which constitute conscience of the Constitution. Covenants of the United Nation add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-

economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins this Court to breath life into the dry bones of the Constitution, international Conventions and the Protection of Human Rights Act, to prevent gender based discrimination and to effectuate rights Act to life including empowerment of economic, social and cultural rights.

**SOCIAL AND ECONOMIC DEMOCRACY IS THE
CORNERSTONE FOR SUCCESS OF POLITICAL
DEMOCRACY. THE SCHEDULED CASTES, SCHEDULED
TRIBES AND WOMEN, FROM TIME IMMEMORIAL,
SUFFERED DISCRIMINATION AND SOCIAL
INEQUALITIES AND MADE THEM TO ACCEPT THEIR
ASCRIBED SOCIAL STATUS.**

As per the U.N. Report 1980, woman constitute half the world population, perform nearly two thirds of work hours, receive one tenth of the world's income and own less than one hundredth per cent of world's property". Half of the Indian population too are women. Women have always been discriminated and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13 14 15 and 16 of Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them to accept their ascribed social status. Among women, the tribal women are the lowest of the low. It is mandatory, therefore, to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity. We keep it at the back of our mind.

**LAND IS THEIR MOST IMPORTANT NATURAL ASSET
AND IMPERISHABLE ENDOWMENT FROM WHICH THE
TRIBALS DERIVE THEIR SUSTENANCE, SOCIAL
STATUS, A PERMANENT PLACE OF ABODE AND WORK.**

Agricultural land is the foundation of a sense of security and freedom from fear. Assured possession is a lasting road for development, intellectual, cultural and moral and also for peace and harmony. Agriculture is the only sources of livelihood for the tribes, apart from collection and sale of minor forest produce. Land is their most important natural asset and imperishable endowment from which the tribals derive their sustenance, social status, a permanent place of abode and

work. The Scheduled Tribes predominantly live in Andhra Pradesh, Maharashtra, Bihar, Gujarat, Orissa, Madhya Pradesh, Rajasthan and North Eastern States, though they spread to other States sparsely.

**IT IS ESSENTIAL THAT THE CUSTOMS
INCONSISTENT WITH OR REPUGNANT TO
CONSTITUTIONAL SCHEME MUST ALWAYS YIELD
PLACE TO FUNDAMENTAL RIGHTS.**

The empirical study by Anthropologists and Sociologists reveals that the customary laws of the tribes are not uniform throughout Bharat. Even in respect of intestate succession, they are not uniform. Though the customs of the tribes have been elevated to the status of law, obviously recognised by the founding fathers in Article 13(3)(a) of the Constitution, yet it is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights. In Sant Ram v. Labh Singh, [1965] 7 SCR 756, this Court held that the, custom as such is effected by Part III dealing with fundamental rights. In Baku Ram v. Bajinath Singh, [1962] Supp. 3 SCR 724, it was held that law of pre-emption based on vicinage is void. In G. Dasaratha Rama Rao v. State of A.P., [1961]2SCR931, this Court held that discrimination based on the ground of descent only offends Article 16(2).

**DUE TO MARCH OF HISTORY THE TRIBAL
LOYALTIES HAVE DISAPPEARED AND FAMILY
TIES HAVE BEEN WEAKENED OR BROKEN AND
THE TRADITIONAL RURAL FAMILY ORIENTED
SOCIETY IS PERMISSIBLE.**

In India agricultural land forms the bulk of the property. In most of the tenancy laws, women have been denied the right to succession to agricultural lands. The discernible reason in support thereof appears to be to maintain unity of the family and to prevent fragmentation of agricultural holdings or diversion of tenancy right. In Atma Prakash v. State of Haryana: [1986]1SCR399, testing the validity of Section 15 of the Punjab Pre-emption Act, 1930, for the aforesaid reasons, this Court held that the right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition, quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession, are today irrelevant. Classification on the basis of unity and integrity of either the village community or the family or on the basis of the agnatic theory of succession, cannot be upheld. Due to march of history the tribal loyalties have disappeared and family ties have been weakened or broken and the traditional rural family oriented society is permissible. Accordingly Section 15(1), Clauses (1) to (3), violates fundamental rights and were declared ultra vires.

ON AGNATIC THEORY, SHE GETS A SHADOW, BUT NOT SUBSTANCE. RIGHT TO EQUALITY AND SOCIAL JUSTICE IS AN ILLUSION. THE DENIAL IS ABSOLUTELY INCONSISTENT WITH PUBLIC POLICY, UNFAIR, UNJUST AND UNCONSCIONABLE.

When male member has the right to seek partition and at his behest, fragmentation of family holding is effected, why not the right to inheritance/succession be given to a female? On agnatic theory, she gets a shadow, but not substance. Right to equality and social justice is an illusion. The denial is absolutely inconsistent with public policy, unfair, unjust and unconscionable. The reason of fragmentation of holding or division of tenancy right would hardly be a ground to discriminate against a woman from her right to inherit the property of the parent or husband. In V. Tulasamma v. Sesha Reddy, :AIR (1977) SC 1944, this Court, cognizant to equality in intestate succession by Hindu woman, held that after the advent to independence old human values assumed new complex; women need emancipation; new social order need to be set up giving women equality and place of honour, abolition of discrimination based on equal right to succession is the prime need of the hour and temper of the times. In Chiranjeet Lal v. Union of India : [1950]1SCR869], this Court held that the guarantee against the denial of equal protection of the law does not mean that identically the same rule of law should be made applicable to all persons within the territory of India in spite of difference in circumstances or conditions. It means that there should be no discrimination between one person and another. It is with regard to the subject matter of the legislation. In State of West Bengal v. Anwar Ali Sarkar: [1952]1SCR869], it was held that the prohibition under Article 14 is to secure all persons against arbitrary laws as well as arbitrary application of laws. It applies to procedural and substantive law. Menaka Gandhi v. Union of India,: [1978]2SCR621, reiterates its creed on grounds of justice, equity and fairness lest law becomes void, oppressive, unjust and unfair.

WHEN WOMEN ARE DISCRIMINATED ONLY ON THE GROUND OF SEX IN THE MATTER OF INTESTATE SUCCESSION TO THE ESTATE OF THE PARENT OR HUSBAND, THE BASIS QUESTION IS WHETHER IT IS FOUNDED ON INTELLIGIBLE DIFFERENTIA AND BEARS REASONABLE OR RATIONAL RELATION OR WHETHER THE DISCRIMINATION IS JUST AND FAIR. OUR ANSWER IS NO AND EMPHATICALLY NO.

Eugene Smith in his Indian Constitution has stated that secularisation of law is essential to the emergence of modern Indian State, foundation of which stands on twin principles of democracy and secularism. He further stated that "the existence of different personal law contradicts the principles of

non-discrimination by the State". Non-discrimination is based on the philosophy of the individual, not the group, as the focal point and the basic unit of the nation. The civilisation, culture, custom, usage, religion and law are founded upon the community life for man's well being. The man will obey the command of the community by consent. The law formulates the principals to maintain the order in the society to avoid friction. Democracy brings about bloodless revolution in the social order through rule of law. Therefore, when women are discriminated only on the ground of sex in the matter of intestate succession to the estate of the parent or husband, the basis question is whether it is founded on intelligible differentia and bears reasonable or rational relation or whether the discrimination is just and fair. Our answer is no and emphatically no.

**THE STATE HAS TO STEP IN TO SET RIGHT THE
IMBALANCE AND THE DIRECTIVE PRINCIPLES,
THOUGH NOT ENFORCEABLE; MANDATE OF
ARTICLE 38, TO RESTRUCTURE SOCIAL AND
ECONOMIC DEMOCRACY, ENJOINS TO ELIMINATE
OBSTACLES AND PROHIBIT DISCRIMINATION IN
INTESTATE SUCCESSION BASED ON SEX.**

In State of Bihar v. Kameswar Singh : [1952]1SCR 889, this Court had held that in judging the reasonableness in imposing restrictions Court would take into consideration public purpose in Article 39. In Kasturi Devi v. State of Karnataka, : [1980]3SCR1338 , this Court held that if law is made to further socio-economic justice it is prima facie reasonable and in public interest. In other words, if it is in negation, it is unconstitutional. In Chandra Bhagvan Boarding House v. State of Mysore, : (1970)IILLJ403SC , it was held that "the mandate of the Constitution is to build a welfare society and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizen are not met". In Narendar Prasad v. State of Gujarat, : [1975]2SCR317 , it was held that no right in an organised society can be absolute. Enjoyment of one's rights must be consistent with the enjoyment of the rights of others. In a free play of social forces, it is not possible to bring about a voluntary harmony; the State has to step in to set right the imbalance and the directive principles, though not enforceable; mandate of Article 38, to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in intestate succession based on sex.

**ON THE ANVIL OF SOCIOECONOMIC JUSTICE, EQUALITY
OF STATUS AND BY OVERSEEING WHETHER IT WOULD
SUB-SERVE THE CONSTITUTIONAL ANIMATION. ARTICLE
15(3) RELIEVES THE STATE FROM THE BONDAGE OF
ARTICLES 14 AND 15(1) AND CHARGES IT TO MAKE**

**SPECIAL PROVISION TO ACCORD SOCIO-ECONOMIC
EQUALITY TO WOMAN.**

In Thota Sesharathamma v. Thota Manikyamma: [1991] 3 SCR 717, construing Section 14 of the Hindu Succession Act 1956 and its revolutionary effect on the right to ownership of the land by Hindu woman, this Court held that the validity of Section 14(1) drawn from the pre-existing limited estate held by a Hindu woman must be tested on the anvil of socioeconomic justice, equality of status and by overseeing whether it would sub-serve the constitutional animation. Article 15(3) relieves the State from the bondage of Articles 14 and 15(1) and charges it to make special provision to accord socio-economic equality to woman.

**TRUE THAT CLAUSES (H) AND (J) OF PARA 3 OF
SCHEDULE 6 OF THE CONSTITUTION GIVE POWER TO
DISTRICT OR REGIONAL COUNCILS IN NORTH
EASTERN STATES TO ALTER LAW RELATING TO
INHERITANCE AND CUSTOMS; THEY TOO ARE BOUND
BY THE LAW DECLARED UNDER ARTICLE 141 OF THE
CONSTITUTION TO BE CONSISTENT WITH ARTICLES
15(3) 14 AND PREAMBLE OF THE CONSTITUTION.**

The Hindu Succession Act revolutionised the status of a Hindu female and used Section 14(1) as a tool to undo past injustice to elevate her to equal status with dignity of person on par with man and removed all fetters of Hindu woman's limited estate which blossomed into full ownership. By legislative fiat the discrimination in intestate succession meted out to woman was done away with. The Court should, therefore, endeavour to find out whether the disposition clauses in the instrument will elongate the animation of Section 14 and would permeate the aforestated constitutional conscience to relieve the Hindu female from the Sashtric bondage of limited estate. Articles 14 15 and 16 frown upon discrimination on any ground and enjoin the State to make special provisions in favour of the woman to remedy past injustice and to advance their socio-economic and political status. Economic necessity is not a sanctuary to abuse woman's person. Section 14, therefore, gives to every Hindu woman full ownership of the property irrespective of the time when the acquisition was made, namely, whether it was before or after the Act had come into force, provided, she was in possession of the property. Discrimination on the ground of sex in matters of public employment was buried fathom deep and is now a relic of the past by decisions of this Court. In C.B. Methamma v. Union of India, : [1980]1SCR668 , Air India v. Nagesh Mirza, : (1981)IILLJ314SC, and a host of other decisions are in that path. True that Clauses (h) and (j) of para 3 of Schedule 6 of the Constitution give power to District or Regional Councils in North Eastern States to alter law relating to inheritance and customs; they too are bound by the law declared under Article 141 of the Constitution to be consistent with Articles 15(3) 14 and Preamble of the Constitution.

**THE CUSTOMS AND MORES MUST UNDERGO CHANGE
WITH MARCH OF TIME. JUSTICE TO THE INDIVIDUAL IS
ONE OF THE HIGHEST INTERESTS OF THE
DEMOCRATIC STATE**

The public policy and constitutional philosophy envisaged under Articles 38 39 46 and 15 (1) & (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the Constitution. They constitute core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores must undergo change with march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

**CUSTOMS WHICH ARE IMMORAL ARE OPPOSED TO
PUBLIC POLICY, CAN NEITHER BE RECOGNISED NOR
BE ENFORCED**

Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is a foundation on which the potential of the society stands. In Sheikriyammada Nalla Koya v. Administrator, Union Territory of Laccadives, : AIR1967Ker259 , K.K. Mathew, J., as he then was, held that customs which are immoral are opposed to public policy, can neither be recognised nor be enforced. Its angulations and perspectives were stated by the learned Judge thus:

It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant

opinion at the given moment, and that in arriving at the decision, the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A judge may not set himself in opposition to a custom which is fully accepted by the community.

But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, whose guardians of an ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organisations of existing society. Thus, the judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that opinion is abhorrent to right thinking people. In other words, the judge would consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality.

**THE CUSTOM IN THE TRIBAL SOCIETY IS MUCH
INFLUENCED BY THE INSTINCT OF POSSESSIVE
AUTHORITY AND NOT ON THE BASIS OF SOCIOLOGICAL
ORIGIN BUT IT HAS BEEN CARRIED, GENERATION
AFTER GENERATION, AS BEING THE FAMILY LAW**

Dr. L.P. Vidyarthi in his Tribal Development Act and Its Administration, published by Concept Publishing Co., (1986 Edn.), has stated at page 310 that the element of certainty and definiteness of customs in the tribal society is lacking because of divergent customs on the same issue adopted by different sections of the tribes. The element of antiquity is also of little aid in that behalf. In Tribal Society, custom is generally a product of dominating mind, nurtured in the belief of supernatural forces and taboos than a source of spontaneous growth. It is mostly based upon the totem and taboos evolved in a particular family having the force of the family law. The custom in the tribal society is much influenced by the instinct of possessive authority and not on the basis of sociological origin but it has been carried, generation after generation, as being the family law. No scientific explanations are available, but if the custom is examined in detail it is found deep rooted in the element of totem and taboos. That is the reason that majority of the customs prevailing in the tribal society could not attain the status of law and there is no legal validity except in the cases of inheritance and some family laws like adoption and marriage. If the working and life of the tribal societies is minutely observed, it will be found that from morning till night, with the birth of a baby till death, agricultural operations are the sole occupation for livelihood; all are tagged, linked and based upon certain conduct and behavior reflecting, nearly custom and it may be said that entire tribal society is based upon the rigid rules of custom and any society still untouched

by the influence of urbanisation exists in the phenomenon of religion mixed with magic custom.

As in other parts of the country, in Bihar, most of the tribes like Munda, Oraom and The practised shifting cultivation along with the settled cultivation as it has not been popular with the tribe to combine various modern productive technology. But, by passage of time, when the land has become scarce, they too have settled down to ploughing cultivation on fixed tenures. Due to diverse reasons which it is not necessary for the purpose of this case to elaborate, major part of the land slipped out from their holdings.

**CHENCHOO WOMEN, TRIBALS IN ANDHRA PRADESH,
ENJOY EQUAL STATUS WITH MEN. THEY CAN OWN
PROPERTY, BUT THEY CANNOT INHERIT ANY
SUBSTANTIAL PROPERTY.**

Notable researchers, who spent their valuable time living among the tribals, are W.G. Archer, Dy. Commissioner, Santhal Pargana during 1939-40, Prof. Christopher Von Furer-Haimendorf, a German Sociologist appointed by Nizam of Hyderabad in 1940 who spent his life with the tribals in Nizam State in Andhra Pradesh as well as Arunachal Pradesh. Portrayed life style and customs operating among the Tribals, Haimendorf says in his "Tribes in India, the Struggle for Survival" that Chenchoo women, tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they cannot inherit any substantial property. They abide by the decision of their husbands. They are equal companions with men doing as much, if not more, of the work in maintaining the common household. She and her husband, are joint possessors of the family property insofar as it is acquired by the daily labour. In South India, in particular Andhra Pradesh, after the grant of ryotwari pattas to the tillers of the soil including the tribes, they acquire permanent right to fixed land holdings and there does not exist any discrimination in matter of intestate succession between man and woman. "Issues in Tribal Development" by Prof P. Ramaiah of Kakatiya University, Andhra Pradesh, at page 9 it is stated that "hereditary rights rule the property distribution arrangements. If a man dies, his wife and sons get equal share of the property. Widow gets her husband's share from the property". At page 14 he has further stated, "land is a part of his spiritual as well as economic heritage."

**SOME STUDIES AS EXAMINED IN MADHU KISHWAR VS.
STATE OF BIHAR IMPELS THAT IT IS NOT DESIRABLE
TO GRANT GENERAL DECLARATION THAT CUSTOM
OF INHERITANCE OFFENDS ARTICLE 14, 15 AND 21
OF THE CONSTITUTION**

Archer in his "Tribal Law and Justice - The Santhal View of Woman" has stated in 1939-40 that the unmarried daughter has ordinarily no right at all in land. She cannot ask for partition and if her brothers separate, some land may be kept by her father or brother for financing her marriage and maintaining her, but that is to fulfill their duties towards her and does not confer upon her any rights. At the partition, she is given no share. She has a right to maintenance. If her father or brothers or father's agnates are against discharging their duties, she can claim enough land for keeping her till marriage. She can acquire the land of her own which is her absolute property. If her father dies leaving no other heirs or agnates, she will get his land until she is married. If she is married, her sisters will share equally with her. If she has no sisters, the property goes to the village community. With regard to married daughters, he stated, that two to three bighas of land would be given as "Stridhan" at the time of marriage. In respect of that property, right of the father, brother or agnates are extinguished. The property given is her absolute property. Her children inherit her property. In their absence, it passes on to the father, brother, mother or her male agnates. With regard to the right of married woman, at page 156, he has stated that at partition the wife and children get one share and the husband gets one share. He has given instances of one Safal Handsdeak of Tharia. With regard to the right to the widow, she is like a Hindu widow having right to maintenance. If her husband died while he was joint holder with his brothers she will continue to live in the family and the situation will not differ materially from what it was in her husband's lifetime. Her right to maintenance will continue and if her husband's family neglects her without cause, she can demand sufficient land to keep herself. If there is a complete family partition the widow and her children will get the share which would have gone to her husband had he been alive. She gets life estate like Hindu widow's estate, "The Mundras and their Courts" by Sarad Chandra Roy, 14th Ed. at p. 244 to 451 (1915). The Origins of Chotanagpur by Sarad Chandra Roy at p. 369 to 370 (1915 Ed.) dealt with inheritance on the same lines. So they need no reiteration.

In *Doman Sahu v. Buka*: AIR1931Pat198, though Mundas and Mundari women in Ranchi District are akin to other tribals, since they regard themselves as Hindus, it was held that Hindu law of succession would apply to them. In *Ganesh Matho v. Shib Charan*: AIR1931Pat305, Kurmi Mahtons of Chota Nagpur adopted Hindu religion. The Division Bench held that it must be presumed that ordinarily they are governed by Hindu law in matters of inheritance and succession except insofar as parties prove any custom obtaining among them which is at variance with it. It was held that Mitakshara Hindu law of succession was applicable to them. They did not prove any special custom alleged by them. In "Law Enforcement in Tribal Areas" by S.K. Ghosh, Director, Law Institute, Calcutta, published by Ashish Publishing House at page 89 it is stated that though the Hindu Succession Act 1956, Hindu Marriage Act 1954, Hindu Adoption and Maintenance Act 1956 did not apply, "because of their contacts with other advanced societies some changes have taken place among tribes in the observance of marriage, divorce, etc. In the event of any litigation, the tribal courts are unable to reach a definite conclusion as these customary codes

as they are unwritten code. Therefore, it was recommended that a proper study of customary codes of the tribals should be made and the same may be codified property." "Some State governments have already action to codify the personal laws of important tribal groups. These laws can be gradually dispensed with or repealed when the tribals are fully assimilated with the main body of our national community." At pages 90-91 he explained the customs, among the Bhils living in Madhya Pradesh and Rajasthan who constitute largest tribal group in the country, of a marriage by elopement or capture or by arrangement. They are very truthful people and they do not hesitate to speak against the culprits, though they may happen to be kith and kin.

The Garos, the Khasis and the Jaintias are the main inhabitants of Meghalaya State. They observe monogamy. The daughter (Nokma Dongipa Mechik) descendant from the ancestor is chosen for marriage for common ancestors. The husband goes and lives with the wife which in Hindu law known as Illatom son-in-law. The custom is that the senior-most household of the area maintains a line of inheritance from the mother to the chosen daughter and the husband of the inheritress mother, popularly known as Nokma is accepted as the constitutional head of the A'Khing. The lands are held in common ownership of the machong, the usufruct rights are granted to all the residents of the A'Khing. Mikirs, a populous tribe in Meghalaya is patrilineal. The sons inherit property and it is divided among them. In the absence of male heirs, the nearest agnate inherits that land. The daughters have been excluded. In the absence of sons and brothers, the widow retains the property provided she marries one of her husband's clan. The Gonds in Andhra Pradesh, Madhya Pradesh, Bihar and Orissa observe monogamy. At page 139, he has stated that the custom is heritable and transferable and right of inheritance is patrilineal. The male heirs would succeed and the females are completely excluded. The sons take equal shares, but among the Apa Tanis and the Nactes, the system of primogeniture prevails, i.e. the eldest son only inherits the father's landed property which has been softened among Apa Tanis. In Manipur, the custom among Thandon Kukis is that the property is of the Chief of the village. The practice is of shifting cultivation and the Chief distributes the plots among the groups. The system of inheritance among the Naga groups is that at the death of the last owner, the succession is by matrilineal and the rules of primogeniture prevails among them. The practice is that during his life-time the father gives some land to the younger brother as well.

In a report on Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa by Dr. Bhupinder Singh and Dr. Neeti Mahanti of Jigyansu Tribal Research center, sponsored by the Ministry of Welfare, Government of India and submitted on May 19, 1993, it is stated at page 1 in last paragraph of his preface that to reduce tribal customary laws into formal, technical, straight-jacket frame is likely to rob it of its vitality and strength. It will expose the innocent, gullible tribals to the machinations of touts, middle-men etc. The customs which differ, in whatever magnitude, from one community to other would help exploitation of the tribals by

application of the traditional law. Its relevance, freshness and vitality to a considerable extent, would get weakened. Whims and fancies in dispensation of justice would be avoided. They concluded that "we must proceed deliberately and wirely." In chapter III at page 8 it is stated thus:

Customary law refers to rules that are transmitted from generation to generation through social inheritance. In a close-knit simple tribal society, the people themselves want to live according to customs backed by social sanctions; to save them from objection and social ridicule of the society.

At page 9, it is stated that "the major areas of interest for a tribal community is inheritance of land, forest rights and social customs like marriage, divorce, desertion, child support, death, birth etc." Santhals, one of the largest tribes of India Spread Over West Bengal, Orissa, Bihar and parts of Assam and Tripura. It is observed at page 30 on the "Chapter Succession to Property" that the succession is in favour of the son, in his absence to the daughter, in their absence to the relative. Even among Santhals, it is not strictly patrilineal. If they have no son, succession is open to the daughter and if they have neither son nor daughter then to the relative of the family. Some people among them preferred succession among son and daughter equally. On husband's demise, the widow gets a share in the property, as life-estate. In their conclusion at page 37, they have stated that the Santhals and Saora tribals practice patrilineal as a mode of succession. At pages 38-43, after detailed discussion it is stated that though there is considerable "on-going acculturation process", the tribes have not completely discarded the customs. At page 45, it was mentioned that though Santhal society is predominantly patrilineal, they do not strictly adhere to it. The inheritance in favour of the daughter has been softened but Saora society is conservative and less exposed to winds of change. They preferred sons to daughters only if there is no son in the family and other relatives of the family. However, the widow inherits the estate of her husband. The working group of the 7th Five Year Plan on the tribal development recommended codification of customary laws prevalent among the tribals in its report at pages 323-24 of the Planning Commission documents. Dr. B.L. Maharde, a bureaucrat of Rajasthan Civil Services, in his "history and Culture of Girjans" in the State of Rajasthan, narrated the practices of tribals at page 84 stating that the property after the death of the father is equally divided among the sons by the village elders of Panchayat and in case of dispute, by the private Panchayat. The youngest son, since he lives with his father, is entitled to have an extra share. The grandson of his pre-deceased son is entitled to an equal share. Daughters are not entitled to inherit their fathers' property but they can share the animal wealth. The son-in-law is entitled to equal share. The widow has right to property which she loses on her remarriage. We do not get any material as regards succession among the tribals in Madhya Pradesh, Maharashtra and Gujarat and in view of the general trend we assume that in those States also patrilineal succession would be in vogue.

It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate. More than 80 per cent of the population is still below poverty line and they did not come at par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court.

Section 2(2) of the Hindu Succession Act, similar to Hindu Marriage Act, Hindu Adoption and Maintenance Act, excludes applicability of customs to the Scheduled Tribes as defined by Clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the official Gazette otherwise directs. Explanation 11 to Article 25 does not include them as Hindus. The Chotanagpur Tenancy Act and the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949, the Bihar Scheduled Areas Regulation, 1969 intend to protect the lands of the tribals and their restoration to them. Sections 7 and 8 of the Act regulate the right of Khuntketti Raiyats. By operation of customary inheritance, the son and lineal descendants inherit the lands held by the tribes for the purpose of cultivation by himself or male members of his family. Section 76 read with Section 6 gives effect to custom, usage or customary right provided thereunder not inconsistent with or not necessarily modified or abolished by the provisions of the Act. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. As stated earlier, it must keep pace with march of time with the heart beats of the society and with the needs and aspirations of the people. As seen, even among the tribals in Bihar, the customs have now undergone advancement. They prefer both son and daughter alike though not uniformly. Succession is patrilineal; Santhals practically adapted the Mitakshara Hindu law of succession. The Hindu Succession Act modified the preexisting law and intestate succession gives right of succession to Hindu female. Section 14(1) has enlarged limited estate known to Sastric law into absolute right of property held by a female. In the Law of intestate and Testamentary Succession, (1991) Ed. at page 21, Prof. Diwan

has stated that Section 2(2) does not mean that Scheduled Tribes which were, prior to the codified Hindu Law, governed by Hindu law will not, now, be governed by the Hindu law. If before codification, any Scheduled Tribe was governed by Hindu law, it will continue to be governed by it. However, it would be uncoded Hindu law that would apply to them. It is settled law that the procedural or substantive law which offend the fundamental right are void. Sections 7 and 8 of the Act exclude woman tribals from inheritance to the Khuntkutti raiyati rights solely on the basis of sex and confine succession and inheritance among male descendants only. In Maneka Gandhi v. Union of India, : [1978]2SCR621 , this Court held that reasonableness is an essential element of equality; non-arbitrariness pervades Article 14. The Court must consider the direct and inevitable effect of the action in adjudging whether the State action offends the fundamental right of the individual. This Court sustained the validity of Passport Act by reading down the statutory provisions. Justice, equity and good conscience are integral part of equality under Article 14 of the Constitution which is the genus and Article 15 is its specie. In Harbans Singh v. Guranchatta Singh, : [1991]1SCR614 , this Court held that though the Transfer of Property Act did not per se apply to the State of Punjab at the relevant time, the general principles contained therein being consistent with justice, equity and good conscience would apply.

Under the General Clauses Act, 1897 male includes female. In Jitmohan Singh Munda v. Ramratan Singh, (1958) Bih LJR 373, interpreting Mundari Khunt Kattidari widow's right to remain in possession of Mundari Khunt Kattidari tenancy, after the death of her husband, the Bihar High Court held that the widow would have life estate in tenancy rights as they have adopted Hindu law of succession. There is no reference whatsoever to the exclusion of the widow of the particular Mundari. Therefore, in respect of Khunt Kattidari tenancy, the widow would be entitled to possession and Section 8 is not inconsistent with that position. In Jani Bai v. State of Rajasthan, interpreting Rajasthan Colonisation Act, 1954, the Division Bench held that male descendants would include female descendants and the adult son and the daughter should be treated alike both being equally eligible for allotment under the rules under that Act. By operation of Section 13(1) of General Clauses Act, males include females, of course, subject to statutory scheme which by now is subject to the Constitution. In Sections 7 and 8 of the Act if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son. Scheduled Tribes are as much citizens as others and are entitled to equality. Sections 7 and 8 accordingly read down and so on that premise are valid.

14. The counterpoint that fell for consideration has been responded by the apex court as under:

"53. The reason assigned by the State level committee is that permitting succession to the female would fragment the holding

and in the case of inter-caste marriage or marriage outside the tribe, the non-tribals or outsiders would enter into their community to take away their lands. There is no prohibition for a son to claim partition and to take his share of the property at the partition. If fragmentation at his instance is permissible under law, why the daughter/widow is denied inheritance and succession on par with son? In Kerala State, the Hindu Succession Act, 1956 was modified in relation to its application to the State of Kerala, by amendment of Devasthanam Properties (Admission of Temporary Management and Control and Hindu Succession) (Amendment) Act, 1958 and of the (Kullaiamma Thumporan Korilakam Society Partition) Act, 1961. Kerala Hindu Joint Family Abolition Act, 1975 brought about change bringing female into the fold for succession per capita. Equally, the Hindu Succession (A.P. Amendment) Act, 13 of 1986, the Andhra Pradesh Legislature took lead and amended Section 6 of the Parent Hindu Succession Act and Section 29A conferred on the unmarried daughter the status of co-parcener by birth and has given her right to claim partition and equal share along with the sons. In the event of sale by the daughter of the property obtained at the partition Section 29C gives right to male heirs to purchase the property on payment of the consideration. In the event of disagreement on the consideration, the Court having the jurisdiction is given power to determine such consideration. In the event of non-payment by male heirs, the right has been given to the female heir to sell the property to outsiders. Karnataka and Maharashtra legislatures have followed the suit and suitably amended the Hindu Succession Act, 1956.

54. Throughout the country, the respective State Laws prohibit sale of all lands in tribal areas to non-tribals, restoration thereof to the tribals in case of violation of law and permission of the competent authority for alienation is a must and mandatory and non-compliance renders the sale void. The Acts referred to hereinbefore prevailing in Bihar State expressly prohibit the sale of the lands by the tribals to the non-tribals and also direct restoration or recommendation by equivalent lands to the tribals. Therefore, if the female heirs intend to alienate their lands to non-tribals, the Acts would operate as a check on their action. In the event of any need for alienation, by a tribal female, it would be only subject to the operation of these laws and the first offer should be given to the brothers or agnates. In the event of their refusal or unwillingness, sale would be made to other tribals. In the event of a disagreement on consideration, the civil court of original jurisdiction should determine the same which would be binding in the partition. In the event of their unwillingness to purchase the same, subject to the permission of the competent officer, female tribal may sell the land to tribals or non-tribals. Therefore, the apprehension expressed by the State-level committee is unfounded.

55. The Christians in India are governed by the Indian Succession Act, 1925. It is stated that by operation of Section 1 notification issued under the Government of India Act of 1935, the operation thereof stood excluded to the tribal Christians residing in the State of Bihar. There is no such prohibition in other States. Even otherwise, though the principles of Indian Succession Act are strictly inapplicable, the

general principles therein being consistent with justice, equity and good conscience should equally be applicable to the tribal Christians of the Bihar State.

56. I would hold that the provisions of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christian. However, the right of alienation will be subject to the relevant provisions like the Act, the Bihar Scheduled Areas Regulation, 1969, Santhals (Amendment) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lineal descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lineal descendent is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions: of the appropriate Act."

15. The rays of human values embedded in ***Madhu Kishwar vs. State of Bihar*** charts the law for the changing social order having its flagships in Article 14, 15 and 21 of the Constitution of India for declaring that the scheduled tribe women would succeed in the estate of their parent, brother, husband, son et al who dies intestate as their lineal heir and inherit the property with equal share with the other male heirs with absolute right similarly to the general principles of Hindu Succession Act, 1956 and of Indian Succession Act which applies to the tribal Christians, but adrift in its declaration. The tribal society in Tripura has largely got settlement of land in the name of the

individual from their families. Even though an empirical study suggests that 40% of the tribal families practice Jhuming (shifting cultivation) in Tripura (Economic Review of Tripura, 2013-14, Directorate of Economics & Statistics Planning (Statistics) Department, Government of Tripura, Page 308). Jhuming is practised on their land or the forest land without valid permission. Jhuming in cycle is more practised. Progressively they are adopting water-shed cultivation or other occupation. It is high time to recognise the property right of the tribal women by inheritance as the lineal descendants of the male parent, brother, husband, son et al in the manner as provided under the Hindu Succession Act or Indian Succession Act subject to accomplishment what the Directive Principles of the State policy under Chapter IV of the Constitution, in particular, under Article 44 cherishes. **Henceforth the tribal women of Tripura from all tribal groups or clan would succeed to the estate of their parent, brother, husband, son et al as heirs by intestate succession and inherit the property with equal share with male heir absolute rights as per the general principles of Hindu Succession Act, 1956 as amended and interpreted by the apex court and equally of the Indian Succession Act to the tribal Christians.** While making this declaration this court has considered dominant precedence of Article 21 of the Constitution over Article 13 of the Constitution in view of law laid down in ***R. C. Cooper vs. Union of India*** reported in ***AIR 1970 SC 564*** and ***Maneka Gandhi vs. Union of India*** reported in ***AIR 1978 SC 597***, so far the interplay of doctrine that all laws must be just, fair and reasonable. Subject to what has been held above, the finding of the trial court is affirmed.

16. Hence, this appeal succeeds and the impugned judgment and decree are set aside and quashed. The judgment and decree dated 24.03.2009 and 31.03.2009 respectively passed by the Civil Judge, Junior Division, Belonia, South Tripura in Title Suit No.20 of 2007 are restored.

Prepare the decree accordingly.

Send down the LCRs thereafter.

JUDGE

MB