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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CIVIL APPLICATION NO. 13771 OF 2010
WITH
CIVIL APPLICATION NO. 13773 OF 2010
IN/WITH
SECOND APPEAL (STAMP) No. 6955 OF 2010**

1. Tetya Subhan Kokani,
deceased, through L.Rs.
- 1-A. Redya Tetya Kokani,
age 57 years occupation Agriculture,
- 1-B. Sukrya Tetya Kokani,
age 52 years occupation Agriculture
- 1-C. Ratod Tetya Kokani,
age 57 years occupation Agriculture,
- 1-D. Aavshya Tetya Kokani,
age 54 years occupation Agriculture

All R/o Shrirampur Post Waghale
Taluka and District Nundarbar
- 1-E. Banibai Tetya Kokani,
(Died) through L.Rs.
2. Suklal Mana Kokani,
age 63 years occupation Agriculture
R/o Waghale Tal. and Dist. Nandurbar
3. Chamar Mana Kokani,
age years occupation Agriculture
R/o Waghale Tal. & Dist. Nandurbar

..APPLICANTS

VERSUS

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1. Anandibai @ Anandibai W/o Chandhu Kokani,
age 64 years occupation Agriculture
R/o Shrirampur Post Waghale Tal. & Dist. Nandurbar
2. Kamalbai w/o Maharu Kokani,
age 62 years occupation Agriculture
R/o Harnipada Tal. Navapur Dist. Nandurbar.

...RESPONDENTS

Mr Pralhad D. Bachate, Advocate for applicants.
Mr Ruchir S. Wani, Advocate, holding for Mr A.G. Magare,
Advocate, for respondents

CORAM : N.W. SAMBRE, J.

DATE : 19th June, 2017

ORAL ORDER

1. Regular Civil Suit No. 151/1990 was filed by the respondents for possession of the suit properties, which came to be decreed by judgment and order dated March 11, 2002, passed by the Civil Judge (J.D.), Nandurbar, further confirming in appeal bearing Regular Civil Appeal No. 13/2002 and R.C.A. No. 14/2002. As such, this Second Appeal by the original defendants.

2. So as to understand the relation between parties and factual matrix of the suit, it is necessary to look into the family tree of Subhan Kalu.

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3. Subhan was blessed with five sons – Raoji, Gopichand, Mana, Sakharam and Tetya. It is claimed that Sakharam predeceased his father Subhan. Sakharam was married to Vedibai and they were blessed with two daughters, who are plaintiffs in the suit for possession.

4. The plaintiffs accordingly come out with a case in the plaint that suit property, to which they are entitled by inheritance, was in possession of their uncles, namely, Gopichand, Mana and Tetya. These three brothers of deceased Sakharam, their father, cultivated the land and used to give benefit out of the same to plaintiffs. The basis for aforesaid factual matrix is the mother of the plaintiffs and wife of Sakharam, after death of Sakharam in 1946, married to Chakadu Kolya. As such, it is the only original plaintiffs – daughters of Sakharam were getting benefit of property in question as Gopichand, Mana and Tetya, whose legal representatives are defendants to the suit, remained in permissive cultivating possession of the suit properties.

5. It is not in dispute that parties are governed by customs and traditions, which are followed in Tribal communities, to which they

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belong.

6. In aforesaid background, Shri Bachate, learned Counsel for the appellants/original defendants so as to substantiate his contention that the provisions of the Hindu Shastrik Law or that of Hindu Succession Act will not be available to the original plaintiffs, who tried to impress upon this Court that customs, which are practised in the Tribal Communities of the plaintiffs and defendants, must prevail. He would draw support from the Judgment of Apex Court in the matter of **Madhu Kishwar and others Vs. State of Bihar and others**, reported in **AIR 1996 Supreme Court 1864**. In addition, Shri Bachate would urge that mutation entry No. 70 of the year 1933, whereby suit properties were mutated in the name of deceased Sakharam and further change in the said mutation by mutation entry No. 221 in the names of defendants in 1950 would speak voluminous that the property in a tribal community would devolve upon only male successors, who are entitled to inheritance.

7. He would take me through the defence raised by the present appellants in the written statement so as to draw inference that the customs and traditions are required to be followed.

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8. The learned Counsel for the respondents/original plaintiffs would urge that factum of partition in 1933 between sons of Subhan Kalu is not an issue under dispute. According to him, the fact that in the written statement, the appellants have come out with a case of right of enjoyment available to the original plaintiffs is sufficient to infer that in the tribal traditions and customs, the plaintiffs are entitled to enjoy the property by virtue of succession. He would then urge that since there are concurrent findings recorded by both the Courts below, the appeal deserves to be dismissed, as this Court should be slow in interference.

9. Having considered rival submissions, it is no doubt true that the Apex Court in the matter of **Madhu Kishwar and others** in para 47, with a majority view, has observed that neither Hindu Succession Act nor Indian Succession Act nor even Shariyat Law is applicable to the customs, which govern the tribal. It is further observed that such customs as were recognized, vary from people to people and region to region.

10. In the aforesaid backdrop, if the case of appellants/defendants is to be considered, they have stated that the respondents/plaintiffs

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have come out with a case of lawful succession to the estate of deceased Sakharam. The right to enjoy the property by the plaintiffs being minors and, their mother Vedibai not entitled to the property, as after the death of Sakahram, her husband, she, having married to Chakadu Kolya, is required to be appreciated.

11. From the evidence of the respective parties and the traditions and customs, it has to be inferred from the evidence of plaintiffs and defendants that plaintiffs have right to enjoy the property in question. Once said fact is not disputed by the defendants/present appellants, the burden shifts on the present appellants/original defendants to prove that they have succeeded to the property of deceased Sakharam on the counts of (a) that his wife Vedibai married to Chakadu Kolya, out of their family and (b) the daughters have no right of inheritance in their tribal community.

12. So far as above referred issues are concerned, the appellants have neither demonstrated from their pleadings nor from their evidence that such burden on the appellants/defendants was discharged by them.

13. Rather, what has been observed from the judgments of both

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the Courts below and that of pleadings of respective parties that the parties are in agreement that the females in their family by virtue of traditions and customs of their tribal community, permit females to have share in ancestral properties.

14. So far as the issue of mutation entry of 1933 in the name of Sakharam is concerned, admittedly Sakharam predeceased his father Subhan and by virtue of same, plaintiffs at the relevant time being daughters, the possession of property vests in defendants i.e. Gopichand, Mana and Taty. It is brought on record that these three brothers of deceased Sakharam maintained plaintiffs from the income of estate of deceased Sakharam and remained in cultivating possession, which permitted Revenue Authorities to take mutation entry in their name.

15. Before filing of the suit, a notice issued by the plaintiffs/respondents herein to Gopichand and his legal heirs, who happened to be real brother of deceased Sakharam, claimed to have surrendered possession of suit property since he recognized rights of the plaintiffs to the property in question, he being custodian of the same.

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16. The cumulative effect of pleadings of respective parties and the evidence brought on record, has rightly prompted both the Courts below to draw a conclusion that plaintiffs have ever right to inherit the suit property, which had fallen to the share of their father Sakharam, by virtue of traditions and customs, as are followed.

17. There are concurrent findings recorded by both the Courts below.

18. The Second Appeal, in my opinion, lacks merit, as it is devoid of any question of law, it fails and stands dismissed.

(N.W. SAMBRE, J.)

pjm