

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.257 of 2001**

1. Godhtin Bai W/o Madwari aged about 34 years, Kanwar
2. Amasobai W/o Sudhan Ra, aged about 40 years, Kanwar

Both cultivator, R/o village Sarmana, Distt. Sarguja (CG)

---- Appellants

Versus

1. Khorai Bai D/o Thaula, aged about 50 years, Kanwar
 2. Sukhdeo S/o Thaula, aged about 65 yers, Kanwar
- Both R/o village Sarmana Tehsil-Sitapur, Distt. Sarguja (CG)
3. State of Chhattisgarh through Collector Sarguja

---- Respondents

For Appellants	:	Mrs.Renu Kochar, Advocate
For Respondents No.1&2	:	Ms Neha Verma, Advocate
For Respondent No.3	:	Mr.A.N.Bhakta, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

03.01.2019

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

“Whether in absence of any documentary evidence the appellate Court was justified in reversing the findings of the trial Court by holding that the suit property described in plaint schedule-D was given to the plaintiff Khorai Bai by the defendant No.1 Bhimsai ?”

[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. Plaintiff-Khori Bai, daughter of Tilo Bai out of her wedlock with Thaula filed a civil suit for declaration of title and permanent injunction stating inter-alia that her brother Bhim Sai performed her marriage as Gharjian with Pitambar and she & her husband Pitambar were kept in his house during lifetime of Bhim Sai as per custom prevalent in Kanwar aboriginal tribe Gharjian marriage is permissible by father/brother, therefore, she is entitled for suit property after death of Bhim Sai and prayer was made for decreeing the suit.
3. The defendants filed their written statement and admitted the fact that the parties are Kanwar by caste and pleaded that in presence of male member, female member does not get any interest in ancestral property and further pleaded that if the father does not have son then the father can keep her daughter and daughter's husband after her marriage as Gharjian, but there is no custom prevalent in Kanwar aboriginal tribe that brother has a right to keep her sister/step-sister as Gharjiha after her marriage and therefore, she has no right or interest in the suit property.
4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 16.6.94 dismissed the suit finding that there is no custom prevalent in Kunwar aboriginal tribe that brother can keep her sister/step-sister as Gharjiha after her marriage and therefore, she has not inherited

the property of Bhim Sai.

5. On appeal being preferred by the plaintiff, the First Appellate Court reversed the finding of the trial Court and decreed the suit.
6. Questioning legality and validity of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.
7. Mrs.Renu Kochar, learned counsel for the appellants/defendants, would submit that the First Appellate Court is absolutely unjustified in holding that the plaintiff has succeeded in proving the custom though among Kanwar aboriginal tribe brother can keep her sister and sister's husband as Gharjian after her marriage, as such, there is no evidence on record to hold so. Therefore, the judgment and decree passed by the First Appellate Court deserves to be set aside.
8. On the other hand, Ms Neha Verma, learned counsel for respondents No.1 and 2, would support the impugned judgment and decree.
9. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumscription.
10. It is the case of the plaintiff that her step-brother Bhim Sai has taken her as Gharjian after her marriage with Pitambar and since

then they were staying with Bhim Sai and therefore, as per custom prevalent in Kanwar aboriginal tribe, she has inherited the property of Bhim Sai, which has been accepted by the trial Court. However, the First Appellate Court did not agree with the said finding and reversed the said finding.

11. It is well settled that a custom is a rule, which in a particular family or a particular class or community, or in a particular district, has from long usage, obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly. It is further essential that it should be established to be so, by clear and unambiguous evidence, for it is only by means of such evidence that the courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends. It must not be opposed to morality or public policy, and it must not be expressly forbidden by the legislature. It is incumbent on a party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. (See Laxmibai v. Bhagwanthuwa¹).

12. The Supreme Court in the matter of Salekh Chand (Dead) by LRs. v. Satya Gupta and others² has held the essential of valid custom as under:-

“21. In Mookka Kone v. Ammakutti Ammal³, it was held that where custom is set up to prove that it is at

1 AIR 2013 SC 1204

2 (2008) 13 SCC 119

3 AIR 1928 Mad 299

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.

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.

23. 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.

26. 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.

27. 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.”

13. Reverting to the facts of the present case in the light of above-stated preposition, the question is whether the plaintiff has succeeded in proving the custom prevalent in Kanwar aboriginal tribe in which brother is entitled to keep her sister/step-sister as Gharjian after her marriage and entitled to succeed the property of her brother.
14. The system of serving for a wife is known as Gharjian and is generally resorted to by widows having daughters (See page No.395 Volume-III, The Tribes and Castes of the Central Provinces of India by R.V. Rusell & Hira Lal.)
15. In order to prove the custom, the plaintiff has examined herself as PW-1 in which she has stated that in Kanwar aboriginal tribe, sister and daughter can be kept as Gharjian after her marriage. Makhan Ram (PW-2) has also stated in the same manner. Sukhdev (PW-3) has stated that Bhim Sai has performed marriage of her sister-Khori Bai with Pitambar and thereafter they started residing in the house of Bhim Sai. The defendants has admitted the case of the

plaintiff that in Kanwar aboriginal tribe, father can keep her daughter after marriage of her daughter and her husband as Ghargiha in case he has no son. It is the case of the defendants that brother cannot keep her sister after her marriage as Gharjian. It was incumbent upon the plaintiff to prove and establish by legal evidence of clinching nature that in Kanwar aboriginal tribe, brother can keep her sister and her husband as Gharjian after her marriage and she is entitled for property of his brother. In fact, the plaintiff and her witnesses Makhan Ram (PW-2) and Sukhdev (PW-3) have made self-serving statement. Nothing has been brought on record to establish the valid custom prevalent in Kanwar caste that brother can keep her sister and her husband after her marriage as Gharjian and she is entitled to succeed the property of his brother. No oral and documentary evidence indicating the custom prevalent among Kunwar aboriginal tribe has been brought on record by the plaintiff to establish the custom. The trial Court after analyzing the evidence available on record has rightly held that the plaintiff has failed to prove the custom of brother keeping her sister as Ghargiha and getting the property by succession, which has reversed by the First Appellate Court by recording the finding, which is perverse and contrary to record. Accordingly, the substantial question of law is answered in favour of the defendants and against the plaintiff.

16. In view of that, the judgment and decree passed by the First Appellate Court is hereby set aside and that of the trial Court is

hereby restored.

17. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

18. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-