

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 145 of 2003

1. Matukdhari Singh (Dead) Through Lrs.

1.1 - Smt. Balbundri Bai, Widow Of Late Shri Matukdhari Singh, Aged About 45 Years, R/o Village Kotya, Tahsil Ambikapur, District Surguja, Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh

---- Appellant

Versus

1. Jhingo Bai (Dead) Through Lrs.

1 (i) Baldev S/o Shri Bhagat Aged About 60 Years, R/o Village Saskalo, P. S. Darima, Tahsil Ambikapur, District Surguja, Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh

1 (ii). Rambhajan S/o Shri Bhagat Aged About 65 Years R/o Village Saskalo, P. S. Darima, Tahsil Ambikapur, District Surguja, Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh

2. Mohan Singh, S/o Kunwar Say and late Kirtikunwar, Occupation Agriculture Aged About 28 Years, R/o Village Puhputra, Tehsil Ambikapur, District Surguja, Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh

3. (A). Sambodhan Ram S/o Thakur Ram, Aged About 55 Years, Occupation Agriculture, R/o Village Sidhma, Post Kakna, P. S. Dhaurpur, Tehsil Rajpur, District Surguja, Chhattisgarh.Plaintiff., District : Surguja (Ambikapur), Chhattisgarh

(B). Manohar Singh S/o Sambodhan Ram Aged About 25 Years, Occupation Agriculture, R/o Village Sidhma, Post Kakna, P. S. Dhaurpur, Tehsil Rajpur, District Surguja, Chhattisgarh.Plaintiff., District : Surguja (Ambikapur), Chhattisgarh

(C). Prem Singh S/o Sambodhan Ram Aged About 22 Years, Occupation Agriculture, R/o Village Sidhma, Post Kakna, P. S. Dhaurpur, Tehsil Rajpur, District Surguja, Chhattisgarh.Plaintiff., District : Surguja (Ambikapur), Chhattisgarh

(D). Naresh S/o Sambodhan Ram Aged About 20 Years, Occupation Agriculture, R/o Village Sidhma, Post Kakna, P. S. Dhaurpur, Tehsil Rajpur, District Surguja, Chhattisgarh.Plaintiff., District : Surguja (Ambikapur), Chhattisgarh

4. The State Of M. P. (Now Chhattisgarh) Through Collector District Surguja, Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh

Defendant No.2.

---- Respondents

For Appellants	:	Shri Vivek Bhakta, Advocate
For Respondent No.1	:	None appears
For Respondent No.4/State	:	Shri Aditya Bhardwaj, Panel Lawyer

S.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

18/07/2019

Heard.

1. This appeal is to be heard on following two substantial questions of law, framed by this Court on 18.3.2019 :-

“ 1. Whether the first appellate Court is justified in holding that Gendi was not entitled to execute a 'Will' dated 22.6.1987 (Ex.D-12) in respect of Hindu undivided family property ?

2. Whether Gendi was entitled to execute a 'Will' in favour of defendant No.1 as Section 30 of the Hindu Succession Act, 1956 is not applicable to the parties being an aboriginal tribe by virtue of the provisions contained in sub-section (2) of Section 2 of the Hindu Succession Act, 1956 ? ”

2. Respondents- plaintiffs filed a suit seeking declaration, permanent injunction and possession of the land in dispute on the pleadings inter alia that the plaintiffs are successors of Ramsay and Rameshwar. Premsay, Ramsay and Rameshwar were three brothers possessing joint property. It was pleaded that after Premsay, his widow Gendibai succeeded. The parties belong to “kanwar (कंवर)” aboriginal tribe, the provision of Hindu Succession Act, 1956 or old Hindu Code is not applicable to them and in the matter of succession, their customary law is applicable according to which, widow of a deceased is only entitled to limited interest that she can only earn her livelihood from the property of her husband during her lifetime, but she cannot dispose off the property in any manner and after her death, the property would revert back to other survivors. It was pleaded that without

any authority of law, Gendibai executed 'Will' deed in respect of her share in the property, in favour of defendant No.1 Matkudhari Singh (appellant herein) on 22.6.1987 (Ex.D-12). Tedi, widow of Ramseshwar was misled and misguided by defendant No.1- Matukdhari Singh to seek partition in equal share which fact came to knowledge and notice of the plaintiffs later on and as the defendant No.1-Matukdhari asserted half share in the property on the strength of 'will deed' dated 22.6.1987, a cause of action arose for the plaintiff to file suit. A declaration was sought that the 'Will' executed on 22.6.1987 by Gendi in favour of defendant No.1 is illegal and inoperative and that the property in dispute be delivered to plaintiffs and the defendant No.1 be restrained from interfering with plaintiffs' possession.

3. Defendant No.1- Matukdhari Singh came out with the case that according to the prevalent customs and customary law applicable in respect of "kanwar (कंवर)" aboriginal tribe, after death of the husband, wife succeeds to as full owner and not in limited interest and she not only gets right to keep the property during her lifetime, but she has full rights to dispose off the property in the manner she likes which may include sale, will, gift etc.
4. Learned trial Court framed as many as eleven issues. The first issue was whether the parties are governed by the customary law of their own community. Learned trial Court held that the provision of Hindu Succession Act, 1956 are not applicable. However, the witnesses having deposed that they follow Hindu religion and that in their community, it is customary law that after death of husband, his widow succeeds to the property, it held that after the death of husband- Premsay, Gendi succeeded to his property as absolute owner and had absolute title to execute 'sale deed'. The suit was dismissed.
5. On appeal being filed by the plaintiffs, the learned lower appellate Court reversed the judgment and decree by holding that the widow had no right to bequeath by 'Will', undivided share in the joint family property and on that ground, held that the 'Will' was incapable of conferring any valid title on defendant and thus decreed the suit.
6. Learned counsel for the appellant/defendant would argue that as it was the case of the plaintiffs that they are governed by their own customary law and not by the Hindu Succession Act, 1956 or the pre-existing customary

Hindu Law prior to coming into force of Hindu Succession Act, 1956. It was the heavy burden on the plaintiffs to come out with specific evidence, but the plaintiffs have neither specifically pleaded nor led clinching evidence to establish that in their customary law, a widow only gets limited interest in the property to earn livelihood during her lifetime without any right to dispose off by sale, 'will' etc. He would argue that plaintiffs' own witnesses have admitted in the cross-examination that in their customary law, the widow not only succeeds to property but she gets it in her full ownership and can dispose off the same also which included dispossession by way of 'Will'. Learned counsel for the appellant would further argue that even if there is no notification issued as required under Section 2(2) of the Hindu Succession Act, 1956, provision of Hindu Succession Act, 1956 will become applicable and in view of provision contained in Section 30 of the Act, the widow is otherwise entitled to dispose off her share as she acquires absolute ownership with all attributes of right over a property.

7. I have heard learned counsel for the parties and perused the records of the Courts below.
8. As far as the second substantial question of law framed by this Court is concerned, it is necessary to look into the relevant provisions of law in this regard. Section 2 of the Hindu Succession Act, 1956 provides for the applicability of the Act. Sub-section (2) of Section 2 of the Act provides as below:-

“2. Application of Act.—

x x x
x x x

(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.”

9. A bare reading of the aforesaid provision which is in the form of non-obstante clause, having overriding effect, the applicability of the succession act is excluded in respect of those who are members of any Scheduled Tribes within the meaning of clause (25) of Article 366 of the Constitution of India unless the Central Government by notification in the official gazette, otherwise directs. It is an admitted position that the parties belong to “kanwar (कंवर)” tribe which is an aboriginal tribe. If that be so, a notification is a must for applicability of Hindu Succession Act, 1956. The provision of the Hindu Succession Act, 1956 will not protanto apply.

However, at the same time, if it can be established that the prevalent customs with regard to succession are only those which are applicable to Hindus and it can be established that the Tribes in relation to its customs has been Hinduised, provision of the Act may become applicable notwithstanding the fact that there is no notification issued. This is what has been held by the High Court of Madhya Pradesh in the case of **Kailash Singh Vs. Mewalal Singh Gond** (AIR 2002 MP 112). The decision rendered in the case of **Lalsai Vs. Bodhan Ram and Ors.** (AIR 2001 MP 159) has, therefore, to be understood only in that manner that in all cases, it may not be necessary that for the purpose of applicability of the provisions of Hindu Succession Act, 1956, notification would be necessary.

10. The customary rights of Scheduled Tribes have been preserved under sub-section (2) of Section 2 of the Hindu Succession Act, 1956. The Act by its own force, would not apply to the Scheduled Tribe because of the non-obstante clause under sub-Section (2) of Section 2 unless there is notification issued to extend the applicability of the Act to the Scheduled Tribes. However, if it is proved that according to customary law of a particular Scheduled Tribe, a widow is entitled to inherit property of her husband as full owner, she may get absolute title to the property of her husband.

11. In the case of **Labishwar Manjhi Vs. Pran Manjhi & Ors.**, (2000) 8 SCC 587, the Supreme Court held that even though the parties therein originally belong to the Santhal Scheduled Tribes, upon appreciation of evidence on record having held that they are Hinduised as they are

following Hindu traditions, sub-section (2) of Section 2 of the Act will not apply to exclude the parties from application of Hindu Succession Act, 1956.

12. It is equally well settled principle that a party, whose claim is based on any custom, is required to specifically plead and lead clinching evidence in this regard. In para-4 of the plaint, the plaintiffs have pleaded that as the parties belong to "kanwar (कंवर)" aboriginal tribe, particular provision of Hindu Succession Act or Hindu Code are not applicable and, therefore, their customary laws of succession governs succession, according to which the widow of a deceased only gets limited right of maintenance out of the property of her husband. She has no right to dispose off the property and after her death, the property gets reverted to survivors. This pleading, however, has been specifically denied by the defendant in their written statement and according to the defendant, according to applicable customary law in their community, a widow gets absolute rights in respect of the property/share of her husband and she is not only entitled to enjoy the property during her lifetime but also has full right to dispose off the property by sale, Will or otherwise.
13. In view of specific denial on the part of the defendant, the plaintiffs were required to lead clinching evidence to establish a customary law of succession prevalent in their community that the widow only gets limited interest and not the full or absolute ownership with right to dispose off the property.
14. Jhingo Bai (PW1), though in para 4 & 5 of her examination-in-chief deposes that under their customary law, the widow gets limited interest and she cannot sell the property, in para-16 of her evidence in cross-examination, she admits that a widow gets a share in the property. In para-20 of her cross-examination, she admits that in their community, widow succeeds to the property of her husband and she becomes absolute owner and thereafter, widow is free to deal with the property in the manner she likes.
15. Nanhu Ram (PW3), who also belongs to the same community, states that "kanwar (कंवर)" community follow Hindu religion and according to him, widow gets only limited interest in the property of her husband.

Buddhu Ram (PW4) has also stated on the same line that during

lifetime, widow lives with the family and is maintained and after her death, her property is reclaimed. In para-10 of his cross-examination, however, he admits that after death of husband, widow succeeds to his property.

16. Defendant- Matukdhari Singh (DW1) himself, who also belongs to same community, has deposed that in their community. the customary law is that after death of husband, widow gets property in absolute title.

17. From the aforesaid evidence, though plaintiffs came out with the pleading that widow is entitled to succeed the property of her husband, on which all the witnesses of the plaintiff and defendant have made similar statements, plaintiff- Jhingo Bai (PW1) herself, as a first witness, admits in para-20 of her cross-examination that after the death of husband, widow not only succeeds to property, but she gets it in full ownership and thereafter she is absolutely free to deal with the property. Therefore, from plaintiff's own evidence, the plaintiff has failed to establish on preponderance of probabilities that as per customary law of succession prevalent in their community, widow only gets limited interest in the property after death of husband without right to dispose off the same whether by sale, gift, Will etc.

18. In view of the legal position which has been discussed by this Court in paragraphs hereinabove, it is clear that unless there is a notification issued under sub-section (2) of Section 2 of the Hindu Succession Act, 1956, Hindu Succession Act, 1956 will have no application to the members of aboriginal tribes, but in view of supreme Court's decision in the case of **Labishwar Manjhi** (supra), if it is established that member of original tribe is Hinduised, in the matter of application of customary laws, notwithstanding the absence of notification under sub-Section (2) of Section 2 of the Hindu Succession Act, 1956, Hindu Succession Act may become applicable.

19. In the present case, the plaintiffs themselves have pleaded that Hindu Succession Act and Hindu Laws are not applicable, but there is no evidence also on record to prove that parties who otherwise belong to "kanwar (कंवर)" aboriginal tribe were Hinduised, therefore, for want of notification, provision of Hindu Succession Act, 1956, will have no application in the present case.

20. Accordingly, the second substantial question of law is answered in the manner that the Hindu Succession Act, 1956 was not applicable in the present case. However, in view of finding that the plaintiffs failed to prove that in their customary law, widow only gets limited interest, on the first question of law, it is held that plaintiffs have failed to prove that Gendi Bai was not entitled to execute 'Will' dated 22.6.1987 in respect of Hindu undivided family property.

21. In the result, this appeal is allowed. The impugned judgment and decree passed by the learned lower appellate Court is set aside. Plaintiffs' suit is dismissed.

22. Parties shall bear their respective costs. Let appellate decree be drawn accordingly.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Praveen