

***HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

+ AS.No.1203 of 2001

And

TRAS.No.804 of 2017

% 25-06-2018

Marripudi Narasimha Rao and another

... Appellant/

Vs.

\$ Maripudi Chenchiah and 3 others.

... Respondents

! Counsel for the appellants: Sri G.Pedda Babu

! Counsel for the Respondents: Sri Y.V.Ravi Prasad

< Gist:

> Head Note:

? Cases referred:

¹ 2008 (17) SCC 491

² AIR 1999 SC 3029

³ (1992)1SCC 197

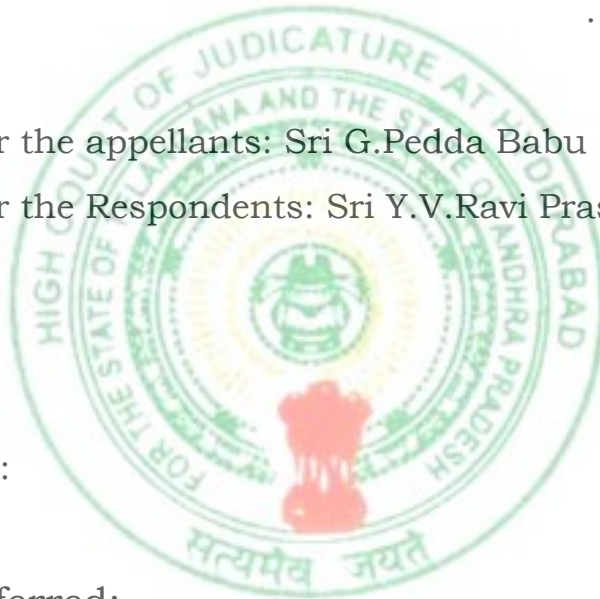
⁴ AIR 1975 SC 733

⁵ AIR 2013 SC 1204

⁶ 2017 (4) ALT 757

⁷ 2009 (2) ALT 22 (SC)

⁸ 2018 (11) SCC 119



HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

AS.No.1203 of 2001

And

TRAS.No.804 of 2017

COMMON JUDGMENT:

These first appeals are filed against common judgment dated 19.02.2001 in OS.No.52 of 1994 and OS.No.8 of 1998 on the file of the Court of the Additional Senior Civil Judge, Ongole. As these are first appeals, the parties are referred to as plaintiffs and defendants as in the lower Court only.

The brief facts of the cases are that:

OS.No.52 of 1994 is filed by the plaintiffs against defendant Nos.1 to 4 for partition of the plaint properties into 12 equal shares and for allotment and separate possession of five such shares to them, for future profits and also for costs of the suit.

OS.No.8 of 1998 is filed originally as OS.No.465 of 1994 on the file of the District Munsif Court, Ongole, by the plaintiffs for grant of permanent injunction restraining the defendants and their men and relatives from interfering with their peaceful possession and enjoyment of the plaint schedule properties therein and also for costs of the suit.

The averments in the suit OS.No.52 of 1994 are that the plaintiffs are a father and daughter. Defendant No.1 is the younger brother of the first plaintiff. Defendant Nos.3 and 4

are the sisters of the first plaintiff and defendant No.1. Defendant No.2 is the undivided son of defendant No.1. Sri Venkata Subbaiah, who is the father of the first plaintiff and defendant No.1, died about three (3) years prior to the suit. Their joint family owns the plaint 'A' schedule immovable properties and plaint 'B' schedule movable properties. The undivided $1/3^{\text{rd}}$ share in the joint family property of late Sri Venkata Subbaiah devolved equally upon the first plaintiff and defendant Nos.1, 3 and 4. Thus, the plaintiffs became entitled to $5/12^{\text{th}}$ share and the defendant Nos.1 and 2 together entitled to $5/12^{\text{th}}$ share, while the defendant Nos.3 and 4 each are entitled to $1/12^{\text{th}}$ share in the suit properties, consequent to the death of Sri Venkata Subbaiah.

The first plaintiff came to know that prior to the death of his father Sri Venkata Subbaiah, a fraudulent and nominal sale deed dated 16.01.1990 was brought into existence in respect of the western Ac.4.50 cents of land in item No.1 in respect of entire items 2 and 3 of the plaint schedule lands for Rs.99,500/- in favour of defendant No.2. Late Sri Venkata Subbaiah was very old and since two years prior to his death he was not mentally sound and was not in disposing state of mind. Neither the defendant No.2 nor his maternal grandfather Sri Venkaiah had the capacity to pay the huge sale consideration of Rs.99,500/- under the said sale deed to Sri late Venkata Subbaiah. The said sale transaction was kept secret as the entire suit property was joint in possession of

the first plaintiff and the defendants and late Sri Venkata Subbaiah. The said sale transaction is null and void and is non-est in the eye of law. The said sale document is also not acted upon. The plaintiffs are entitled to ignore the said sale transaction. Hence, the suit was filed for partition.

Defendant No.1 in his written statement contended that the suit schedule properties are not ancestral properties; that items 1 and 3 of the plaint 'A' schedule properties originally belong to Sri Idupulapati Chenchaiiah, who died and that all his properties devolved upon his only daughter Smt. Audemma. On the death of Smt. Audemma intestate, all her properties devolved upon her two daughters namely Mahalakshamma and Parvathamma and her only son Sri Venkata Subbaiah. Smt. Mahalakshamma sold her 1/3rd share in item-1 of the plaint 'A' schedule property to him under a registered sale deed dated 02.05.1980 and Smt.Parvathamma sold her 1/3rd share in item-1 of plaint 'A' schedule property to defendant No.3 under a registered sale deed in the year 1990. Sri Murripaudi Venkata Subbaiah sold his 1/3rd share in items 1 and 3 and item-2, which was his self-acquired property to defendant No.2 under a registered sale deed dated 16.01.1990 and that all the suit properties are the self-acquired properties of himself and defendant Nos.2 and 3. Sri Venkata Subbaiah was hale and healthy and with sound mind till his death and that the documents executed by him are valid. The plaint 'B' schedule

movable properties are not at all in existence. The plaintiffs have no share in the suit schedule properties and the plaintiffs have neither possession nor right over the suit schedule properties. The Court fee paid is not correct and the suit, which is not maintainable at all, may be dismissed with costs.

Defendant No.2 adopted the written statement of the defendant No.1.

Defendant No.3 in her written statement contended that the suit schedule immovable properties originally belonged to Sri Idupulapati Chenchaiyah, who is her great-grandfather. Smt. Audemma, who is the only daughter of Smt. Late Chenchaiyah became entitled to the entire properties after the death of Sri Chenchaiyah. Smt. Audemma died intestate leaving behind her two daughters Smt. Mahalakshamma and Smt. Parvathamma and a son Sri Venkata Subbaiah. Smt. Mahalakshamma died issueless. Late Sri Venkata Subbaiah married Smt. Venkamma, who is the daughter of his sister Smt. Parvathamma. Subsequently, she (defendant No.3) was married to Sri Thirupathaiah, who is the son of Smt. Parvathamma, who was 25 years elder than her, that on account of the old age of her husband and her mother-in-law Smt. Parvathamma, she was looking after the agricultural operations of the schedule land. Smt. Parvathamma sold a portion of item-1 of plaint 'A' schedule property in her favour

under a registered sale deed dated 25.01.1990. On the same day, defendant No.1 as guardian of his son, who is defendant No.2, sold a portion of item-1 of the plaint 'A' schedule property in her favour though the extents are separate, she has been enjoying the said extents as a single plot and that her father Sri Venkata Subbaiah sold his share in item No.3 of the plaint schedule house in favour her son. Ever since, she; her son and her husband have been in exclusive possession and enjoyment of the said house property by paying tax to the Gram Panchayat. From the beginning, the first plaintiff was hostile towards his parents, brother and sisters. The first plaintiff left the village long back to Piduguralla Village and other places by abandoning his right and share in the properties of his father Sri Venkata Subbaiah. Prior to filing of the suit, the first plaintiff came to the suit village and began making false claims in the properties. When the first plaintiff and his brother-in-law tried to forcibly dispossess her from the plaint schedule properties, which have been exclusively belonging to her and her sons, she and her son filed OS.No.465 of 1994 (later numbered as OS.No.8 of 1998) on the file of the District Munsif Court, Ongole against the first plaintiff and others for grant of permanent injunction. The plaintiffs have no right to seek partition of item No.1 and a portion of house property under item-2 of the plaint 'A' schedule which have been in exclusive possession and enjoyment by her and her son and

hence, the suit may be dismissed with costs. Defendant No.4 remained *ex parte*.

On the above pleadings, the following issues were settled for trial:

1. whether the plaintiffs are entitled for partition of plaint schedule properties into 12 equal shares and allot five such shares in their favour?
2. whether the first plaintiff abandoned his rights and shares in his father's properties?

The averments in OS.No.8 of 1998 (old OS.No.465 of 1994) on the file of the District Munsif Court, Ongole are virtually the same averments of the written statement filed by defendant No.3 in OS.No.52 of 1994. The plaintiffs therein filed the suit for grant of permanent injunction restraining the defendants and their men from interfering with the possession and enjoyment of the plaintiffs and the plaint schedule properties therein. The averments in the written statement of defendant No.1 are virtually the same averments in the plaintiff in OS.No.52 of 2004 filed by him and his daughter. A memo was filed on behalf of defendant Nos.2 and 4 adopting the written statement of defendant No.1.

On the above pleadings, the following issues were settled for trial:

- (1) Whether the plaintiff is entitled for permanent injunction as prayed for?
- (2) Whether the Court-fee paid is correct?

A joint memo was apparently filed in OS.No.8 of 1998 to try the said suit along with OS.No.52 of 1994 and to record the evidence in OS.No.52 of 1994. Therefore, the evidence in respect of both the suits were recorded in OS.No.52 of 1994.

In support of the claim of the plaintiffs in OS.No.52 of 1994, PWs.1 to 4 were examined and Exs.A.1 to A.7 were marked. On behalf of defendant Nos. 1 and 2, DWs.1 and 2 were examined and Exs.B.1 to B.12 were marked. The defendant No.4 in OS.No.52 of 1994 remained *ex-parte*.

The facts which are not in dispute in this case are the genealogy/relationship between the parties to the suit. Hence, the same is not being repeated.

This Court has heard Sri G.Pedda Babu, learned counsel for the appellants/plaintiffs in OS 52/94 and Sri Y.V.Ravi Prasad, learned counsel for the respondents.

The first plaintiff and his daughter (second plaintiff) filed the suit OS.No.52 of 1994 for partition of item 1 to 3 of the plaint 'A' schedule immovable properties and the 'B' schedule movable properties. They plead that the property should be divided into 12 shares and five such shares are to be allotted to them. As OS.No.52 of 1994 is the comprehensive suit, this Court proposes to take up the said suit first. Both in the lower Court and in the submissions before this Court, learned counsels also relied upon questions of title and partition first. Following the issues framed and the submissions made, this

Court is of the opinion that issue No.1 in OS.No.52 of 1994 namely, “whether the plaintiffs are entitled to a partition as prayed for?” is the crucial issue in this entire *lis* and it should be decided first. The claim for partition is based upon the fact that the property in question is admittedly the property belonging to Idupulapati Chenchiah. The claim of the plaintiffs is that Smt. Audemma’s husband Sri Narsimham was an Illatom son-in-law of late Chenchiah. Therefore, after the death of Sri Chenchiah the property devolved upon the Illatom son-in-law of Sri Narasimham, who is father of the first plaintiff. The case of the plaintiffs is that the Venkata Subbaiah, S/o late Narasimham and the father of the plaintiff, got 1/3rd share which in turn devolved upon the present plaintiff and defendant Nos.1, 3 and others. Hence, the first plaintiff and second plaintiff together claim a 5/12th share in the properties.

Therefore, the first and foremost point to be determined is whether the Audemma succeeded to the properties or her husband acquired the properties as the illatom son-in-law.

The counsel for the appellants argued that the parties to the proceedings belong to the ‘Kamma’ community and that there is a custom of bringing in a boy as an illatom son in the absence of a natural born son. The learned counsel for the appellant argued that as per the said custom, N.Venkata Subbaiah was brought as an illatom son-in-law.

In reply thereto, the learned counsel for the respondents argued that there is no pleading at all of the existence of such a custom let alone evidence on the same and that the defendants do not agree that there is such a custom at all. Both the counsels referred to the extensive discussion in para 26 of the lower Court judgment, wherein case law and extracts from leading books were discussed in the impugned judgment. Both the learned counsels made submissions in this Court also about the existence/non existence of the custom and the taking of N.Venkata Subbaiah as illatom son-in-law.

Learned counsel for the respondents also strongly relied upon the judgment in ***Bachhaj Nahar v. Nilima Mandal and Another***¹ and argued that there is no pleading about illatom son-in-law and that the lower Court mistakenly went into the issue of illatom son-in-law without adequate pleading.

On the other hand, the reply of the learned counsel for the appellants is that in the suit which is clubbed with OS.No.52 of 1994 namely OS.No.8 of 1998 there is adequate pleading about the illatom son-in-law and this is the reason why the lower Court went into the question of illatom son-in-law.

¹ 2008 (17) SCC 491

This Court on an examination of the pleadings finds that in the plaint in OS.No.52 of 1994 there is absolutely no pleading about the “illatom” son-in-law. This is the more comprehensive case but there is no pleading about this “illatom” at all. The suit OS.No.465 of 1994, which is re-numbered as OS.No.8 of 1998 is a mere suit for injunction filed by defendant No.3 in OS.No.52 of 1994. The succession by Audemma was clearly mentioned in the plaint in para 3(b). In that suit, the defendant had pleaded in paragraph 4 as follows: “By virtue of an oral arrangement which also amounts to an illatom arrangement” Venkata Subbaiah came as an illatom son-in-law. As per the appellants this pleading is sufficient in the facts and circumstances of the case. The learned counsel for the appellants argued that the pleading is enough and that both the parties were at issue on the issue of illatom son-in-law and that therefore, this Court has the jurisdiction to look into the same. He also relied upon ***Syed Dastagir v. T.R.Gopalakrishnasetty***² and argued that the pleadings cannot be treated as an expression of art and science and that the Court should look at the substance rather than content. The learned counsel for the appellants also argued that this Court is bound to look into the issue of the illatom son-ion-law. Despite the lack of pleading, both the parties, according to the appellants, introduced evidence.

² AIR 1999 SC 3029

For the plaintiffs in OS.No.52 of 1994, four (4) witnesses were examined as PWs.1 to 4. This Court notices that none of the witnesses deposed about the existence of such a custom particularly in the community to which the plaintiffs in OS.No.52 of 1994 belong. No caste elder or a senior citizen was examined to prove the existence of such a custom in the community to which the plaintiffs belong. In fact no evidence is given of the particular community to which the plaintiffs belong. No evidence of similar instances of “illatom son-in-law” were pleaded or proved. PW.1 is the grand son of Marripudi Narasimham @ Narasaiah, who supposedly came to the house of his father-in-law as illatom son-in-law. Obviously, PW.1 will not have personal knowledge of the said fact. He claims to have knowledge of the fact through his grand mother. PW.2 was examined to talk of the possession and enjoyment of the property. He was aged 35 years by the date he gave evidence. PW.3 is another person aged 45 years when gave evidence in 1999 and the 4th witness is the husband of the second plaintiff in OS.No.52 of 1994 who was aged 34 years when he gave evidence in the year 1999. Therefore, it is clear that none of them have any personal knowledge about the so called custom or of the fact whether Marripudi Narasimham came as an illatom son-in-law. Even if this Court examines the documentary evidence that is introduced, PW.1 the main witness merely marked Exs.A.1 to A.3. Ex.A.1 is a sale deed dated 16.01.1990 executed by the

father of PW.1. EXs.A.2 and A.3 are the village accounts. The sale deed Ex.A.1 shows that Ac.4.50 cents was alienated by the father of the plaintiff. He clearly states that he has inherited the property by succession. The contents of the sale deed do not speak of the “illatom” son-in-law at all. Exs.A.2 and A.3 are two village accounts, which are filed to prove the possession of Venkata Subbaiah, the father of PW.1. Both these documents are of November, 1994 i.e. after filing of the suit. The name of Audemma is also visible in this document. So therefore, neither Ex.A.2 nor Ex.A.3 which are revenue records would prove the fact that there was a custom of son-in-law being brought as illatom son-in-law. All other documents that are marked in ‘A’ series namely, Exs.A.4 to A.7 do not support the case of the son-in-law inheriting the entire property as he has come as an “illatom” son-in-law. Ex.A.4 is the decree and judgment in OS.No.156 of 1963 filed by Venkata Subbaiah against third parties and not against the present contestants. Similarly, Ex.A.5 is the decree and judgment in AS.No.79 of 1965 against the judgment and decree in OS.No.156 of 1963 (Ex.A.4). Learned counsel for the respondents also pointed out that Exs.A.4 and A.5 were not filed and marked through PW.1, but are in fact marked through PW.4, who is the husband of the second plaintiff in this suit OS.No.52 of 1994. He is defendant No.4 in the suit OS.No.8 of 1998, which is filed for injunction. He was examined as a witness after the defendants’ witnesses were

examined and his testimony, therefore, as per the learned counsel, will have to be scrutinized with care. On a perusal of the testimony, this Court is of the opinion that the evidence of PW.4 does not support the case of an illatom son-in-law. He does not speak of the existence of a “custom.” He only speaks of what he supposedly heard from his grand father. The learned counsel for the respondents also rightly submitted that even if the theory of illatom son-in-law is taken as correct, there should be some documentary or other proof to show that the father of the plaintiff enjoyed the property as the son-in-law who was brought as an illatom son-in-law. The evidence on record shows that both Audemma and her husband Narasaiah (grand parents of first plaintiff PW.1) died long ago. The witness PW.1 when he was deposing in March 1999, in his cross-examination, clearly stated “Audemma and Narasaiah are no more. Audemma died about 25 years back. Narasaiah died prior to Audemma”. Therefore, learned counsel argued that if the son-in-law was managing the property as the owner and illatom son-in-law, there would definitely be some documentary evidence like village accounts, mutation entries etc., to prove that the son-in-law inherited the properties and was enjoying the same. The witness could not produce any documents to show that his grand father Narasimham @ Narasaiah enjoyed these properties as the owner. In fact, he deposes that he does not even know the contents of Ex.A.3-adangal. Learned

counsel also pointed out that even in the sale deed marked as Ex.A.1, there is no recital about the illatom son-in-law or through whom the vendor of Ex.A.1 got the property.

The learned counsel also points out that the property was divided into three different bits as pleaded in the written statements filed and each of the parties who inherited Ac.4.50 cents sold/transferred the same. Therefore, learned counsel submits that long prior to the dispute itself, the transfers were being effected without any query or question through registered sale deeds like Ex.A.1, Exs.B.1, Ex.B.2 and Ex.B.16 (1980) etc., and the owners were issued pattadar pass books/title deed books (Exs.B.27 and 28). In addition, Ex.B.29-patta clearly shows that the name of Audemma is mutated in the revenue records.

This Court also notices that the sale deed Ex.A.1 which is mentioned in the plaint in OS.No.52 of 1994 is dated 16.01.1980. PW.1 in his chief-examination filed the registration extract of this document. In his cross-examination on 23.03.199, he clearly admits that he came to know about Ex.A.1 sale deed after its execution. He also states that "I did not raise any dispute with my father about this alienation". Therefore, the conduct of the plaintiff also clearly establishes that he was aware of the rights that his father had namely 1/3rd share inherited from his mother and that therefore, it is this reason why the plaintiff did not raise

any dispute about the same. This Court finds substantial force in the submission that the delay makes it clear that the plaintiff was actually aware of what was happening and that therefore, he did not file this suit immediately after Ex.A.1. There is neither adequate pleading nor proof to show the existence of a custom more so in this case.

The practice of bringing a boy as an illatom son-in-law is a custom that is recognized in certain communities in certain parts of the State of Andhra Pradesh as can be seen from the decided cases which are cited and the texts relied upon in the lower Court. These judgments do show that the custom of an illatom son-in-law is accepted in “Kamma” and “Reddy” communities. As this has the effect of upsetting the normal line of succession and particularly as it is a custom confined to a few communities only, like any other custom the same should be pleaded with certainty in the case. There are a long line of cases which have held that the existence of a custom should be pleaded with certainty. Evidence should also be introduced of the said custom. A few relevant cases on illatom son-in law and custom are reproduced below.

In ***G.Narayanappa and Others V. Govt. of Andhra Pradesh***³, the Hon’ble Supreme Court held as follows:

5. It has also been stated by Mayne that an illatom son-in-law has no right to claim partition with his father-in-law unless there is

³ (1992)1SCC 197

an express agreement or custom to that effect. An illatom son-in-law is not an adopted son in any sense. In N.R. Raghavachariar's Hindu Law, 8th Edition, in paragraph 176, it is stated that an illatom son-in-law loses no rights of inheritance in his natural family and the property he takes in the adoptive family is taken by his own relations to the exclusion of those of his adoptive father. The position, as set out in Mulla's Hindu law, 16th Edition is no different. Regarding the position of an illatom son-in-law it has been inter alia observed by Mulla at para 515 (page 534) as follows:

He does not lose his right of inheritance in his natural family. Neither he nor his descendants become coparceners in the family of adoption though on the death of the adopter he is entitled to the same rights and the same share as against any subsequently born natural son or a son subsequently adopted in accordance with the ordinary law. He cannot claim a partition with the father-in-law and the incidence of a joint family, such for instance as right to take by survivorship, do not apply. In respect of the property or share that he may get he takes it as if it were his separate and self-acquired property.

13. Coming to the position in law, the discussion in the text books, which we have referred to in some detail earlier, makes it clear that although an illatom son-in-law has some rights similar to those of a natural son born after the adoption of the illatom son-in-law, his rights are not identical to those of conferred by law on a son or an adopted son. To cite two main differences, he does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law. His position is not identical to that of an adopted son because he does not lose his rights in his natural family on being taken as an illatom son-in-law and continues to be entitled to a share in the property of his natural father. It is, therefore, difficult to regard an illatom son-in-law who has attained majority as a major son for the purposes of Section 4A of the Ceiling Act.”

In ***Harihar Prasad Singh and Others V. Balmiki***

Prasad Singh and Others⁴, the Hon'ble Supreme Court of

India held as follows:

“6. Now on whom does the burden rest and what is the scope of the evidence that is admissible ? The earliest decision on the question regarding proof of custom in variance of the general law is found in Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya MANU/PR/0027/1872 to the effect:

it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

This passage was quoted by this Court with approval in its decision in Pushpavathi Vijayaram v. P. Visweswar (AIR 1964 SC 118) and this Court went on further to observe:

In dealing with a family custom, the same principle will have to be applied, though, of course, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them their statements, and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved, vide Abdul Hussein Khan v. Bibil Sana MANU/PR/0125/1917.

In ***Laxmibai (Dead) thr. L.Rs. and Other V.***

Bhagwantbuva (Dead) thr. L.Rs. and Others⁵, the Hon'ble

Supreme Court of India held as follows:

⁴ AIR 1975 SC 733

“7. Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom.

Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it.

Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.”

In ***S. Sugunamma V. B. Padmamma and Others***⁶, a

Bench of this Court held as follows:

“19. As pointed out by the Supreme Court in *G. Narayanappa v. Government of Andhra Pradesh* (1) MANU/SC/0028/1992 : (1992) 1 SCC 197, an illatom son-in-law is a creature of custom. The Supreme Court quoted in the said decision, a passage from Mayne's Hindu Law, which records the fact that the custom of taking a person in illatom adoption prevailed among Reddy and Kamma castes in the Madras Presidency. But the rules that govern the rights of an illatom son-in-law, as culled out from various judicial decisions both by Mayne and by N.R. Raghavachariar are as follows:

(i) to constitute a person as illatom, a specific agreement is necessary.

(ii) after the death of the adopter, such a son-in-law is entitled to the full rights of a son even as against natural sons subsequently born or a son subsequently adopted in the usual manner,

⁵ AIR 2013 SC 1204

⁶ 2017 (4) ALT 757

(iii) an illatom son-in-law has no right to claim partition with his father-in-law unless there is an express agreement or custom to that effect,

(iv) an illatom son-in-law cannot be taken to be an adopted son,

(v) an illatom son-in-law will not lose the rights of inheritance in his natural family and similarly the property that he takes in the adoptive family is taken by his own relations to the exclusion of those of his adoptive father,

(vi) neither he nor his descendants become coparceners in the family of adoption though on the death of the adopter he is entitled to the same rights and same share as against any subsequently born natural son or an adopted son,

(vii) the rights of an illatom son-in-law are not identical to those conferred by law on a son or an adopted son, and

(viii) an illatom son-in-law does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law."

In ***Salekh Chand (Dead) by Lrs. V. Satya Gupta and***

Others⁷, the Hon'ble Supreme Court held as follows:

6. In Mookka Kone v. Ammakutti Ammal MANU/TN/0603/1927, it was held that where custom is set up to prove that it is at variance with the ordinary law, it has to be proved that it is not opposed to public policy and that it is ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy. It is not disputed that even under the old Hindu law, adoption during the lifetime of a male issue was specifically prohibited. In addition, I have observed that such an adoption even if made would be contrary to the concept of adoption and the purpose thereof, and unreasonable. Without entering into the arena of controversy whether there was such a custom, it can be said that even if there was such a custom, the same was not a valid custom."

It is incumbent on party setting up a custom to allege and prove the custom on which he

⁷ 2009 (2) ALT 22 (SC)

relies. Custom cannot be extended by analogy. It must be established inductively and not by a priori methods. Custom cannot be a matter of theory but must always be a matter of fact and one custom cannot be deduced from another. It is a well established law that custom cannot be enlarged by parity of reasoning.

Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the alleged custom should be forthcoming. A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case. Where, however a custom is repeatedly brought to the notice of the courts, the courts, may hold that the custom was introduced into law without the necessity of proof in each individual case.

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. Coming to the facts of the case P.W.1 did not speak any thing on the position either of a local custom or of a custom or usage by the community, P.W.2, Murari Lal claimed to be witness of the ceremony of adoption he was brother-in-law of Jagannath son of Pares Ram who is said to have adopted Chandra Bhan. This witness was 83 years old at the time of deposition in the Court. He did not speak a word either with regard to the local custom or the custom of the community. P.W.3 as observed by the lower appellate Court was only 43 years' old at the time of his deposition where as the adoption had taken place around 60 years back. He has, of course, spoken about the custom but that is not on his personal knowledge and this is only on the information given by P.W.2, Murari Lal. He himself did not speak of such a custom. The evidence of a plaintiff was thus insufficient to prove the usage or custom prevalent either in township of Hapur and around it or in the community of Vaish. The evidence of D.W.3 refers only to one instance. From his evidence it cannot be inferred that Om Prakash had adopted Munna Lal who was his real sister's son. As already pointed out above, the trial court found that the evidence of D.W.3 was not so clear and unambiguous as to lead to no other conclusion except that Munna Lal was son of

real sister of Om Prakash. Besides, this solitary instance of adoption of his sister's son cannot amount to long usage, which has obtained the force of law. Mulla has categorically commented that where the evidence shows that the custom was not valid in numerous instances, the custom could not be held to be proved. A custom derives its force from the evidence from long usage having obtained the force of law.

All that is necessary to prove is that usage has been acted upon in practice for such a long period with such invariability as to show that it has, by consent, been submitted so as to establish governing rules of a particular locality or community.

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. 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.

In yet another decision reported in Hem Singh and Anr. v. Hakim Singh and Anr. MANU/SC/0105/1954 : [1955]1SCR44 , this Court observed that the custom recorded in the 'Riwaj-i-am' is in derogation of the general custom and those who set up such a custom must prove it by clear and unequivocal language. Similarly, when a custom is against the written texts of the Hindu Law then, one who sets up such a custom must prove it by a clear and unequivocal language"

Against this backdrop of settled law, if the present case is viewed and the evidence is weighed, this Court has to conclude that the pleading is absolutely bald and bereft of any details whatsoever. Neither the custom nor the full facts

which would establish the rights of the illatom son-in-law in this case and in the community of the plaintiffs are pleaded or proved. None of the facts which are considered relevant under Section 13 of the Indian Evidence Act are proved in this case in relation to custom. Even the so called 'oral agreement' is not deposed about or proved by evidence.

In addition, this Court also notices a very recent judgment of Hon'ble Supreme Court of India reported in ***Ratanlal @ Babulal Chunilal Samsuka v. Sundarabai Govardhandas Samsuka***⁸, wherein his Lordship Sri N.V.Ramana, speaking for the Bench held as follows:

"As customs, when pleaded are mostly at variance with the general law, they should be strictly proved. Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner. It should be noted that, there are many types of customs to name a few-general customs, local customs and tribal customs etc. and the burden of proof for establishing a type of custom depend on the type and the extent of usage. It must be shown that the alleged custom has the characteristics of a genuine custom viz., that it is accepted willfully as having force of law, and is not a mere practice more or less common. The acts required for the

⁸ 2018 (11) SCC 119

establishment of customary law ought to be plural, uniform and constant. (emphasis supplied)

In view of this latest judgment, the earlier reported judgements and the judgment cited by the counsel for the respondents, which is based on the salutary principle of 'no pleading no evidence' this court holds that the plaintiffs have failed to plead about the existence of a custom and prove the custom as required under law. Neither the pleadings nor the evidence in the case prove the existence of the custom or the actual factum of the son in law being an illatom son in law.

Hence, this Court holds that the finding of the lower Court on issue No.1 is correct. Neither the existence of the custom nor the "oral agreement" is spoken about or proved by any of the witnesses. There is absolutely no proof that the son in law was actually an illatom son in law. The plaintiffs' case in OS.No.52 of 1994 is thus bound to fail and this Court confirms the finding that the plaintiffs are not entitled for a partition of 'A' schedule property.

So far as the other issues are concerned, neither of the learned counsels really argued on the same. This Court also finds that the Court fee paid is not correct. A fixed court fee is paid as if the plaintiff is in joint possession. PW.1 in his cross-examination on 223.03.1999 clearly admits as follows: "by the date of filing of the suit, the schedule properties were not in my possession. Witness volunteers that the schedule

properties were in the possession of Chenchaiiah”. Therefore, in view of this categorical admission and the documents filed by the defendants, this Court holds that there is no ‘joint possession’ of the property. Hence, the Court fee is totally inadequate.

This Court concurs with all the findings of the Court below and holds that there are no grounds to interfere with the orders passed in OS.No.52 of 1994.

Further in view of the clear documents of title in the plaintiffs favour and their possession of the property as evidenced by the sale deeds, revenue records, pass book etc., the plaintiffs in OS.No.8 of 1998 have proved their possession and so they are entitled to a permanent injunction against the defendants therein. The learned counsel essentially argued about the suit OS.No.52 of 1994. The submissions both oral and written were in this suit only and both concentrated on the issue of title. The issues involved in the second suit for injunction were not touched upon. However on a review of the order passed by the lower Court in this suit, this Court finds that the same is a reasoned order passed after considering the facts, pleadings etc. This Court finds no reason to interfere with the findings on this suit also.

For all these reasons, this Court is of the opinion that there are no merits in these two appeals and both the appeals

are, therefore, dismissed. In the circumstances, no order as to costs.

As a sequel, miscellaneous petitions, if any, pending in these appeals shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date: 25.06.2018

KLP

Note: L.R. copy be marked.

