

HIGH COURT OF CHHATTISGARH, BILASPUR
Second Appeal No.265 of 2007

1. Bhuneshwar son of Husaini Ram, aged about 35 years,
 2. Chitranjan Prasad Singh son of Husaini, aged about 25 years,
 3. Rajeshari daughter of Husaini, aged about 30 years,
 4. Bijeshwari son of Husaini, aged about 43 years,
- All are by Caste-Kanwar, R.O. Village-Bandana, Post-Coat, Police Station & Tahsil Sitapur, District Surguja (CG)

(Defendants)

---- Appellants

Versus

1. Munna son of Ronha, aged about 40 years, By Caste-Majhwar, R/o Village-Kondagaon, Post-Coat, Police Station & Tahsil Sitapur, District Surguja (CG)
2. Wasu (Dead) through his LR's
 - 2.A. Smt.Jagmaniya W/o Late Wasu, aged about 45 years,
 - 2.B. Shaan Kumari D/o Late Wasu, aged about 12 years,
 - 2.C. Champa D/o Late Wasu, aged about 10 years,
 - 2.D. Samita D/o Late Wasu, aged about 8 years,
 Respondent No.2.B. to 2.D. being minor through natural guardian mother namely Smt. Jagmaniya (respondent No.2.A.)
 All are by Caste-Majhwar, R/o Village Kondagaon, Post-Coat, Police Station and Tahsil-Sitapur, Dist.-Surguja (CG)

(Plaintiffs)

3. State of C.G., through the Collector Surguja (CG)

---- Respondents

For Appellants/Defendants	: Mr.Rakesh Pandey, Advocate
Res.No.1/Plaintiff No.1	: Mr.Sunil Tripathi, Advocate
For LR's of respondent No.2:	None present though served
For Respondent No.3	: Mr.S.K. Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

08/01/2020

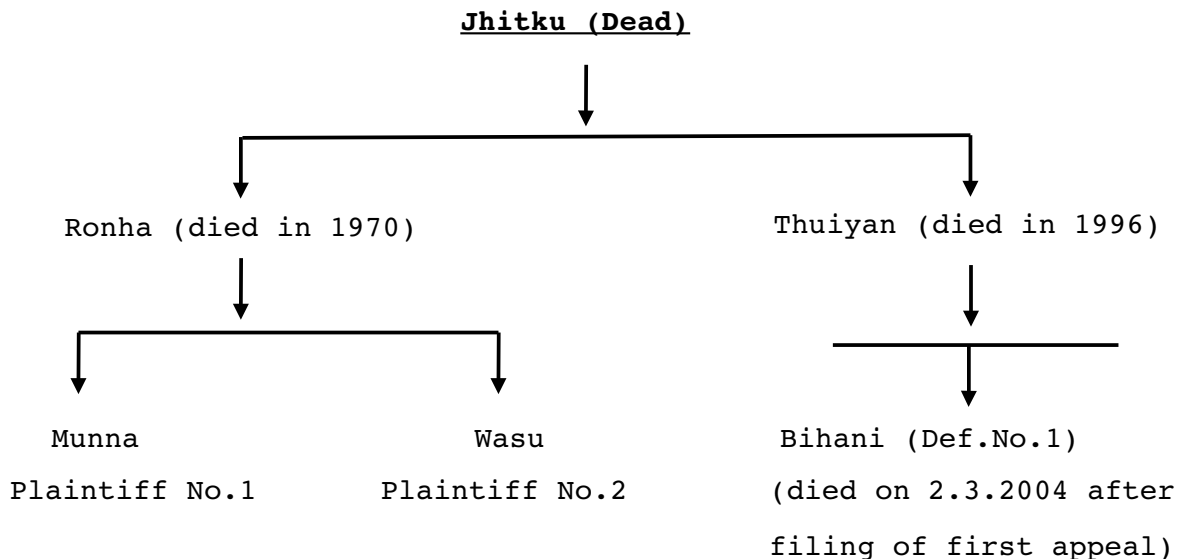
1. This defendants' second appeal under Section 100 of the CPC was admitted for hearing by formulating the

following substantial question of law: -

"Whether both the courts below were justified in holding that defendant No.1 – Bihani had only limited right over the suit property and she is not entitled to alienate the suit property as per customary law even after coming into force of Hindu Succession Act, 1956 i.e. from 17th June, 1956 and, therefore, alienation made by her to defendants No.2 to 5 is not binding on the plaintiff?"

(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. Two plaintiffs-Munna and Wasu filed a suit for declaration of their title and for declaring the sale deed dated 27.1.99 (Ex.P-1) executed by defendant No.1 in favour of defendants No.2 to 5 as null & void alleging that said sale deed has not conferred any title to them. They are by caste-Manjhi (Tribe) and defendant No.1 (widow of

Thuiyan) has only right of maintenance over the suit property and widow has no right to alienate the property of her husband. They are governed by old Hindu law and therefore, alienation made by defendant No.1 in favour of defendants No.2 to 5 is null & void and accordingly, decree be granted in their favour.

4. The defendants have filed their joint written statement and denied the averments made in the plaint stating inter-alia that in Manjhi caste, female (widow) would succeed the property of her husband and as such, alienation made by her in favour of defendants No.2 to 5 is valid and it is incorrect to say that defendant No.1 had limited right over the suit property. Defendant No.1 has right and title over the suit property and she has rightly alienated the suit land in favour of defendants No.2 to 5 and as such, the suit deserves to be dismissed.

5. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 8.1.2003, decreed the suit holding that the parties are governed by old Hindu law and in light of the fact that they are Manjhi by caste and in their community widow gets only limited right of maintenance over the property of her husband, therefore, alienation made by her

in favour of defendants No.2 to 5 is null & void and the plaintiffs are entitled for decree of possession from defendants No.2 to 5. On appeal being preferred by the defendants under Section 96 of the CPC before the first appellate Court, the said appeal Court upheld the judgment and decree of the trial Court by dismissing the appeal, against which, this second appeal under Section 100 of the CPC has been filed 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.Rakesh Pandey, learned counsel for the appellants/defendants No.2 to 5 (purchasers from defendant No.1 as defendant No.1-Bihani has died during pendency of first appeal on 2.3.2004), would submit that Bihani being widow of Thuiyan who died in the year 1996 had full right over the suit property and provisions of the Hindu Succession Act, 1956 (hereinafter called as 'Act of 1956') are not applicable by virtue of Section 2(2) of the Act of 1956. The plaintiffs were required to prove the valid custom that in Manjhi caste, widow does not get any share in the property of her husband which has neither been pleaded nor established by them, but the trial Court has granted decree in favour of the plaintiffs, which has been affirmed by the

first appellate Court, as such, the judgment and decree of both the Courts below deserve to be set aside by allowing the appeal.

7. On the other hand, Mr. Sunil Tripathi, learned counsel for respondent No.1/defendant No.1, would submit that both the Courts below are justified in granting decree in favour of the plaintiffs and in Manjhi caste, widow does not get any share in the property of her husband, which is fully established from the statements of defendant No.1 and Bhogluram (PW-3), as such, the appeal deserves to be dismissed.

8. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

9. Admittedly, the suit property was originally held by Jhitku and after death of Jhitku, it is apparent on record that the suit property fell in share of Thuiyan, husband of defendant No.1-Bihani. Thuiyan was murdered by one of the sons of Ronha (other son of Jhitku) and thereafter defendant No.1-Bihani sold the suit property on 27.1.99 (Ex.P-1) to defendants No.2 to 5 and left that village. The plaintiffs have filed a suit for declaration of their title and for declaring that alienation made by defendant No.1 in favour of defendants No.2 to 5

is null and void as in Manjhi caste, widow does not get any share in the property of her husband and property would revert to the nearest relative of her husband and the plaintiffs being nearest relatives of her husband are entitled to succeed the property of Thuiyan as Bihani has limited right of maintenance over the suit property of her husband.

10. It is admitted position that the parties are Manjhi tribe by caste, they are governed by their own customary law and the provisions of the Hindu Succession Act are not applicable to them by virtue of Section 2(2) of the Act of 1956.

11. The question for consideration would be, whether the plaintiffs, who have claimed that in Manjhi caste widow would not succeed the property of her husband and has only right of maintenance, have pleaded and established the valid custom only giving right of maintenance over the property of her husband ?

12. In this regard, decision of the Supreme Court in the matter of Saraswathi Ammal v. Jagadambal and Another¹ 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

¹ AIR 1953 SC 201

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."

13. Again, in the matter of **Salekh Chand (Dead) by LRs. v. Satya Gupta and Ors.**², 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

2 (2008) 13 SCC 119

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."

14. The Supreme Court in the matter of **Bhimashya**

and Ors. v. Smt. Janabi @ Janawwa³ 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.

³ (2006) 13 SCC 627

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 '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."

15. In the matter of Ratanlal @ Babulal Chunilal Samuska v. Sunderabai Govardhandas Samsuka⁴ 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.

4 AIR 2017 SC 5797

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. 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."

16. In the matter of Madhu Kishwar and others v. State of Bihar and others⁵ 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, 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

5 AIR 1996 SC 1864

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."

17. The Supreme court in the matter of Indian Young Lawyers Association & Ors. v. The state of Kerala & Ors.⁶ (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

6 AIR 2018 SC (Supp) 1650

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

18. Recently, the Bombay High Court in the matter of Babulal Bapurao Kodape and another v. Sau. Resmabai Narayanrao Kaurati and another⁷ 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

⁷ AIR 2019 Bombay 94

of justice, equity and good conscience.

19. The Supreme Court in the matter of Mohammad Baqar and Ors. v. Naimun Nisha Bibi & Ors.⁸ 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.
20. 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 plaintiffs that they & defendant No.1 are Manjhi tribe by caste and defendant No.1 being widow of Thuiyan was not entitled to alienate the property of her husband in favour of defendants No.2 to 5 as she has only right of maintenance over the suit property in accordance with custom prevalent among Manjhi caste, by which widow does not get or inherit the property of her husband except right to maintenance. It must have been pleaded and proved by the plaintiffs that widow in Manjhi caste is excluded from inheriting the property of her husband and would not get any share in the property of her husband except right to maintenance. The

8 AIR 1956 SC 548

plaintiffs have only pleaded in plaint that in Manjhi caste widow has only right of maintenance being limited right and the property would revert to the nearest relative of husband, but simultaneously no clinching evidence is brought on record to establish the said fact except statement of Bhogluram (PW-3), who in para-3 has stated that in Manjhi caste widow does not get any share in the property of her husband. It would be absolutely unsafe to rely upon oral testimony to have a custom established without being any further oral and documentary evidence on record. The Courts below have also relied upon the statement of defendant No.1-Bihani who has stated that in Manjhi caste widow has a right of maintenance to the property of her husband as she has not stated in her statement that widow is excluded from succession/inheritance of property of her husband, as such, the plaintiffs have failed to establish any such custom by which widow would not succeed the property of her husband, therefore, it cannot be presumed that in Manjhi caste, widow is excluded from inheriting the property of her husband, as such, the plaintiffs have failed to establish the custom excluding the widow to inherit the property of her husband except the right of maintenance.

21. Submission of learned counsel for the

plaintiffs that they are governed by old Hindu Law by which woman would get limited right over the suit property deserves to be rejected in the light of decision of this Court in the matter of Smt. Butaki Bai and others v. Sukhbat and others⁹ in which this Court held as under:-

"25. On the basis of forgoing analysis, the following proposition would emerge:-

(i) that the plaintiffs pleading they have abandoned their law of origin (customary law) has to plead and establish by leading appropriate legal evidence that they have given up their customary succession, and

(ii) to establish further that they have become "Hindus out and out" or "sufficiently Hindus" so as to be governed by in matter of succession and inheritance by any school of Hindu law, and thereafter to prove

(iii) that they have adhered to any particular school of Hindu law."

"26. Having ascertained the legal position, turning back to the facts of the instant case, it would appear that according to the plaintiffs, they belong to Halba tribes of Bastar and in matter of succession, they are governed by their own tribal customs prevalent, among them, which is similar to Mitakshara School of Hindu Law and custom as prevalent is very old, continuous and has a force of law in Halba tribes. The plaintiff in the plaint did not particularize the prevalent tribal custom except stating that those custom are similar to that of Mitakshara school of Hindu law and thereafter, proceeded to claim that she is entitled for 1/10th share in the suit land and suit house.

32. Thus, in view of the foregoing discussion, this Court is of the considered opinion that the plaintiff has failed to establish that

9 2014(3) C.G.L.J. 590

members of the Halba scheduled tribe, have given up her 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 enacted under sub-section (2) of Section 2 of Act of 1956 will apply in full force and provision of the Hindu Succession Act 1956 will not apply to parties to suit i.e. Halba Scheduled Tribes in absence of notification by Central Government applying the provision of Act of 1956 to them."

22. In the present case, the plaintiffs have failed to prove that they have given up their customary succession and did not state anything so as to be governed by in the matter of succession and inheritance by any school of Hindu law, and that they have adhered to any particular school of Hindu law, as such, both the Courts below have misdirected in holding that in Manjhi tribe widow would not get any share in the property of her husband and she has only right of maintenance throughout her life and the property would revert to nearest relative of her husband and therefore, alienation made by defendant No.1 in favour of defendants No.2 to 5 is null and void as existence of valid custom governing them for sufficiently long time has not been established giving only right of maintenance of widow, as such, defendant No.1 had right and authority to alienate the suit property being full owner of property to defendants No.2 to 5 and such alienation is in accordance with

law.

23. For the foregoing reasons, the judgment and decree passed by both the Courts below being perverse and contrary to the fact and law available on record deserve to be and are hereby set aside and resultantly, the plaintiffs' suit would stand dismissed. The substantial question of law is answered in favour of the defendants and against the plaintiffs.

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

25. Decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-