

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.48 of 2004**

1. Munshiram, aged about 70 years, S/o Dirpal, resident of village Baalajhar, Tah. Pathalgaon, Jashpur (CG)

Through : Special Power of Attorney, Sanjhuram, son of Shri Budhram caste Chikwa, aged about 55 years, resident of village Sarga, Tah. Seetapur, District Surguja

2. Mu. Ratilo, Wd/o. Dirpal, aged – resident of village Baalajhar, Tah. Pathalgaon, District Jashpur (since died)

---- Appellants

Versus

1. Sanjhi Bai (deleted)
2. Bitul, aged about 60 years, son of Shri Sunhari,
3. Balamsai, aged about 55 years, son of Shri Sunhari,
4. Aleefsai, aged about 52 years, son of Shri Sunhari,
5. Mu. Gauribai, aged about 50 years, Daughter of Sunhari,
6. Majhnobai, aged about 53 years, daughter of Sunhari,

All are residents of village Tamta, Tah. Pathalgaon, District Jashpur (Chhattisgarh)

7. The State of Chhattisgarh, through : The District Collector, District Jashpur (Chhattisgarh)

---- Respondents

For Appellants/Plaintiffs	:	Mr.Vivek Bhakta, Advocate
For Respondents No.2 to 6	:	Mr.Shobhit Koshta, Advocate
For Respondent No.7/State	:	Mr.Vimlesh Bajpai, G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

28/01/2019

1. The substantial question of law involved, formulated and to be answered in the second appeal preferred by the plaintiff is as under:-

“Whether the first appellate Court was justified in holding that plaintiff No.1-Munshiram is not entitled to succeed the property of plaintiff No.2-Mu. Ratilo under Section 15 (1) (b) read with Section 3 (1) (j) of the Hindu Succession Act, 1956 ?

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. Plaintiffs-Munshiram Son of Dirpal and Mu. Ratilo Widow of Dirpal brought a suit for declaration of title and permanent injunction stating inter-alia that Dirpal had no son, therefore, he and plaintiff No.2-Ratilo had adopted plaintiff No.1-Munshiram as their adopted son. Plaintiff No.1-Munshiram started staying with plaintiff No.2-Ratilo and after death of Dirpal both have succeeded the suit property and defendant No.1-Sunhari (brother's son) has no right and title over the suit land. During pendency of the suit, plaintiff No.2-Ratoli, widow of Dirpal, died on 5.8.92. The plaintiff claimed the suit property exclusively.
3. The defendant denied the plaint allegation stating inter-alia that the plaintiff is not entitled for decree and prayed for dismissal of suit. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 15.2.2001, decreed the suit of the plaintiff holding since Ratilo has died and it has not been proved that plaintiff No.1-Munshiram is adopted son of Dirpal & Ratilo and further held that plaintiff No.1-Munshiram is son of Ratilo with her former/first husband Gajju Ram, therefore, he will

succeed the suit property under Section 3 (1) (j) read with Section 15 (1) (b) of the Hindu Succession Act, 1956 (hereinafter called as “the Act of 1956”), which was reversed by the First Appellate Court on the ground that there is no such pleading that Ratilo Bai is biological mother of plaintiff No.1 and he is son of plaintiff No.2-Ratilo with her former husband Gajju Ram. Questioning legality and validity of the impugned judgment and decree of the First Appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which substantial question of law has been framed by this Court, which has been set out in the opening paragraph of this judgment.

4. Mr.Vivek Bhakta, learned counsel for the appellant/plaintiff, would submit that the First Appellate Court is absolutely unjustified in reversing the well merited finding of the trial Court by which the trial Court has clearly held that plaintiff No.1 will succeed the property of plaintiff No.2-Ratilo, therefore, it is liable to be set aside.
5. On the other hand, Mr.Shobhit Koshta, learned counsel for respondents No.2 to 6, would submit that there is no pleading by plaintiff No.1 that Ratilo was his biological mother and he is son of Ratilo with her first husband Gajju Ram, who had died and thereafter Ratilo was married with Dirpal. In absence of requisite pleading, no amount of evidence can be looked into to grant a decree in favour of the plaintiff, therefore, the second appeal deserves to be dismissed.

6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
7. It is evident on record that plaintiff No.1-Munshiram and plaintiff No.2-Ratilo filed a suit for declaration of title with a specific pleading that Dirpal had no son and therefore, Dirpal and plaintiff No.2-Ratilo had adopted plaintiff No.1-Munshiram as their son, Dirpal was married with plaintiff No.2-Ratilo, mother of plaintiff No.1-Munshiram and after death of Dirpal, the plaintiffs have succeeded the property left by Dirpal. In the course of trial, plaintiff No.1-Munshiram failed to prove that he is adopted son of Dirpal and plaintiff No.2-Ratilo. The trial Court has recorded the finding in this regard while answering issue No.4, but the trial Court further held that since plaintiff No.1-Munshiram is son of Ratilo with her former husband Gajju Ram, who has died, therefore, by virtue of the provisions contained in Section 3 (1) (j) read with Section 15 (1) (b) of the Act of 1956, plaintiff No.1-Munshiram will succeed the property of plaintiff No.2-Ratilo relying upon the judgment of the Bombay High Court in the matter of **Rama Ananda Patil v. Appa Bhima Redekar and others**¹.
8. The question for consideration would be whether in absence of pleading by plaintiff No.1-Munshiram specifically that plaintiff No.2-Ratilo is her biological mother with her former husband Gajju Ram, the trial Court is justified in granting the decree in favour of the plaintiff ?

¹ AIR 1969 Bombay 205

9. The Supreme Court in the matter of Nandkishore Lalbhai Mehta v. New Era Fabrics P. Ltd. & Ors.² while emphasizing the need for specific pleading held as under:-

“10..... (i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

16. The principle was reiterated by this Court in *Ram Sarup Gupta v. Bishun Narain Inter College* (AIR 1987 SC 1242):

“6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise.....”

10. Reverting to the facts of the present case, it is quite vivid that plaintiff-Munshiram has failed to aver in the plaint that plaintiff No.2- Ratilo Bai is her biological mother and he is son of plaintiff No.2- Ratilo out of her wedlock with her former/first husband Gajju Ram and her mother Ratilo Bai married with Dirpal after death of Gajju

² AIR 2015 SC 3796

Ram. The plaint is blissfully silent in this regard. Therefore, no amount of evidence can be looked into to grant a decree in favour of the plaintiff on this basis in absence of pleading.

11. Next contention of Mr.Bhakta, learned counsel, is that there is a custom prevalent among the plaintiff's community that if a woman having son, re-marries after death of her husband, then her son is called as "*Lameta*" and will stay along with woman on her remarriage. No such pleading with regard to valid custom has been raised by the plaintiff in the plaint.

12. The Supreme Court in the matter of Ratanlal alias Babulal Chunilal Samsuka v. Sundarabai Govardhandas Samsuka (D.) Th. Lrs. and others³ laid down essentials for establishing a valid custom as under:-

"13. As per the settled law under Section 2(a) the Act, the following ingredients are necessary for establishing a valid custom.

- a. Continuity.
- b. Certainty.
- c. Long usage.
- d. And reasonability.

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

³ AIR 2017 SC 5797

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 establishment of customary law ought to be plural, uniform and constant.

14. Custom evolves by conduct, and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law. The characteristic of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted, but from practices prompted by the convenience of society. A judicial decision recognizing a custom may be relevant, but these are not indispensable for its establishment. When a custom is to be proved by judicial notice, the relevant test would be to see if the custom has been acted upon by a court of superior or coordinate jurisdiction in the same jurisdiction to the extent that justifies the court, which is asked to apply it, in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration. In this case at hand there was no pleading or proof which could justify that the above standards were met.

18. In response to issue number two, we are concerned here with the custom of adopting married sons in the community of the appellant. The only evidence, the appellant has adduced, is his own testimony and a word of a priest who had performed the ceremony. A general custom which the appellant intends to prove requires greater proof than the one appellant adduced before the court. Moreover, there is no dispute with regard to the fact that the appellant did not plead in his written statement about existence of any custom as such. Parties to a suit are always governed by their pleadings. Any amount of evidence or proof adduced without there being proper pleading is of no consequence and will not come to the rescue of the parties.

19. At this juncture it would be necessary to observe the law laid down by this Court in numerous cases that the burden of proving adoption is a heavy one and if there is no documentary evidence in support of adoption, the Court should be very cautious in relying upon oral evidence. This Court held so in *Kishori Lal v. Mst. Chaltibai*, AIR 1959 SC 504, we can do no better than to

quote the relevant passage from the above judgment which reads as under:-

"As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance.

(emphasis supplied)"

13. No such pleading with regard to "*Lameta*" custom has not been raised by the plaintiff in the plaint, as such, no evidence can be looked into to grant a decree in favour of the plaintiff based on such custom. The First Appellate Court is absolutely justified in setting aside the decree of the trial Court allowing the appeal, in which I do not find any illegality or perversity warranting interference by this Court. The substantial question of law is answered in favour of the defendant and against the plaintiff.

14. The second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

15. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge