

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 162 of 2008**

1. Surjotin Wd/o Late Atmaram, Aged about 46 years, R/o Village Bardevri (Bazarpara), Tahsil and Distt. Kanker, Chhattisgarh.
2. Jait Kumar Halba, Aged about 35 years, R/o Village Chamel, Tahsil Bhanupratappur, Distt. Kanker, Chhattisgarh.
3. Durga D/o Atmaram, W/o Harish Kumar, Aged about 25 years, R/o Village Bansala, Tahsil Bhanupratappur, Distt. Kanker, Chhattisgarh.
4. Maneshwari, D/o Atmaram, Aged about 17 years, R/o Village Bardevri, Bazarpara, Tahsil and Distt. Kanker, Chhattisgarh.
5. Minor Rameshwari D/o Atmaram, Aged about 16 years.
6. Minor Gayatri D/o Atmaram, Aged about 13 years.
7. Minor Rameshwar Singh S/o Atmaram, Aged about 12 years.

No. 4 to 7 are minors and through their natural guardian Surjotin Bai Wd/o Late Atmaram R/o Village Bardevri, Bazarpara, Tahsil and Distt. Kanker, Chhattisgarh.

---Appellants/Plaintiffs

Versus

1. Chamrin Bai W/o Sunaram, Aged about 64 years, R/o Village Bardevri, Bazarpara, Tahsil and Distt. Kanker, Chhattisgarh.
2. Mathurabai W/o Ram Prasad, Caste Halba, Aged about 32 years, R/o Village Bardebhata, Tahsil and Distt. Kanker, Chhattisgarh.

3. Rambha Bai W/o Mukund, Caste Halba, Aged about 28 years, R/o Village Kodabhata, Tahsil and Distt. Kanker, Chhattisgarh.
4. Ramila W/o Rangilal, Aged about 45 years, R/o Village Kunwapani, Tahsil Bhanupratappur, Distt. Kanker, Chhattisgarh.
5. Amila Bai W/o Shyamlal, Caste Halba, Aged about 40 years, R/o Bardevri, Tahsil and Distt. Kanker, Chhattisgarh.
6. State of Chhattisgarh, Through Collector, Distt. Kanker, Chhattisgarh.

--- Respondents

For Appellant	:-	Mr. D.N. Prajapati, Advocate
For Respondents	:-	Mr. Shalvik Tiwari, Advocate
For State	:-	Mr. Anshuman Rabra, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
Order on Board

28/01/2020

1. Heard on admission and formulation of substantial question of law in this second appeal preferred by the appellants/plaintiffs under Section 100 of the CPC questioning the impugned judgment and decree passed by the first appellate Court affirming the judgment and decree of the trial Court by which plaintiffs' suit for declaration of title and possession has been dismissed finding no merit.
2. Mr. D.N. Prajapati, learned counsel for the appellants/plaintiffs would submit that both the Courts below have concurrently erred in not holding

that in 'Halba' community (Scheduled Tribe), daughters do not get any share in the property of their father as the provisions of Hindu Succession Act, 1956 are not applicable to them by virtue of Section 2(2) of the Act of 1956 by recording a finding which is perverse and contrary to record, as such, the second appeal deserves to be admitted for hearing by formulating substantial question of law in this regard.

3. The suit property was originally by Kulanjan who had only one son namely Atmaran and five daughters. Plaintiffs are the widow and children of Late Atmaram and defendants are the daughters of Late Kulanjan.

4. It is the case of the plaintiffs that they belong to 'Halba' community (Scheduled Tribe) and the provisions of Hindu Succession Act, 1956 are not applicable to them by virtue of Section 2(2) of the Act of 1956 and as per their custom, daughters do not inherit the property of their father. Only the son succeeds to his father's property and daughter would inherit the property only if there is no son. They further pleaded that Kulanjan got the suit property from his in-laws' family as he was kept as lumsena by his father-in-law and therefore, sought declaration stating that they are the exclusive

title-holders of the suit property as the defendants, being the daughters of Kulanjan, would not succeed the suit property to which all the defendants except defendant No. 4 opposed and claimed equal share in the suit property.

5. Learned trial Court, upon appreciation of oral and documentary evidence on record, dismissed the suit finding no merit which the first appellate Court also affirmed in the appeal preferred by the plaintiffs holding that plaintiffs have miserably failed to prove and establish the custom that in 'Halba' community (Scheduled Tribe), daughters do not succeed the property of their father and only the son succeeds the property of his father as the provisions of Hindu Succession Act are not applicable to them by virtue of Section 2(2) of the Act of 1956.

6. Plaintiffs have pleaded that in their 'Halba' community (Scheduled Tribe) daughters are not entitled to get any share in the property of their father as the provisions of Hindu Succession Act are not applicable to them by virtue of Section 2(2) of the Act of 1956. The question for consideration would be whether the plaintiffs have been able to plead and establish the valid custom that prevails in their tribe i.e. 'Halba' community

in which daughters do not inherit any share in the property of their father ?

7. 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 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."

8. 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 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."

9. 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.

2(2008) 13 SCC 119

3(2006) 13 SCC 627

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 '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."

10. 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. 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."

11. In the matter of **Madhu Kishwar and others v. State of Bihar and others**⁵ 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 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."

12. 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 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."

13. Recently, the Bombay High Court in the matter of **Babulal Bapurao Kodape and another v. Sau. Resmabai Narayanrao Kaurati and another**⁷ has held that if a

6AIR 2018 SC (Supp) 1650
7AIR 2019 Bombay 94

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.

14. 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.

15. Reverting to the facts of the present case in light of the principles of law laid down by the Supreme Court in the aforesaid decisions, it is quite vivid that both the Courts have concurrently held that though the parties belong to 'Halba' community (Scheduled Tribe), but the plaintiffs have failed

to prove and establish that as per their custom, in 'Halba' community, daughters are excluded from inheriting the property of their father, and also for the reason that there cannot be any presumption that the customary law governing their tribe excludes daughters from inheriting the property of their father. Plaintiffs have failed to discharge their burden placed upon them to prove that daughters do not inherit the property of their father in 'Halba' community, as such, the concurrent finding recorded by both the Courts below holding that plaintiffs have failed to establish the valid custom excluding daughters from inheriting their father's property and therefore, they are not entitled for decree for declaration of title and possession is a finding of fact based on evidence available on record which is neither perverse nor contrary to record and does not give rise to any substantial question of law for determination.

16. The second appeal deserves to be and is accordingly dismissed *in limine* without notice to the other side. No cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge