

HIGH COURT OF CHHATTISGARH, BILASPUR
Second Appeal No.426 of 2008

1. Bihari Gond, S/o Bali Gond, Aged 64 years, R/o Village-Khaprahatha, Post-Gendatola, Tah. & Distt.-Rajnandgaon
2. Seuk Ram (died and deleted)
3. Chherku S/o Seuk Ram Gond, Aged about 49 years, R/o Village-Tekaharra, P.S. - Gendatola, Tah & Distt.-Rajnandgaon
4. Bisnath S/o Seuk Ram Gond, aged about 39 years, R/o Village-Tekaharra, P.S.-Gendatola, Tah & Distt.-Rajnandgaon
5. Smt.Hathiyarin Bai W/o Seuk Ram Gond, Aged 69 years, R/o Village Tekaharra, Post-Ramtai Tah.& Distt.-Rajnandgaon
6. Smt.Fulbasan Bai (died and deleted)
7. Smt.Shyam Bai W/o Bihari Gond, aged about 59 years, R/o Village-Khapdabhanth, Post-Gendatola, Tah.&Distt.-Rajnandgaon

(Defendants)

---- Appellants

Versus

1. Shanbu S/o Bulkhu Gond, Aged about 59 years, R/o Village-Tekaharra, Post-Ramtai, P.S.-Gendatola, Tah & Distt.-Rajnandgaon
- (Plaintiff)
- Respondent
2. Chhattisgarh Govt.Through: Collector, Rajnandgaon
- (Defendant No.5)

For Appellants/Defendants:

Mr.Gyan Prakash Shukla, Advocate

For Respondent No.1/plaintiff:

Mr.Abhishek Sharma, Advocate

For Respondent No.2/State:

Mr.S.K.Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

16/03/2020

1. This defendants' second appeal under Section 100 of the CPC was admitted for hearing by formulating the following substantial question of law: -

"Whether the first appellate Court was justified in decreeing the suit of the plaintiff holding that the parties being the aboriginal tribe (*Gond*), daughters do not get share in the property of their father as the valid custom in that regard has not been pleaded and proved by 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 suit property was originally held by Bulku Gond.

He had one son – plaintiff herein and four daughters namely, Budhiyarin Bai, who had died issueless, Hathiyarin Bai-defendant No.6, Fulbasan-defendant No.7 and Dullo. Defendant No.8 is daughter of Dullo. The plaintiff filed a suit for possession stating inter-alia that the suit property is ancestral property in the hands of Bulku Gond and the parties are aboriginal tribe by caste (*Gond*) and as such, the provisions of the Hindu Succession Act, 1956 (hereinafter called as 'the Act of 1956') are not applicable to them, but defendants No.2 to 4 dispossessed him on 6.7.1994 and thereafter started cultivating the suit land. It was further pleaded that in their custom, daughters do not get any share in the property of their father and therefore, he is entitled for possession from the defendants and therefore, appropriate decree be passed in his favour.

3. The defendants filed their written statement and

denied the averments made in the plaint stating inter-alia that due share in the property has been given to the defendants by their mother during her lifetime in the share of suit property, as such, the plaintiff is not entitled for possession.

4. The trial Court upon evaluation and after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 30.11.2002, dismissed the suit. On appeal being preferred by the plaintiff, the first appellate Court reversed the judgment and decree of the trial Court and decreed the suit of the plaintiff. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants before this Court, in which substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment.

5. Mr.Gyan Prakash Shukla, learned counsel for the appellants/defendants, would submit that the plaintiff has failed to plead and establish the valid custom in which daughters do not get share in the property of their father and except self-serving statement of the plaintiff himself, his nephew Goutar (PW-3) and nearest relative Raisingh (PW-3), there is no other appropriate evidence of custom in which daughters do not get share in the property of their father and as

such, the first appellate Court is absolutely unjustified in granting impugned decree in favour of the plaintiff.

6. On the other hand, Mr. Abhishek Sharma, learned counsel for respondent No.1/plaintiff, would support the impugned judgment and decree.
7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.
8. It is true that the parties are aboriginal tribe by caste (Gond) and the provisions of the Act of 1956 are not applicable to them by virtue of Section 2(2) of the Act of 1956. The party pleading that daughters do not get any share in the property of their father, the burden to prove the custom would lie on him to plead and prove that in their community daughters do not get share in their father's property.
9. 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

¹ AIR 1953 SC 201

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."

10. 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."

11. 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."

12. 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

4 AIR 2017 SC 5797

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."

13. 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

5 AIR 1996 SC 1864

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."

14. 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."

15. 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 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....."
16. 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.

7 AIR 2019 Bombay 94

8 AIR 1956 SC 548

17. Reverting to the facts of the present case, in light of the principles of law laid down by the Supreme Court and the Bombay High Court in the above-stated judgments (supra), it is quite vivid that it is the case of the plaintiff that in their community daughters do not get any share in the property of their father/parents and would not inherit the property of their father/parents. In order to prove the aforesaid fact, the plaintiff was required to plead and establish that in Gond community, daughters are excluded from inheriting the property of their father or would not get any share in the property of their father. The plaintiff himself was examined as PW-1, in which he has given self-serving statement that in Gond community daughters do not get any share in the property of their father. Likewise Goutar (PW-2), aged about 49 years, real nephew of the plaintiff, has also stated in the same line and Raisingh (PW-3), close relative of the plaintiff, has also stated the self-serving statement that daughters do not get any share in property of their father/their parents. There is no other appropriate evidence of clinching nature to establish valid custom excluding daughters from getting the property of their father. The plaintiff has failed to plead and establish valid custom in which daughters do not get any share in the property of their father. Once it has been proved that

the property is ancestral property in the hands of their father, daughters would be entitled to inherit the property of their father unless it is pleaded and established that daughters are excluded from inheriting the property of their father or would not get any share in the property of their father and as such, the plaintiff has failed to plead and establish the customary law governing their tribe which excludes the female/daughters from inheritance, as such, the first appellate Court is absolutely unjustified in reversing the judgment and decree of the trial Court, which is liable to be set aside.

18. For the foregoing reasons, the judgment and decree of the first appellate Court is hereby set aside and that of the trial Court is restored. The substantial question of law is answered in favour of the defendants and against the plaintiff.
19. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).
20. Decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-