

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 129 of 2008**

Roopautin Bai Wd/o Late Phoolsingh, Aged about 60 years, R/o Village Pateli, Patwari Halka No. 17, Tahsil Ambagarh Chowki, District Rajnandgaon, Chhattisgarh.

---Appellant/Plaintiff

Versus

1. Sunderi Bai W/o Mehatar Gond, Aged about 50 years, R/o Village Pateli, Patwari Halka No. 17, Tahsil Ambagarh Chowki, District Rajnandgaon, Chhattisgarh.

2. Baisakhin, D/o Narsingh Gond, R/o Village Birhi Kala, Tahsil Ambagarh Chowki, District Rajnandgaon, Chhattisgarh.

3. State of Chhattisgarh, through Collector, Rajnandgaon, Chhattisgarh.

--- Respondents/Defendants

For Appellant	:-	Mr. Anup Majumdar and Mr. Gyan Prasad Shukla, Advocate
For State	:-	Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

12/02/2020

1. Heard on admission and formulation of substantial question of law in this second appeal preferred by the appellant/plaintiff under Section 100 of the CPC against the impugned judgment and decree of the first appellate Court affirming the

judgment and decree by which trial Court dismissed the suit of the plaintiff finding no merit.

2. Mr. Gyan Prasad Shukla, learned counsel for the appellant/plaintiff would submit that both the Courts below have concurrently erred in holding that plaintiff is not the exclusive title-holder of the suit property left by Narad as parties are 'Gond' by caste and as per their customary law, daughters do not inherit the property of their father, as such, the second appeal deserves to be admitted by formulating substantial question of law for determination.

3. Suit property was originally held by Narad who had one son namely Foolsingh. Plaintiff is the widow of Foolsingh and defendants No. 1 and 2 are daughters of Narad.

4. Admittedly, parties belong to 'ab-original' tribe and the provisions of Hindu Succession Act, 1956 are not applicable to them. Plaintiff, being the widow of Foolsingh, brought a suit that after the death of Narad, the suit property would be solely inherited by her husband Foolsingh and defendants would not get any share in the suit property as in 'ab-original' tribes, daughters do not inherit

the property of their father, as such, decree for declaration of title and permanent injunction be granted in her favour to which defendants opposed by filing written statement stating that the suit property was the self-acquired property of their father Narad in which they too, have equal share being class I heirs. Defendants also filed a counter-claim.

5. Learned trial Court, upon appreciation of oral and documentary evidence on record, dismissed the suit of the plaintiff as well as the counter-claim of the defendants and the first appellate Court affirmed the findings recorded by the trial Court in the appeal preferred by the plaintiff against which only plaintiff has preferred the second appeal.

6. Admittedly, parties are 'Gond' by caste and provisions of Hindu Succession Act, 1956 are not applicable to them. They are governed by their own customary laws. It is the case of the plaintiff that as per their customary law daughters do not inherit the property of their father, as such, the suit property held by Narad has been succeeded by her husband Foolsingh and after his death, plaintiff has inherited the suit

property. In the light of the above-mentioned fact, the burden to prove the custom would lie on the plaintiff as she has pleaded that in their community, daughters do not inherit their father's property.

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.

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 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 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 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 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

⁷AIR 2019 Bombay 94

⁸AIR 1956 SC 548

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 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 plaintiff that in their community, daughters do not inherit the property of their father, as such, plaintiff was required to plead and establish the said fact that in 'ab-original' tribe, daughters are not entitled to get their father's property.

16. Both the Courts below have dismissed the suit after having held that the burden to prove the customary law was upon the plaintiff and she has failed to establish any such custom by which daughters are excluded from inheriting the property of their father. I do not find any perversity or illegality in the said finding recorded by both the Courts below, much less any substantial question of law for determination.

17.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

Harneet

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