

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.163 of 2006

1. Bhanu Ram, S/o Shri Babulal Gond, aged about 35 years.
 2. Santram (dead) through LRs: -
 - 2(a). Agasiya Bai, W/o Late Santram, aged about 44 years.
 - 2(b). Kamal Singh, S/o Late Santram, aged about 28 years.
 - 2(c). Jayant, S/o Late Santram, aged about 25 years.

All No.2(a) to 2(c) R/o Village Amadula, Tahsil Balod, District Durg, now Balod (C.G.)
 3. Narendra, S/o Shri Babulal Gond, aged about 30 years.
 4. Preet Ram, S/o Shri Babulal Gond, aged about 28 years.
- All No.1, 3 and 4 farmer and resident of Village Aamadula, Tahsil Balod, District Durg (C.G.)
- (Plaintiffs)
---- Appellants

Versus

1. Mahar Singh (dead) through LR-
 - (a) Bhuwan Ram Darra, S/o Late Mahar Singh, aged about 40 years, R/o Village Telguda, Tahsil Charama, District Kanker (C.G.)
 2. State of Chhattisgarh, through Collector, Kanker, Tahsil, P.O. and District Kanker (C.G.)
- (Defendants)
---- Respondents

For Appellants:	Mr. R.N. Jha, Advocate.
For Respondent No.1(a): -	Mr. Raghavendra Pradhan and Mr. Shikhar Sharma, Advocates.
For Respondent No.2 / State: -	Mr. Aakash Pandey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

13/11/2019

1. This second appeal preferred by the plaintiffs / appellants was

admitted for hearing by framing the following two substantial questions of law: -

“(1) Whether the lower appellate Court was not justified in holding that the original defendant no.2 Dashmat Bai was having no right to execute sale deed according to the custom being the widow of the Gond community and also being remarried before the date of sale?

(2) Whether the lower appellate Court erred in law in holding that defendant no.1 was an adopted son of Dharam Singh?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the suit before the trial Court.)

2. The suit property was originally held by Dharam Singh. He died on 9-12-1974 leaving behind his wife Dashmat Bai. Dashmat Bai sold the suit land area 10.17 acres situated at Village Tirkadand, Tahsil Charama, Distt. Kanker, vide Ex.P-1 in favour of the plaintiffs and prior to alienation, the name of Dashmat Bai was recorded in the revenue records which was challenged originally by defendant No.1 Mahar Singh claiming to be the adopted son of Dharam Singh & Dashmat Bai and also challenged the sale deed dated 20-1-1977 before the revenue court. It is the case of the plaintiffs that the sale deed was set-aside by the Commissioner leading to filing of suit for declaration of title and permanent injunction over the suit land area 10.17 acres in which defendant No.1 setup the plea that he is the adopted son of Dharam Singh & Dashmat Bai as per the custom prevailing in the Gond community and the sale deed dated 20-1-1977 is null and void and prayed that the suit be dismissed.
3. Upon appreciation of oral and documentary evidence on record, the trial Court held that the adoption was not proved by defendant No.1,

by Dharam Singh & Dashmat Bai and the plaintiffs having purchased the suit land from Dashmat Bai on payment of consideration, and the revenue Court has no jurisdiction to declare the sale deed as void and accordingly, decreed the suit and also granted permanent injunction in favour of the plaintiffs. On appeal being preferred by defendant No.1, the first appellate Court allowed the appeal and set-aside the decree of the trial Court by dismissing the suit holding that adoption by Dharam Singh – original holder of the land & Dashmat Bai is proved and further held that since Dashmat Bai has entered into second marriage after death of her husband Dharam Singh, therefore, she has lost the right to property, even otherwise, Dashmat Bai was the aboriginal tribe and in their custom, widow has no right to alienate the property after death of husband, which has been questioned in this second appeal preferred by the plaintiffs and in which two substantial questions of law have been framed which have been set-out in the opening paragraph of this judgment.

4. Mr. R.N. Jha, learned counsel appearing for the appellants / plaintiffs, would submit that the finding recorded by the first appellate Court holding that original defendant No.1 was the adopted son of Dharam Singh & Dashmat Bai, is absolutely perverse and contrary to record. He would further submit that there is no pleading that Dashmat Bai has ever remarried with someone after death of her husband Dharam Singh and further, according to Section 6 of the Central Provinces Laws Act, 1875, even if the Hindu Succession Act, 1956 is not applicable, widow would be entitled to inherit her husband's property and she cannot be

deprived of the property of her husband, as right to property is a constitutional right under Article 300-A of the Constitution of India. As such, the first appellate Court is absolutely unjustified in setting-aside the well-reasoned and well-merited judgment & decree of the trial Court, that be set-aside and the appeal be allowed restoring the judgment & decree of the trial Court.

5. Mr. Raghavendra Pradhan, learned counsel for respondent No.1 / legal representative of the original defendant No.1, would submit that the first appellate Court is absolutely justified in holding that defendant No.1 was the adopted son of Dharam Singh & Dashmat Bai and the first appellate Court is further justified in holding that Dashmat Bai being the widow as a member of aboriginal tribe, did not have salable right in the suit property to the plaintiffs and even otherwise, she having entered into remarriage, has lost her property rights, therefore, even she could not have alienated the suit property in favour of the plaintiffs as such, no exception can be taken into the judgment & decree of the first appellate Court and the appeal deserves to be dismissed.
6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
7. For the sake of convenience, the second substantial question of law with regard to adoption is taken first.
8. The trial Court has framed issue with regard to the fact as to whether defendant No.1 Mahar Singh was the adopted son of Dharam Singh & Dashmat Bai to whom the said property belonged

and returned finding based upon oral and documentary evidence that he is not the adopted son of Dharam Singh & Dashmat Bai. The trial Court clearly recorded that in all the documents filed by the defendants – Exs.D-1 to D-7, name of the father of defendant No.1 is recorded as Ramji Gond i.e. the natural father and no other document has been filed showing the father of defendant No.1 as Dharam Singh – adoptive father. The first appellate Court has also taken note of the statement of defendant No.1 Mahar Singh that in school his father's name is recorded as Ramji who is resident of Telguda, Tahsil Charama, whereas Dharam Singh & Dashmat Bai were staying at Village Tirkadand, Tahsil Charama and he is in possession of his natural father's property. The trial Court has even noted the statement of Hajari Ram (DW-3) to hold that defendant No.1 is still cultivating the land owned by his natural father Ramji, and no documentary evidence has been filed to say that his father's name is Dharam Singh – adoptive father and thereby disbelieved the story of adoption projected by defendant No.1. Whereas, the first appellate Court reversed this finding relying upon the statement of Narayan Singh (DW-1) that ceremony of adoption took place in the house of Ramji and defendant No.1 was adopted by Dharam Singh & Dashmat Bai and the fact of defendant No.1's cultivating and possessing the land held by Ramji could have no consequence, as the adopted son can cultivate the land of his natural father. Dashmat Bai has admitted the fact of Mahar Singh having been adopted, in the Tahsil Court.

9. A careful scrutiny of the statement of defendant witnesses, particularly of defendant No.1 Mahar Singh (DW-2), would show

that defendant No.1 has clearly admitted that his father's name is Ramji – natural father and he has also admitted the fact that his father is resident of Village Telguda and he stayed therein and in the school, his father's name is recorded as Ramji, whereas, his alleged adoptive father Dharam Singh stayed at Village Tirkadand which is at a distance of 13 Kms. from Village Telguda. Likewise, in all the documents Exs.D-1 to D-7 filed by the defendants which are copies of kistbandi khatauni of the years 1983-84, 1992-93, 2000-2001, 1984-85 and 2000-2001, father's name of defendant No.1 is recorded as Ramji. As such, there is sufficient evidence available on record to hold that father of defendant No.1 was his natural father Ramji and there is no mention of any other document that he was ever adopted by Dharam Singh. Even in the school records, as admitted by defendant No.1, his father's name is recorded as Ramji – natural father. If defendant No.1 was really adopted by Dharam Singh, his father's name as Dharam Singh could have been recorded not only in the revenue records, but also in the school, but admittedly, it was not recorded obviously for the reason that there is no adoption at all. Even otherwise, there is no evidence on record to hold that his natural father namely, Ramji had given defendant No.1 in adoption to Dharam Singh & Dashmat Bai in any ceremony held to adopt defendant No.1 which is very much essential even under the Hindu Adoptions and Maintenance Act, 1956, though it is not applicable, but, drawing the analogy, it ought to have been pleaded and established that natural father of defendant No.1 – Ramji given defendant No.1 on adoption in a specific ceremony to Dharam Singh & Dashmat Bai, as such, there

is no evidence brought on record to that effect, even though Dashmat Bai was impleaded as defendant No.2 before the trial Court, but subsequently, her name was deleted from the plaint on her death. Therefore, the finding recorded by the first appellate Court that defendant No.1 was the adopted son of Dharam Singh & Dashmat Bai is a finding which is contrary to the record and being perverse, it is liable to be set aside and the finding of the trial Court holding that defendant No.1 has failed to prove that he is the adopted son of Dharam Singh & Dashmat Bai to whom the property belonged, is liable to be restored. It is held accordingly.

10. This will lead me to the first substantial question of law.

11. It was pleaded by defendant No.1 that Dashmat Bai being the widow of Dharam Singh, was the member of aboriginal tribe, therefore, as per the custom, a tribal widow had no right to alienate the property held by her husband. The trial Court relying upon the statement of Narayan Singh (DW-1) who has stated that in Gond caste, widow has right to alienate the property of her husband, held that defendant No.1 has failed to prove the custom which is required to be pleaded and established that widow had any such right and answered issues No.2 & 10 in negative, but the first appellate Court reversed the finding that in Gond caste, a tribal widow had no right to alienate the property of her husband, as she would not succeed. It is clear from the record that both the parties have failed to establish the custom governing succession in their caste.

12. The Central Provinces Laws Act, 1875 has been enacted to regulate the inheritance, special property of females, betrothal,

marriage, dower, adoption and other system and customs.

Sections 5 and 6 of the said Act reads as follows: -

“5. Rule of decision in cases of certain classes.- In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be the Muhammadan Law in cases where the parties are Muhammadans, and the

Hindu Law in cases where the parties are Hindus, except in so far as such law has been by the legislative enactment altered or abolished, or is opposed to the provisions of this Act:

Provided that when among any class or body of persons or among the members of any family any custom prevails which is inconsistent with the law applicable between such persons under this section, and which if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to.

6. Rules in cases not expressly provided for.- In cases not provided for by section 5, or by any law for the time being in force, the Courts shall act according to justice, equity and good conscience.”

13. Their Lordships of the Supreme Court have also in the matter of

M.V. Elisabeth and others v. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama,

Goa¹ held that where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience. It was observed as under: -

“86. The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access

1 1993 Supp (2) SCC 433

to court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.”

14. Now, the question is, what is meaning and significance of the expression “justice, equity and good conscience”.

15. In the matter of U. Bransly Nongaiang v. U. Drolishon Syiemiong and others², meaning and significance of the expression “justice, equity and good conscience” has been considered by the Gauhati High Court and it was held as under: -

“The Formula "Justice, Equity and Good Conscience"—The origin of the formula lie in the Romeo canonical sources, way back in the 16th Century. Late the formula was applied in Italy, Germany and France. It appealed the English legal system which modified and incorporated it in their own system. The preamble to the Act of Succession enacted in 1536 used the expressions "Equity, reason and good conscience". The East India Company carried the principle to India. In 1688, the Judges appointed in Bombay under the Company's Law were "to behave themselves according to good conscience". The Royal Charters of 1683, 1687, 1726 and 1753 also used the expressions "Equity and Good Conscience" and "Justice and Right". The Regulation of 1781 enjoined that in all cases for which no directions were given the respective Judge "do act according to justice, equity and good conscience". The principles were to be applied where positive law or custom did not assist the Court to dispense judicial Justice. Indeed, the term "Justice" eludes a precise definition. It means the constant and perpetual disposition to render to every man his due. The Courts are to administer "commutative justice" and "distributive justice" as well. The expression "commutative justice" means that virtue whose object is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, so that no one may be gainer by another's loss. The expressions "distributive justice" means that virtue whose object is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have

2 (1986) 2 Gauhati Law Reports 487

unequal things nor unequal persons things equal. "Equity' is a system of law or rules more consonant than the ordinary law which opinions current for the time being as to a just regulation of the mutual rights and duties of men living in a civilized society, vide Halsbury's Laws of England, 3rd Edn., Vol. 14, p. 464. "Equity' according to Blackstone means "that portion of remedial justice which was formerly exclusively administered by a court of Equity as contra-distinguished from that portion which was formerly exclusively administered by a court of common law" - vide Blackstone's Commentaries, 429-437. The meaning of the expressions "Justice, equity and good conscience" was summed up by Lord Hobhouse in *Waghela Rajsanji v. Shekh Masludin* (1887) 13 Ind. Appl. 89(96). "Justice, equity and good conscience" could be interpreted to mean the rules of English Law and found applicable to Indian society and circumstances".

16. In the matter of Chuiyya s/o Jhadi and another v. Mangari Bai and another³, the M.P. High Court while dealing with the issue of inheritance of property of father by daughter belonging to "Oraon tribe" held as under: -

"It is true that the provisions of Hindu Succession Act, 1956 do not apply to the members of the Scheduled Tribe as per section 2(2) of this Act. It is also true that parties are Scheduled Tribes. In the absence of son the daughter was entitled to inheritance and she used to get "limited Estate" and on her death it used to pass on to the reversioners of her father. That rule has been abrogated. Section 14 of the Hindu Succession Act, 1956 confers full heritable capacity on a female heir. There is no definite evidence that amongst the Oraons a daughter is excluded from inheriting the property of her father. There should be no disparity in the rights of man and woman in matters of succession and inheritance. This is recognized in all the systems. It is for the person setting up the plea of exclusion of daughter from inheritance to prove and establish that there is such a caste custom. A custom is a rule which has by long usage obtained the force of law. It must be ancient, certain and reasonable. The daughter is entitled to the share in the lands in dispute."

17. Similarly, in the matter of Sukhmani and others v. Jagarnath⁴, the M.P. High Court applying the principles of equity, justice and good

³ 2000(2) M.P.L.J. 441

⁴ 2000 RN 301

conscience, finding no provision of law governing right to succession among Gond-caste held as under: -

“10. The trial Court had rightly held that the daughters are entitled to a share in the property of father in the Gond community and they along with Sonamati and the respondent succeeded to the property of Jatu. After the death of Sonamati half share of Sonamati was also transmitted to the appellants as there was no prohibition in law to succeed the property of their step-mother. In fact, sections 5 and 6 of the Central Provinces Law read together would show that in absence of any law governing the right to succession, the principles of equity, justice and good conscience shall apply.

11. For all these reasons, this Court comes to the conclusion that the appellants and the respondent are entitled to 1/6th share each in the suit property.”

18. This Court also in the matter of **Mst. Sarwango and others v.**

Mst. Urchamahin and others⁵, applying Section 6 of the Central Provinces Laws Act, 1875, held that in absence of any law of inheritance or custom prevailing in Gond-caste, Courts are required to decide right according to justice, equity and good conscience and allotted ½ share to daughters on the property left by their father. It was observed as under: -

“10. In the present case, both the parties have failed to prove any law of inheritance or custom prevailing in their Gond caste i.e. member of Scheduled Caste whom Hindu Law or other law governing inheritance is not applicable. In absence of any law of inheritance or custom prevailing in their caste governing the inheritance the Courts are required to decide the rights according to justice, equity and good conscience in term of Section 6 of the Act. Plaintiffs Sawango and Jaituniya are daughters of Jhangal, nearest relative rather the respondents, who were daughter-in-law of brother of Jhangal and legitimate or illegitimate son of Balam Singh, son of Dakhal.

11. In these circumstances, plaintiffs Sawango and Jaituniya would be the persons' best entitlement to inherit the property left by their father. The Courts below ought to have decreed the suit for partition to the extent of

5 AIR 2013 Chhattisgarh 98

share of Jhangal, but the Court below i.e. the lower appellate Court has allowed the appeal and dismissed the suit in absence of any law or custom for inheritance for a member of Schedule Tribe. The Courts below are required to decide their rights of inheritance in accordance with the provisions of Section 6 of the Act applicable to the State of Chhattisgarh and undivided State of Madhya Pradesh.“

19. In view of the aforesaid legal position, it is held that defendant No.1 has failed to establish that being the members of aboriginal tribe, they have given up their customary succession and have become “Hindus out-and-out” or “sufficiently Hinduised” and in the matter of succession they are governed by any particular School of Hindu Law. Consequently, the legislative bar contained in Section 2(2) of the Hindu Succession Act, 1956 would apply in full force and hence, the provisions of the said Act would not apply to the parties to suit i.e. Gond caste in absence of notification by the Central Government applying the provisions of the Act of 1956 to them and in absence of any law of inheritance or custom prevailing in Gond caste, the provisions of Section 6 of the Central Provinces Laws Act, 1875 would apply as held above and the courts are required to decide right according to justice, equity and good conscience applying the said principles and following the principles of law laid down in this behalf in the above-stated judgments – Sukhmani (supra) and Mst. Sarwango (supra). It is held that Dashmat Bai would succeed the property of her husband and she has also the salable right over the suit property.
20. The first appellate Court has also held that since Dashmat Bai has remarried after death of her husband Dharam Singh on 9-12-1974, therefore, she could not have alienated the suit property on 20-1-1977, as she has become disqualified from alienating the suit

property. The finding recorded by the first appellate Court cannot be accepted for two reasons. Firstly, in the written statement filed by defendant No.1, there is no whisper about the fact of remarriage by Dashmat Bai after death of Dharam Singh. In order to prove, remarriage, performance of all the ceremonies will have to be done in her remarriage. There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies, therefore, performance of all ceremonies is necessary for completion of marriage. The effect of valid remarriage is the widow losing her right in the property inherited from the previous husband. Therefore, where the fact of remarriage is set up as defence, it has to be strictly proved looking to the devastating consequence to be befallen upon widow in shape of depriving her right to property. As such, there is no pleading and proof of remarriage by Dashmat Bai after death of her husband Dharam Singh. Even otherwise, Hajari Ram (DW-3) has clearly stated in paragraph 7 of his statement that after death of Dharam Singh, Dashmat Bai stayed in the house of Dharam Singh for 4-5 years. Dharam Singh died on 9-12-1974 and the sale deed was executed on 20-1-1977, as such, even on facts, the finding recorded is perverse. One more reason is that, in the instant case, the first appellate Court has held that since Dashmat Bai remarried (though the said fact is not established), therefore, she has lost her right over the property.

21. At this stage, Section 2 of the Hindu Widow's Remarriage Act, 1856 requires to be noticed which provides as under: -

“2. Rights of widow in deceased husband's property

to cease on her remarriage.—All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.”

[The Hindu Widow's Remarriage Act, 1856 was repealed by the Hindu Widows' Re-marriage (Repeal) Act, 1983 with effect from 31-8-1983.]

22. A focused glance of the aforesaid provision would show that the said provision has taken away the right of a widow in the event of remarriage and the provision is very specific to the effect that widow on remarriage would be deemed to be otherwise dead and in the event of remarriage, one loses the rights of even limited interest in such property. This position continued till the Hindu Succession Act, 1956 came into operation with effect from 18-5-1956. Section 4 of the Hindu Succession Act, 1956 has an overriding effect. The provisions of the Hindu Succession Act, 1956, thus, shall prevail over the text of any Hindu law or the provisions of the 1856 Act and Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Sections 4 and 24 thereof. (See Cherotte Sugathan (Dead) Through LRs. and others v. Cherotte Bharathi and others⁶.)

23. After coming into force of the Hindu Succession Act, 1956, the provisions of the Hindu Widow's Remarriage Act, 1856, would not prevail and widow on remarriage, would not lose her right which

⁶ (2008) 2 SCC 610

she had otherwise. In view of that, since the fact of remarriage has not been expressly pleaded nor it has not been proved and widow had right to alienate the property, the finding recorded by the first appellate is contrary to law and is perverse. As such, judgment & decree of the first appellate Court are set-aside and that of the trial Court are restored.

24. The substantial questions of law are answered accordingly and the second appeal is allowed to the extent indicated herein-above. No order as to cost(s).

25. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma