

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

SECOND APPEAL NO. 245 OF 2001

1. Bhagga Damma Bhil,
Age : 73 years, Occupation : Agriculturist,
 2. Shama Bhagga Bhil,
Age : 32 years, Occupation : Agriculturist,
Both residents of Madkha, Taluka : Shahada,
District : Dhule.
-Appellants
(Orig. Defendants)
- Versus

Sau. Ranu w/o. Raising Pawar,
Age : 35, Occupation : Household,
Residing at Sulwade, Taluka : Shahada,
District Dhule.

....Respondent
(Orig. Plaintiff)

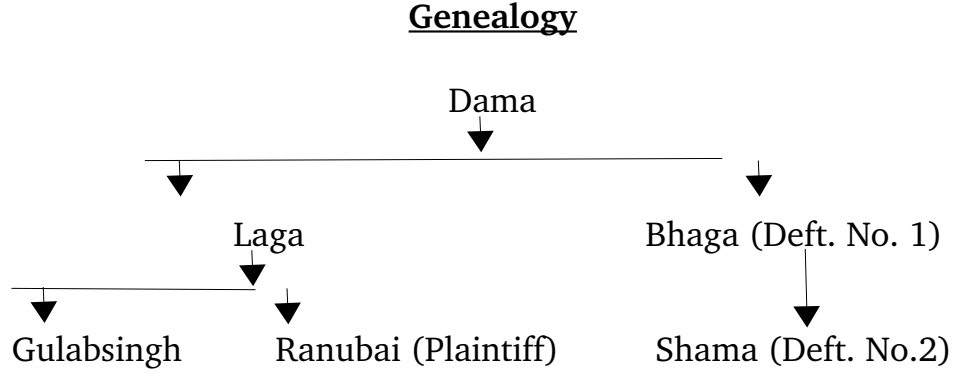
.....
Mr Amit Sawale, Advocate for the appellant
Mr V. V. Deshmukh, Advocate (appointed) for respondent
.....

CORAM : A. M. DHAVAL, J.
DATE : 29.11.2018.

ORAL JUDGMENT :-

1. This is an appeal by the original defendants challenging the Judgment and Decree in Civil Appeal No. 32/1983 passed by learned District Judge, Dhule on 06.01.1987 whereby the Judgment and Decree of dismissal of Reg. Civil Suit No. 10/1981 passed by Civil Judge Jr. Divn., Taloja Camp, Shahada was reversed and decree for partition was passed in favour of daughter of a Scheduled Tribe on the basis of custom pleaded by her.

2. A brief reference to the facts is essential for deciding this appeal. The genealogy undisputed is as follows:



3. The plaintiff-Ranu is thus niece of her real uncle Bhaga (Defendant No.1) and cousin of defendant No. 2 Shama. Following ancestral properties are the suit properties.

अ.नं.	मौजे	गट नं.	क्षेत्र		आकार	
			हे.	आर	रु.	पैसे
.1	मटकानी	5	14	39	10	31
.2	दरा	63	2	4	2	87
.3	सुलवाडे	120	2	35	7	44

4. The plaintiff claimed that, as per the Hindu Law and existing customs, she was entitled for half share of her father. She demanded partition and separate possession of her half share from the defendants orally and by notice dt. 26.12.80. The defendants declined. Hence, the suit for partition and separate possession of half share.

5. The defendants by Written Statement (Exh. 9) admitted the relationship but claimed that, they belong to Scheduled Tribe and the provisions of Hindu Succession Act are not applicable to them. The suit properties became the properties of Bhaga by survivorship. They denied any custom whereby the plaintiff was entitled for share of her father.

6. The learned trial Judge framed issues and dismissed the suit with costs. The plaintiff preferred appeal before the District Judge, Dhule. The ld. Principal District Judge, Dhule held that, the parties being illiterate persons, the pleading should be liberally construed and there was pleadings and evidence to establish a custom and therefore the suit was decreed and half share was given to the plaintiff. The aggrieved defendants have preferred this appeal.

7. This appeal has been admitted on following substantial question of law framed on 09.02.1988.

Whether a custom prevails in the Bhil Community in Dhule district by which a daughter inherits a share equally to that of son in the property of her grand father?

.... I answer it in the negative.

8. Heard Mr Amit Savale, learned counsel for the appellant and Mr. V. V. Deshmukh, learned advocate appointed by my leaned predecessor as *amicus curiae*.

9. I answer the substantial question of law framed in the negative and allow the appeal and dismiss the suit leaving the parties to bear their own costs.

REASONS

10. There is no dispute about the facts but there is dispute about the existence of customs. The law regarding customs has been placed before this Court through following judicial pronouncement.

[i] **Kochan Kani Kunjuraman Kani etc. v. Mathevan Kani Sankaran Kani and Ors. etc. AIR 1971 SC 1398** (Para 8)

8. He (the plaintiff) did not plead any family custom. Before he could succeed in his suits, he had to establish the custom pleaded by him. Proof of any other custom could not help him.

[ii] **Gokal Chand v. Parvin Kumari AIR 1952 SC 231**

The general principles to be kept in view in dealing with customs may be summarised as follows:

- (1) It should be recognised that many of the agricultural tribes in the Punjab are governed by a variety of customs, which depart from the ordinary rules of Hindu and Muhammadan law, in regard to inheritance and other matters mentioned in [section 5](#) of the Punjab Laws Act, 1872.

- (2) In spite of the above fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove the existence of the custom set up by him. (See *Daya Ram v. Sohel Singh and Others*, 110 P R. (1906) 390 at 410; [Abdul Hussein Khan v. Bibi Song Dero, L.R.](#) 45 I.A. 10).
- (3) A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. (See [Mt. Subhani v. Nawab](#), A.I.R. 1941 P.C. 21 at 32).
- (4) A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the *Riwaj-i-am* or Manual of Customary Law. (See *Abroad Khan v. Mt. Channi Bibi*, A.I.R. 1925 P.C. 267 at 271).
- (5) No statutory presumption attaches to the contents of a *Riwaj-i-am* or similar compilation, but being a public record prepared by a public officer in the discharge of his duties under Government rules, the statements to be found therein in support of custom are admissible to prove facts recited therein and will generally be regarded as a strong piece of evidence of the custom. The entries in the *Riwaj-i-am* may however be proved to be incorrect, and the quantum of evidence required for the purpose of rebutting them will vary with the circumstances each case. The presumption of correctness attaching to a *Riwaj-i-am* may be rebutted, if it is shown that it affects adversely the rights of females or any other class of

persons who had no opportunity of appearing before the revenue authorities. (See Beg v. Allah Ditta, A.I.R. 1916 P.C. 129 at 131 ; Saleh Mohammad v. Zawar Hussain A.I.R. 1944 P.C. 18; Mt. Subhani v. Nawab, A.I.R. 1941 P.C. 21 at 25).

- (6) When the question of custom applicable to an agriculturist is raised, it is open to a party who denies the application of custom to show that the person who claims to be governed by it has completely and permanently drifted away from agriculture and agricultural associations and settled for good in urban life and adopted trade, service, etc., as his principal occupation and means and source of livelihood, and does not follow other customs applicable to agriculturists. (See Muhammad Hayat Khan v. Sandhe Khan and Others, 55 P.R.(1906) 270 at 274; Muzaffar Muhammad v. Imam Din, I.L.R. (1928) 9 Lab. 120, 125).
- (7) The opinions expressed by the compiler of a *Riwaj-i-am* or Settlement Officer as a result of his intimate knowledge and investigation of the subject, are entitled to weight which will vary with the circumstances of each case. The only safe rule to be laid down with regard to the weight to be attached to the compiler's remarks is that if they represent his personal opinion or bias and detract from the record of long standing custom, they will not be sufficient to displace the custom, but if they are the result of his inquiry and investigation as to the scope of the applicability of the custom and any special sense in which the exponents of the custom expressed themselves in regard to it, such remarks should be given due weight.

[iii] *T. Saraswathi Ammal v. Jagadambal and another*
AIR 1953 SC 201

Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given. (Para 5)

In the absence of proof of existence of a custom whereby *dasi* daughter succeed to their *dasi* mother in preference to the married daughters, the rule of propinquity will apply as

a rule of justice, equity and good conscience according to which the married and dasi daughters would take the mother's property in equal shares.(Para 7)

It was there said that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be established inductively, not deductively and it cannot be established by a priori methods. [Relied on : **Abdul Hussain Khan vs. Mussammat Bibi Sona** reported in (1918) 20 BOMLR 528]. (Para 10)

- [iv] **Kaliamma vs. Janardhanan Pillai and others**
AIR 1973 SC 1134

Plea of special custom as to Pathnibhagam on the basis of earlier decisions. Decisions not based on evidence adduced cannot be relied on.

- [v] **Arun Laxmanrao Navalkar vs Meena Arun Navalkar**
AIR 2006 Bombay 342

It is for wife to prove that there is a custom allowing marriages amongst sapindas in their community. When the evidence of wife to prove the custom was inadequate, the marriage was declared null and void.

- [vi] **Harihar Prasad Singh and Ors vs Balmiki Prasad Singh and Ors** 1975 AIR 733

21. The significant, point in all these three instances is the attitude of the parties concerned. They did not come and give evidence where they would have been the best persons to explain the circumstances relating to those instances even though as many as 81 instances were examined on their behalf. P.W. 64 was the sole plaintiff to give evidence. Till this case started they have nowhere, literally nowhere, made a claim solely on the basis of the

custom which they are now putting forward. The documentary evidence which shows the actual attitude of the parties and their consciousness regarding the custom is more important than any oral evidence that might have been given in this case. Considerable stress was laid on behalf of the appellants on the fact that some of the defendants witnesses had said that some of the witnesses on the plaintiffs' side are respectable persons and they knew the custom better than they themselves knew. But such statements have to be evaluated in the background of the history of this litigation. It is true that the defendants, who are respondents in this appeal, also put forward some 10 instances to disprove the plaintiffs' case but did not succeed in providing them. But in the first instance it is for the plaintiffs to prove the existence of the custom and if they fail to do so they cannot succeed on the basis that the defendants did not succeed in proving that the custom did not exist. In any case as we have held that instances in families other than those of Ch. Mohkam Singh are not relevant nothing much depends on it. We shall now discuss the attitude of the parties and their consciousness based on their actions at various stages in this litigation.

[vii] **Moulvi Mohammed and others v. Mohaboob Begum**
AIR 1984 Madras 7

Custom must be ancient, reasonable and majority at least of any given class of persons must look upon it as binding. It must be proved by continuous instances by party who sets up custom. (Para 5)

[viii] **Bhimashya and Ors. Vs. Smt. Janabi @ Janawwa**
2006 (13) SCC 627

Custom is an established practice at variance with the general law. A custom is local Common Law. It is Common Law because it is not Statute Law; it is Local Law because it is the law of a particular place, as distinguished from the general Common Law. Local Common Law is the law of the country (i.e., particular place) as it existed before the time of legal memory".

- [ix] *Salekh Chand (Dead) by L.Rs. v. Satya Gupta and Ors.*
2008 AIR SCW 4211

A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. Custom is a rule which in a particular family or a particular class or community or in a particular district has from long use, obtained the force of law. In the instant case, one of the witnesses produced by the plaintiff did not speak any thing on the position either of a local custom or of a custom or usage by the community regarding adoption of sister's son.

- [x] Similar view in *Mst. Maro and others v. Paras Ram and others* AIR 1966 HP 22 (Para 11)

11. Per contra, Mr V. V. Deshmukh, learned advocate for the respondent relied on minority view in *Madhu Kishwar and others V. State Of Bihar and others* AIR 1996 SC 1864,

41. I would hold that the provisions of Hindu Successions 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.

. The majority however did not accept this view and observed.

49. However much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route of return on the Court's entering the thicket, it is far better that the court kept out of it. It is not far to imagine that there would follow a bee-line for similar claims diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Non-uniformities would not in all events violate Art. 14. Judge made amendments to provisions, over and above the available legislature, should normally be avoided.

. **Lakshmi Narayan Tudu alias Lakshmi Narayan Manjhi and another vs Smt. Basi Majhian and others**
AIR 2004 Jhar 121

Parties though originally belonging to the Santhal Scheduled Tribe but the evidence on record show that they were Hinduised and followed Hindu tradition not be excluded from the applicability of Hindu succession Act. (Para 12).

12. In the light of these rulings, it is crystal clear that there should be specific pleadings regarding the customs and its long continuity and acceptability by any community or by people of any particular area. The law of inheritance as per religion govern the parties and if the deviation from the same is claimed, there should be

specific and cogent evidence in support thereof. In order to prove custom, it is necessary that, the instances wherein such custom was followed, recognized, admitted should have been quoted wherever possible, the documentary evidence should have been produced.

13. In the present case, the parties belong to Bhilla community from Dhule district (now Nandurbar district). There is no specific pleading regarding the nature of custom and who were following the same. Whether it was enjoyed by all persons from Bhilla community or persons of Bhilla community from Shahda area or Dhule area or by people of particular sub-caste of Bhilla community, there is no pleading that it was long standing and well recognized by all the members of the particular group. In fact, the plaint pleadings disclosed that the right of inheritance was claimed firstly as per Hindu Law and secondly as per custom [प्रचलित पुर्वापारच्या रितीरिवाजानुसार]. The pleadings are extremely vague.

14. The vagueness of the pleadings itself was a sufficient ground in the light of the rulings referred above to discard the case of custom. Apart from it, I find that the evidence is also not satisfactory. PW1 Ranubai (the plaintiff) has not deposed about existence of any custom. She merely stated that, as she is the only heir of her father,

she should get his share. She further stated that, if there was no heir in our caste, then the girls are entitled to get his share. She has not given the instances wherein such custom was followed. She admitted that, nobody told her about the existence of such practice. PW2 - Gosa has stated that, he was a Bhilla Adiwasi person. According to him, one of the two daughters was not having a male issue while the other was having male issue. The daughter of brother having no male issue is entitled to share of her father and there is a custom in his community. He stated that, the plaintiff is belonging to different sub-caste than his sub-caste and this custom was followed in his sub-caste. He stated that, he had not disclosed this custom to plaintiff at any time and he has no documentary evidence that such custom was followed. PW3 Malla is also Adiwasi Bhilla. He has also deposed similar custom. He admitted that, his sub-caste was different from the sub-caste of Gosa. He told that, nobody told him about existence of such custom.

15. PW4-Gulabsingh has admitted that, he was related to husband of the plaintiff. He came with a case of instance giving share to the daughter. He stated that, Zajubai was his niece and they had given share to her as her father had no son but his subsequent evidence shows that, he is deposing about totally different custom.

He stated that, his wife was not having brothers and he was cultivating the land of his father-in-law for a period of 10 years by residing in the village of his father-in-law. He stated that, by virtue of his cultivation, he got the said land from his father-in-law. Apart from the fact that such a custom has not been pleaded, I find that it is totally different from the evidence on the point of custom led by the plaintiff. According to him, if a person was not having son and he brings his son-in-law for cultivation of his land, the son-in-law was getting share in the lands. This is not the case of the plaintiff. In his further evidence, he stated that he transferred his land in the name of his wife and he had no documents to show that, the land was allotted to his wife. The evidence of PW5 Jatan regarding the extracts of death register is not relevant. The defendant has examined himself and has specifically denied that the plaintiff was entitled for any share by way of custom.

16. The evidence shows that, the plaintiffs' father Laga died in 1971 whereas; the suit for claiming the share of father was filed on 12.02.1981 i.e. after 10 years. The ld. trial Judge has considered these discrepancies in the pleadings and evidence regarding custom and has rightly held that the custom was not proved.

17. The learned Principal District Judge probably to help a widowed daughter entered into conjectures and surmises. He observed that, the plaintiff belongs to Bhilla community settled in Khandesh. He considered the case law regarding Dravidian culture in case of Rajgonda residing in Vidarbha area. He observed that, if the persons were following Hindu religion, they would be governed by Hindu law.

18. There is no dispute that the plaintiffs and the defendants being Scheduled Tribe, are governed by Hindu law but the provisions of codified Hindu law specifically excludes them from application and therefore they are governed by un-codified Hindu law. The ld. Principal District Judge if did not agree with the ld. trial Judge, he should have considered the reasons given by the ld trial Judge and shown how those reasons were wrong. When there is no evidence of specific instances, a vague evidence of some witnesses that there was such custom, is of no help. The judgments of Apex Court referred to herein above disclose that the pleadings and evidence before the trial Court was totally insufficient to hold that there was existing custom governing the parties. It is difficult to declare, whether the custom was among the families or persons from particular locality or from particular sub-caste. No finding could have been recorded regarding

the existence of custom. In such situation, if there is no custom, the parties governed by old Hindu law would succeed by principles of survivorship and plaintiff would not be entitled to share of her father. Ld. District Judge ought not to have interfered with the findings recorded by the trial Judge. Hence, the appeal deserves to be allowed.

19. In this case, the respondent was unrepresented and Mr. V. V. Deshmukh, learned counsel was appointed as *amicus curiae*. I appreciate the able assistance provided by him. He fairly submits that, he is not interested in getting any fees for his service.

20. Hence, the substantial question of law is answered accordingly and the following order is passed.

ORDER

[i] The appeal is allowed.

[ii] The judgment and decree passed by learned District Judge, Dhule in Civil Appeal No. 32/1983 dt. 06.01.1987 is set aside and the judgment and decree of dismissal of suit passed by ld. Civil Judge Sr. Divn., Taloja Camp, Shahada in Reg. Civil Suit No. 10/1981 is restored.

- [iii] In the facts and circumstances, the parties shall bear their own costs throughout. Decree be drawn up accordingly.

[A. M. DHAVALA]
JUDGE

Punde