

HIGH COURT OF CHHATTISGARH, BILASPUR
Second Appeal No.311 of 2005

Smt.Bhagwati, wife of Chandan Singh aged about 57 years, caste Gond, R/o Village Sarangpal, Tahsil Kanker, Distt. Kanker, C.G.

(plaintiff)
 ---- Appellant

Versus

- 1(a) Cheduram (died and deleted)
 1(b) Ishwar, S/o Devsingh, aged about 30 years,
 R/o village Sarangpal, Tahsil Kanker, Distt.
 Kanker , C.G.
- 2.Jagguram, S/o. Navlu, caste Gond, aged about 30 years,
 3.Navalsingh, S/o Murha, caste Gond, aged about 45 years,
 4.Mangal Singh (died and deleted)
 5. Ghasiya Ram (died and deleted)
 6. Budhram (died and deleted)
 7. Sudhu Ram (died and deleted)
 8(a) Smt. Koshilya Bai, widow of Tularam, caste Gond, aged about 20 years,
 (b) Vishnu S/o Tularam, caste Gond, aged about 20 years,
 9. Pilaram (died and deleted)
 10. Sukram, S/o Ram Singh, caste Gond, aged about 35 years,
 All agriculturist and R/o Village Sarangpal, Tahsil Kanker, Distt. Kanker (CG)
 11.State of Chhattisgarh, through the Collector Kanker, Distt. Kanker (CG)

---- Respondents/Defendants

For Appellant/Plaintiff	: Mr.Shobhit Koshta, Advocate
For Res.No.1(b), 2, 3,	: None present
8(a), 8)(b) & 10	
For Respondent No.11	: Ms Shivali Dubey, P.L.
For Amicus	: Mr.Ravi Kr.Bhagat, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

09/12/2019

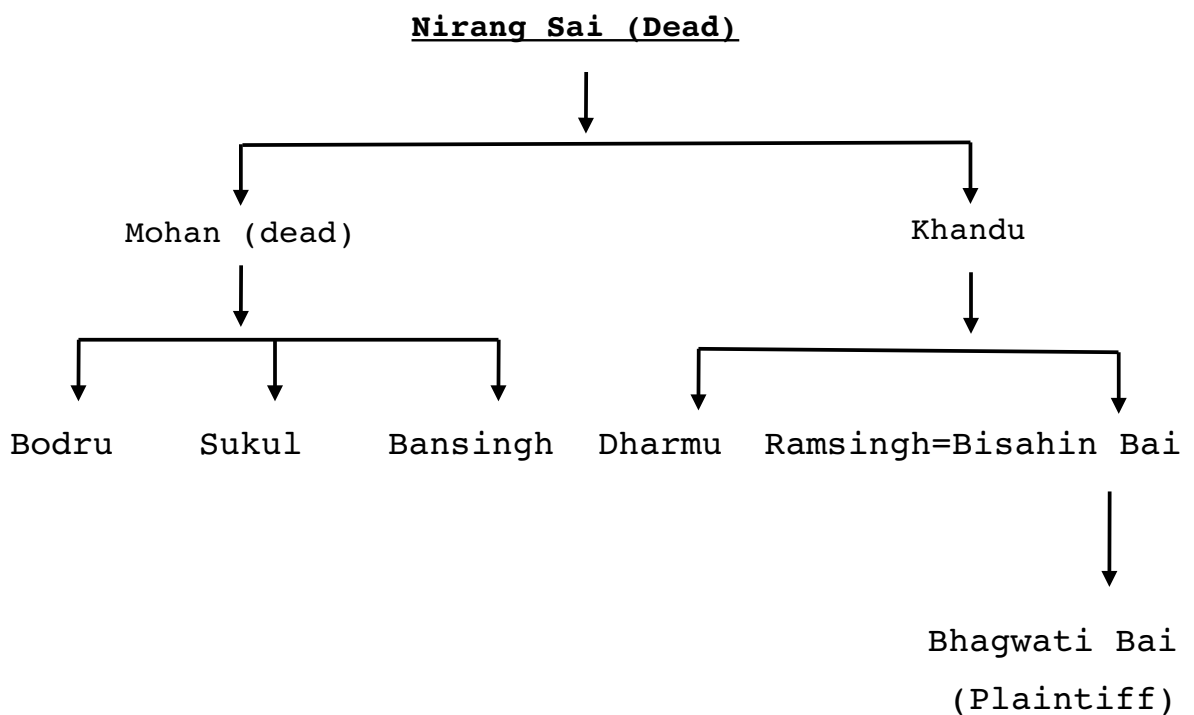
1. This plaintiff's second appeal under Section 100 of the CPC was admitted for hearing by formulating the

following substantial question of law: -

"Whether both the Courts below are justified in dismissing the suit of the plaintiff by recording a perverse finding holding that the plaintiff is Gond by caste and after death of her father Rai Singh, she will not inherit the suit property as per custom prevalent in Gond community ?"

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The following genealogical tree would demonstrate the relationship among the parties:-



3. The suit property was originally held by Dharmu. Dharmu had no issue. The plaintiff is daughter of Dharmu's brother Ramsingh. Dharmu died issueless in the year 1950 and thereafter his property devolved upon Ramsingh. It is the case of the plaintiff that after death of Dharmu and Ramsingh she being only sole heir of Dharmu being Ramsingh's daughter would

inherit the suit property and the defendants who are her grandfather's brother sons would not inherit the suit property and occasion to file a suit has arisen on account of she having been dispossessed from the suit property by the defendants.

4. The defendants filed their written statement and controverted the plaint averments stating inter-alia that they are legal heirs of Mohan, who was brother of Khandu. Khandu had two sons Dharmu and Ram Singh and the suit property belonged to Dharmu who was staying with them, Dharmu was issueless and they are in possession of Dharmu's property and cultivating the same. They further pleaded in para-5 of written statement that in Gond caste and as per prevailing customs, daughter has no right in father's or uncle's property.
5. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 29.10.98, dismissed the suit solely on the ground that the plaintiff has failed to prove the customs regarding right of daughter to inherit the property of her father or uncle, which was assailed by the plaintiff before the first appellate Court, but she remained unsuccessful on finding that the fact of custom by which daughter is entitled to inherit the property

of her father or uncle is not established, leading to filing of this second appeal under Section 100 of the CPC before this Court, in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.

6. Mr. Shobhit Koshta, learned counsel for the appellant/plaintiff, would submit that the plaintiff being niece of Dharmu and daughter of Ramsingh has inherited the suit property after death of Dharmu and her father Ramsingh and it is the claim of the defendants that in Gond caste daughters do not get the property of their father and therefore, would not inherit any share in the property of their father and it was the defendants who could have pleaded that in Gond caste daughters do not get the property of their father and could have established the same in accordance with law. He would further submit that both the Courts below have erred in placing the burden upon the plaintiff that since she could not establish that in Gond caste there is custom that daughters would inherit the property of their father and as such, the finding recorded by both the Courts below is wholly erroneous. The view taken by both the Courts below placing negative burden on the plaintiff to prove the custom by which daughters would inherit the property of their father is erroneous, as such, the

judgment and decree of both the Courts below deserve to be set aside and the suit be decreed.

7. None present for the respondents through served.

8. Mr. Ravi Kumar Bhagat, learned counsel appearing as Amicus, would submit that the plaintiff being daughter would inherit the property of her father and there is no presumption in law that in Gond community daughters would not inherit any share in the property of their father as she has no brother, as such, the view taken by two Courts below is vulnerable.

9. I have heard learned counsel for the appellant/plaintiff, counsel appearing as Amicus and considered the submissions made hereinabove and went through the record with utmost circumspection.

10. It is not in dispute that the parties are Gond by caste and they are governed by their own customary law. The plaintiff brought a suit that the suit property held by his uncle Dharmu and after his death it was inherited by his father Ram Singh and after death of Ramsingh she has inherited the property, in which the defendants set-up a plea that daughters do not get any share in the property of their father.

11. The question for consideration would be, whether both the Courts below are justified in holding that

since it has not been proved that in Gond community daughters are entitled to get any share in the suit property or would inherit the property of their father, therefore, a decree cannot be granted in favour of the plaintiff ?

12. Section 2(2) of the Hindu Succession Act, 1956 (for short 'the Act of 1956') provides as under: -

"2. Application of Act.—(1) xxx xxx xxx

(2) 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."

13. List of Scheduled Tribes is contained in the Constitution (Scheduled Tribes) Order, 1950 amended with effect from 1.11.2000 by virtue of Section 20 of the Madhya Pradesh Reorganisation Act, 2000, which provides that on and from the appointed day, the Constitution (Scheduled Tribes) Order, 1950, shall stand amended as directed in the Fourth Schedule. Gond to which the parties herein belong is in Entry 16 in relation to Chhattisgarh in the above order. As such, Gond is a Scheduled Tribe within the meaning of the Constitution of India notified by the Constitution (Scheduled Tribes) Order, 1950 by the President of India and it is a Scheduled Tribe within the meaning of Article

366(25) of the Constitution. Thus, the provisions of the Act of 1956 do not pro-tanto apply to the members of Scheduled Tribe as per Section 2(2) of the Act of 1956, because of *non obstante* clause in Section 2(2) of the Act of 1956, as the customary law of the Scheduled Tribe has been preserved by the legislature.

14. The Supreme Court in the matter of Madhu Kishwar and others v. State of Bihar and others¹, after noticing sub-section (2) of Section 2 of the Act of 1956, held as under:-

"4. ... Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region."

15. Thus, it is held that the provisions of the Hindu Succession Act, 1956 will not apply to the parties, as they are Gond scheduled tribes, which is Scheduled Tribe within the meaning of Article 366(25) of the Constitution of India and the Central Government has not issued any notification directing otherwise and applying the provisions of the Hindu Succession Act to them.

16. It is admitted position on record that the parties are Gond by caste and the provisions of the Hindu Succession Act are not applicable to them by

¹ (1996) 5 SCC 125

virtue of Section 2(2) of the Act of 1956.

17. Further, the question for consideration would be, whether the plaintiff who claimed on the basis that she has inherited the property of her father and the defendants pleaded that they belong to Gond community in which daughters do not get share in the property of their father. In the light of above-mentioned fact, the burden to prove the custom would lie on the defendants as they have pleaded that in their community daughters do not get share in their father's property ?

18. In this regard, decision of the Supreme Court in the matter of Saraswathi Ammal v. Jagadambal and Another² may be noticed herein profitably in which Their Lordships have clearly held that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies and custom cannot be extended by analogy and it must be established inductively, not deductively. It was observed as under:-

"11. The correct approach to a case where a party seeks to prove a custom is the one pointed out by their Lordships of the Privy Council in Abdul Hussein Khan v. Soma Dero, (I.L.R. 45 Cal. 450: PC). 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. Theory and custom are antitheses, custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another. A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same-custom."

19. Again, in the matter of Salekh Chand (Dead) by LRs. v. Satya Gupta and Ors.³, it was held by Their Lordships of the Supreme Court 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 was observed as under:-

"21. In Mookka Kone v. Ammakutti Ammal [AIR 1928 Mad 299 (FB)], 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.

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

20. The Supreme Court in the matter of **Bhimashya and Ors. v. Smt. Janabi @ Janawwa**⁴ has held as under:-

"12. "Custom defined : - Custom is an established practice at variance with the general law.

Nature of custom - A custom varying the general law may be a general, local, tribal or family custom.

Explanation 1. - A general custom includes a custom common to any considerable class of persons.

Explanation 2. - A custom which is applicable to a locality, tribe, sect or a family called a special custom.

Custom cannot override express law. (1) Custom has the effect of modifying the general personal law, but it does not override the statute law, unless it is expressly saved by it.

(2) Such custom must be ancient, uniform, certain, peaceable, continuous and compulsory.

Invalid custom - No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.

Pleading and proof of custom (1) He who relies upon custom varying the general law must plead and prove it.

(2) Custom must be established by clear and unambiguous evidence."

(See Sir HS. Gour's Hindu Code, Volume I.Fifth Edition.)

13. Custom must be ancient, certain and reasonable as is generally said. It will be noticed that in the definition in Cl. (a) of Section 3 of the Act, the expression

4 (2006) 13 SCC 627

'ancient' is not used, but what is intended is observance of custom or usage for a long time. 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' has not been strictly applied to Indian conditions. All that is necessary to prove is that the custom or usage has been acted upon in practice for such a long period and with such invariability and continuity as to show that it has by common consent been submitted to as the established governing rule in any local area, tribe, community, group of family. Certainty and reasonableness are indispensable elements of the rule. For determination of the question whether there is a valid custom or not, it has been emphasized that it must not be opposed to public policy."

21. In the matter of Ratanlal @ Babulal Chunilal Samuska v. Sunderabai Govardhandas Samsuka⁵ Their Lordships of the Supreme Court have explained the ingredients for establishing a valid custom and held 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 type of custom depend on the type and the extent of usage.

5 AIR 2017 SC 5797

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."

22. In the matter of Madhu Kishwar and others v.

State of Bihar and others⁶ Their Lordships of the Supreme Court have considered the constitutional validity of sections 7, 8 and 76 of the Chhota Nagpur Tenancy Act. The contention was that the customary law excluding tribal women from inheritance of land or property is discriminatory and ultra-vires Articles 14, 15 and 21 of the Constitution of India. The Hon'ble Supreme Court,

6 AIR 1996 SC 1864

by a majority judgment, refrained from striking down the provisions of the said Enactment on the touchstone of Article 14 of the Constitution of India although the exclusive right of male succession conceived of in sections 7 and 8 was directed to remain in suspended animation so long as the right of livelihood of the female descendant of the last male holder remains valid and in vogue. The majority judgment in *Madhu Kishwar* (supra) articulates the reason for refraining from judicially intervening thus:-

"48. In face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist Court, apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However, laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. for in whatever measure be the concern of the court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial

parlance as self restraint. We agree therefore with brother K. Ramaswamy, J., as summed up by him in the paragraph ending on page 36 of his judgment that under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the Court."

23. The Supreme court in the matter of **Indian Young Lawyers Association & Ors. v. The state of Kerala & Ors.**⁷ (**Sabarimala Temple Case**) has held as under:-

"276(99). Custom, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny, is to deny the primacy of the Constitution.

Our Constitution marks a vision of social transformation. It marks a break from the past – one characterized by a deeply divided society resting on social prejudices, stereotypes, subordination and discrimination destructive of the dignity of the individual. It speaks to the future of a vision which is truly emancipatory in nature. In the context of the transformative vision of the South African Constitution, it has been observed that such a vision would:

"require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of

7 AIR 2018 SC (Supp) 1650

inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships."

24. Recently, the Bombay High Court in the matter of Babulal Bapurao Kodape and another v. Sau. Resmabai Narayanrao Kaurati and another⁸ has held that if a female tribal who is a natural legal heir seeks equal share in the property of her father or mother, it would be impermissible for the Court to start with the assumption that the customary law governing the tribe excludes the females from inheritance and to then insist that the female tribal must plead and prove a custom that she is not so excluded. It would be burden of the person who asserts such exclusion from inheritance under the customary law to so plead and prove. Such view would further be in consonance with the principles of justice, equity and good conscience. It was further held that even on the touchstone of the provisions of Sections 101 to 103 of the Evidence act, the plaintiffs were not required to plead and prove that they are not excluded from inheritance. The burden that customary law excludes females from inheritance was that of the defendants. It was also held that the plaintiffs were under no burden to plead and prove that under the customary law applicable to the Gond community, females are not

⁸ AIR 2019 Bombay 94

excluded from inheritance and that the burden to prove the exclusion was that of the defendants who set up such defence.

25. The Supreme Court in the matter of Mohammad Baqar and Ors. v. Naimun Nisha Bibi & Ors.⁹ has held that the burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it was incumbent on the appellants to prove by clear and cogent evidence that there was such a custom as was pleaded by them.

26. Reverting to the facts of the present case, in light of the principle of law laid down by the Supreme Court and the Bombay High Court in the above-stated judgments (supra), it is quite vivid that in the instant case, it is the case of the plaintiff that she is female tribal and natural legal heir of Ramsingh and she has claimed the property of her father and it is the case of the defendants that in Gond community by which they are governing, daughters/female are not entitled to inherit the property of their father, as such, the defendants must plead and prove that in Gond caste, daughters are excluded from inheriting the property of their father or would not get any share in the property of their father. Even on the touchstone of the provisions of Sections 101 to 103 of the

9 AIR 1956 SC 548

Evidence Act, daughters were not required to plead and prove that they are not excluded from inheritance as held by Their Lordships of the Supreme Court in Mohammad Baqar (supra), which the defendants failed to prove. Once the plaintiff proved that the suit property belonged to her father and she being natural heir (female) would be entitled to inherit the suit property and the defendants failed to plead and establish the customary law governing their tribe which excludes the female/daughters from inheritance, the suit ought to have decreed. Both the Courts below have dismissed the suit after having held that the plaintiff has failed to establish any such custom by which daughters would inherit the property of their father though there cannot be any presumption that the customary law governing the tribe excludes female from inheritance of their father and imposing the burden on the daughter to plead and establish that she is not so excluded from inheriting the property of their father.

27. In the considered opinion of this Court, both the Courts below were absolutely unjustified in holding that the plaintiff has failed to establish a valid custom by which the daughters would inherit the property of their father, rather it was the defendants to plead that daughters do not succeed

to their father's property, as such, the judgment and decree of both the Courts below being contrary to law deserve to be and are hereby set aside and the plaintiff's suit would stand decreed and held that the plaintiff is entitled for declaration of the title of the property shown in Schedule 'A' appended with plaint and the defendants are directed to deliver vacant and peaceful possession of the suit property to the appellant/plaintiff within 30 days from the date of receipt of copy of this judgment.

28. The second appeal is allowed to the extent indicated hereinabove. Parties shall bear their own cost(s). This Court appreciates the assistance rendered by Mr.Ravi Bhagat, Advocate, who appeared as amicus curiae.

29. A decree be drawn up accordingly. Schedule 'A' of the plaint be made part of the decree.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-