

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 226 of 2008****Judgment reserved on 20.07.2020****Judgment delivered on 10.08.2020**

1. Rupchand, S/o. Binjhavar Kanwar, aged about 43 years.

2. (A) Smt. Rupa Bai, W/o. Rupau, aged about 55 years,

(B) Dhan Sai, Son Late Rupau, aged about 20 years

----- Appellants/Plaintiffs

Versus

1. Benu Bai (since deceased) through LRs:

1A. Kurkurmi Bai, aged about 50 years, wife of Santuram Thakur, R/o Kokha, Ward No. -08, Bhilai, District Durg (C.G.), at present residence of Village - Bhatagaon, Tehsil - Gunderdehi, District Balod (C.G.)

1B. Virendra, aged about 48 years, S/o Bodrinath "teacher" R/o Near New bus stand, Tehsil - Dongarhgaon, District - Rajnandgaon (C.G.)

1C. Balwant, aged about 46 years, S/o Bodrinath, R/o Village - Bhatagaon, Tehsil - Gunderdehi, District Balod (C.G.)

1D. Smt. Satiya Bai, aged about 44 years, W/o Dukhit Thakur, R/o Village - Kamroad, Tehsil - Gunderdehi, District Balod (C.G.)

2. Rupotin Bai (since deceased) through LRs.:-

2-A Ram Lal, aged about 53 years, S/o Shambu.

2-B Rajendra Kumar, aged about 30 years, S/o Ram Lal

2-C Ku. Santoshi, aged about 22 years, D/o Ram Lal

3. Sumit Bai, D/o. Binjhavar Kanwar, aged about 48 years, Resident of Village Karela, P.S. Ranchiral, Tahsil Patan, District Durg (C.G.)

4. State of Chhattisgarh, Through : The Collector, Durg, District Durg (C.G.)

----- Respondents/Defendants

For Appellants	: Shri Shobhit Koshta, Advocate appears on behalf of Mr. Vishnu Koshta, Advocate.
For Respondent No. 1	: None appeared, though served.
For Respondents No. 2-A to 3	
	: Shri Kunal Das, Adv.
For Respondent No. 4/State	: Shri Mateen Siddiqui, Dy. Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment [C.A.V.]

(1) Final hearing of this second appeal has been conducted through video conferencing.

(2) The appeal preferred by the plaintiffs/appellants was admitted for hearing on 22.11.2013 by formulating following substantial question of law :-

“ Whether the lower appellate court was justified in reversing the finding of the trial Court in holding that the respondents/defendants would also be entitled for the share in the property of plaintiff's father – Binjhavar ?

Thereafter, on 8.6.2020, following additional question of law was framed and respondent No. 1 /her legal

representatives were noticed on additional substantial question of law.

“ Whether the lower appellate Court is justified in dismissing the suit by reversing the finding of the trial Court holding the suit as barred by limitation by recording a finding perverse to the record ?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court).

(3) The imperative facts required to be noticed for adjudication of this appeal are as under:

(3.1) The suit property was originally held by Binjhwar Kanwar, who is aboriginal tribe by caste. Binjhwar Kanwar had two wives. His first wife was Ramhin Bai and out of their wedlock, they (Binjhwar Kanwar & Ramhin Bai) had one son namely Mehatter and defendant No. 1 – Benu Bai is the daughter of Mehatter. Binjhwar Kanwar had entered into second marriage to Smt. Vishwasa Bai and out of their wedlock, they (Binjhwar Kanwar & Vishwasa Bai) had two sons namely Rupchand & Rupau, plaintiffs herein and two daughters namely Rupotin Bai & Sumit Bai, defendants No. 2 & 3, respectively herein. Binjhwar Kanwar died in the year 1959.

(3.2) Two plaintiffs namely Rupchand and Rupau instituted a suit seeking declaration of title stating

inter alia that the suit land is originally held by their father — Binjhwari and after his death in the year 1959, the suit land was inherited by them and since then they are in peaceful possession over the suit land and cultivating the suit land. They further pleaded that if it is found that plaintiffs and defendants No. 1 to 3 are also 1/5th share in the suit property, then their 1/5th share be declared in the suit property. It was further pleaded that they belong to aboriginal Tribe by caste i.e. *Kanwar caste*, in which the daughters do not get share in the property of their father. It was also pleaded that when they were minor, defendant No. 1 — Benu Bai by playing fraud with their father late Shri Binjhwari Kaur got executed a gift deed on 7.9.1949 in her favour of suit land, which was declared void by Civil Court, Durg at the instance of Binjhwari Kanwar. Against which defendant No. 1 preferred first appeal before the first appellate Court and that has also been dismissed by the First Appellate Court vide order dated 15.04.1958 affirming the order of civil Court. Against which, defendant No. 1— Benu Bai preferred second appeal being Second Appeal No. 444/58 before the High Court of Madhya Pradesh, which was dismissed by the MP High Court on 16.09.1960 affirming the judgment & decree passed by the first appellate Court. Pursuant to which, name of the plaintiffs/appellants have been recorded in the revenue records. Thereafter, the

defendant No. 1 got her name mutated in the revenue records along with the names of the plaintiffs on 8.5.1978 without authority of law, as such, the order dated 8.5.1978 mutating the name of defendant No. 1 in the revenue records also be declared void and decree of declaration of exclusive ownership and /or in alternative 1/5th share of each be granted.

(4) Resisting the suit, defendant No. 1 filed his separate written statement stating *inter alia* that the suit as framed and filed with regard to correction in the revenue records is barred by limitation and the plaintiff had no right and title over the suit land and suit deserves to be dismissed in toto.

(5) The defendants No. 2 & 3 by filing written statement supported the case of the plaintiffs to the extent of relief No. 15 (स) holding that each of them will get 1/5th share in the suit property.

(6) Upon appreciation of oral and documentary available on record, the trial Court by its judgment and decree dated 22.03.2003 decreed the suit in toto holding that the parties are not governed by provisions contained in Hindu Succession Act, 1956 and they are governed by their own customary law in which the daughters do not get share in the property of their father and the plaintiffs' suit is

within limitation.

(7) Being aggrieved & dissatisfied with the judgment & decree of the trial Court, defendant No. 1 preferred first appeal before the first appellate Court.

(8) The First Appellate Court, by its impugned judgment & decree dated 16.04.2008, held that the plaintiffs have failed to prove their custom in which the daughters do not get share in the property of their father; and further held that the suit filed by the plaintiffs questioning the order of revenue Court dated 8.5.1978 passed in Revenue Case No. 18-A/6, year 73-74 seeking declaration was beyond the period of limitation and consequently allowed the appeal filed by defendant No. 1 by dismissing the suit of the plaintiffs in toto. Against which, instant second appeal has been preferred by plaintiff No. 1 & legal representatives of plaintiff No. 2 in which two substantial questions of law have been formulated and set out in opening paragraph of the judgment for sake of completeness.

(9) Mr. Shobhit Koshta, learned counsel appearing for the appellants / plaintiffs would submit that the first appellate Court was absolutely unjustified in holding that the custom has not been proved and defendants No. 1 to 3 are also entitled for share in the property held by their

father late Shri Bhinjwan Kanwar by recording a finding which is perverse to the record and the alternative prayer made the plaintiffs was not at all adverted by the first appellate court. He would further submit that the mere adverse entry in the revenue record does not furnish cause of action for filing suit for declaration under article 58 of the Limitation Act and, therefore, the finding recorded by the first appellate Court in this regard is liable to be set aside.

(10) None appeared for legal representatives of respondent No. 1, though served.

(11) Shri Kunal Das, learned counsel for respondents No. 2-A to 3 would support the impugned judgment & decree.

(12) I have heard Shri Koshta, learned counsel appearing for the appellants and Shri Kunal Das, respondents/defendants No. 2-A to 3 and considered their submissions and went through the record with utmost circumspection.

(13) For the sake of convenience, substantial Question of Law No. 2 framed on 08.06.2020 with regard to limitation is taken first.

(14) The plaintiffs claimed that the order dated 8.5.1978 passed in Revenue Case No. 18-A/6, year 73-74 recording the name of defendant No. 1 in the revenue records is bad and they be given declaration that it is void whereas the

suit was filed on 12.08.2002 and that the trial Court held that suit to be within the period of limitation with regard to claim of declaration of the said revenue entries whereas the first appellate Court has held that suit to be barred by limitation qua adverse entry in the revenue record.

(15) The question for consideration is whether the suit filed by the plaintiffs is barred by limitation as admittedly the adverse entries in the revenue records was made by order dated 8.5.1978 whereas the suit was filed on 12.08.2002.

(16) Article 58 of the Limitation Act, 1963 States as under :-

	Description of suit	Period of limitation	Time from which period begins to run
58.	To obtain any other declaration	Three years	When the right to sue first accrues

(17) The Privy Council in the matter of Mt.Bolo v. Mt. Koklan¹ has held that there can be no “right to sue” until there is an accrual of right asserted in the suit and its infringement, or atleast a clear and unequivocal threat to infringe that right, by the defendant against whom suit is

1 AIR 1930 PC 270

instituted.

(18) Similarly, Supreme Court in the matter of C. Mohammed Yunus v. Syed Unissa and others² has held that cause of action for the purpose of Article 120 accrues only when the right asserted in the suit and its infringement or atleast a clear and unequivocal threat to infringe that right. It was further held that mere adverse entry in the revenue records does not give rise to cause of action. Paragraph 7 of the report states as under:-

"7. The period of six years prescribed by Article 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right."

(19) Keeping in view the principles of law flowing from the aforesaid judgments, it reveals that the first appellate Court has held that for getting defendants' declaration for invalidating the order of Revenue Court, the suit should have been filed within three years from date of order and for getting the order of revenue Court dated 8.5.1978 set aside, the suit ought to have been preferred within a period of three years from 7.3.1978. The said finding is erroneous as adverse entry in the revenue records does not give rise to cause of action.

2 AIR 1961 SC 808

It is the case of the plaintiffs that despite the order in the earlier proceedings, which went up to the High Court of Madhya Pradesh holding title of their father -late Shri Binjhwar Kanwar, defendant No. 1 – Benu Bai got her name mutated in the revenue records, which they came to know on 23.04.2001 after getting the copy of revenue record, as such, the finding recorded by first appellate Court declaring the suit *qua* order dated 8.5.1978 passed in Revenue Case No. 18-A/6, year 73-74 is barred by limitation, deserves to be set aside. It is held that suit as framed and filed was within the period of limitation.

Answer to Substantial Question of law No. 1.

(20) It is not in dispute that the parties are aboriginal tribe by caste and they are governed by their own customary law and two plaintiffs brought a suit stating *inter alia* that the suit property was originally held by their father late Shri Binjhwar Kanwar and after his death, it was inherited by two brothers (plaintiffs) and defendants No. 2 & 3 being the daughters and defendant No. 1 being the daughter of Mehattar (son of Binjhwar Kanwar from his first wife), therefore, they do not get any share in the property of their father.

(21) The trial Court decreed the suit holding that valid custom has been proved and in the aboriginal tribe i.e.

Kanwar caste, daughters are not entitled to get any share in the suit property of their father but the first appellate has reversed that finding by dismissing the suit of the plaintiffs in toto.

(22) The First appellate Court has clearly held that the plaintiffs have failed to prove the custom, in which daughters do not get share in the property of their father.

(23) It is not in dispute that by virtue of Section 2(2) of the Hindu Succession Act, 1956, provision of Hindu Succession Act are not applicable to the aboriginal tribes.

(24) Section 2(2) of the Hindu Succession Act, 1956 (for short 'the Act of 1956') provides as under: -

"2. Application of Act.—(1) xxx xxx xxx

(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."

(25) List of Scheduled Tribes is contained in the Constitution (Scheduled Tribes) Order, 1950 amended with effect from 1.11.2000 by virtue of Section 20 of the Madhya Pradesh Reorganisation Act, 2000, which provides that on and from the appointed day, the Constitution

(Scheduled Tribes) Order, 1950, shall stand amended as directed in the Fourth Schedule. Kanwar to which the parties herein belong is in Entry 20 in relation to Chhattisgarh in the above order. As such, Kanwar is a Scheduled Tribe within the meaning of the Constitution of India notified by the Constitution (Scheduled Tribes) Order, 1950 by the President of India and it is a Scheduled Tribe within the meaning of Article 366(25) of the Constitution. Thus, the provisions of the Act of 1956 do not pro-tanto apply to the members of Scheduled Tribe as per Section 2(2) of the Act of 1956, because of *non obstante* clause in Section 2(2) of the Act of 1956, as the customary law of the Scheduled Tribe has been preserved by the legislature.

(26) The Supreme Court in the matter of **Madhu Kishwar and others v. State of Bihar and others**³, after noticing sub-section (2) of Section 2 of the Act of 1956, held as under:-

"4. ... Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region."

(27) Thus, it is held that the provisions of the Hindu Succession Act, 1956 will not apply to the parties, as they are Kanwar scheduled tribes, which is Scheduled

3 (1996) 5 SCC 125

Tribe within the meaning of Article 366(25) of the Constitution of India and the Central Government has not issued any notification directing otherwise and applying the provisions of the Hindu Succession Act to them.

(28) It is admitted position on record that the parties are Kanwar by caste and the provisions of the Hindu Succession Act are not applicable to them by virtue of Section 2(2) of the Act of 1956.

(29) In this regard, decision of the Supreme Court in the matter of Saraswathi Ammal v. Jagadambal and Another⁴ 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."

(30) Again, in the matter of Salekh Chand (Dead) by LRs. v. Satya Gupta and Ors.⁵, 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."

(31) The Supreme Court in the matter of Bhimashya and Ors. v. Smt. Janabi @ Janawwa⁶ 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."

(32) In the matter of Ratanlal @ Babulal Chunilal Samuska v. Sunderabai Govardhandas Samsuka⁷ 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."

(33) In the matter of Madhu Kishwar and others v. State of Bihar and others⁸ 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."

(34) The Supreme court in the matter of Indian Young Lawyers Association & Ors. v. The state of Kerala & Ors.⁹ (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."

(35) Recently, the Bombay High Court in the matter of Babulal Bapurao Kodape and another v. Sau. Resmabai Narayanrao Kaurati and another¹⁰ 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.

(36) The Supreme Court in the matter of Mohammad Baqar and Ors. v. Naimun Nisha Bibi & Ors.¹¹ 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.

10 AIR 2019 Bombay 94

11 AIR 1956 SC 548

(37) 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 afore-cited judgments (supra), it is the case of the plaintiffs that in the Kanwar caste, daughters are not entitled to get any share in the property of their father, and, therefore,, plaintiffs are required to plead and establish that in Kanwar caste, daughters are excluded from inheriting the property of their father or would not get any share in the property of their father. Even on the touchstone of the provisions of Sections 101 to 103 of the Evidence Act, plaintiffs were required to plead and prove that defendants are excluded from inheritance as held by Their Lordships of the Supreme Court in Mohammad Baqar (supra), which the plaintiffs have failed to prove.

(38) The first appellate Court, upon appreciation of the oral evidence of defendant No. 1 Benubai (DW-3), Johanram (DW-4) & Kalabai (DW-5) has clearly recorded a finding that in their caste, daughters are entitled to get share in the property of their father, which neither perverse nor contrary to record. Thus, I am of the view that it has rightly been concluded by the first appellate Court that it cannot be held that in the Kanwar tribe, daughters do not get share in the

property of their father, as such, the findings recorded by the first appellate Court in the Kanwar caste, daughters get share in the property of their father, is a finding of fact based on evidence available on record and, therefore, the such finding is hereby affirmed, but the first appellate Court dismissed the appeal on the ground of limitation which has held to be within limitation in preceding paragraph of this judgment.

(39) Now, the question is that what relief should be granted to the plaintiffs.

(40) Plaintiffs, in paragraph 11 and relief No. 15 (c) of the plaint, have stated as under :-

"11/ यह कि, कदाचित न्यायालय में आये साक्ष्य एवं तर्कों के उपरांत यदि विवादित भूमि में प्रतिवादी क्रं. 1 से 3 का भी हम हिस्सा होने बाबत निष्कर्ष में पहुँचे - तो उस स्थिति में विवादित भूमि में चूँकि वर्तमान में मृतक बिंझवार के पुत्र-पुत्री एवं मृतक मेहत्तर की पुत्री बेनूबाई का प्रत्येक का 1/5 हिस्सा होना । जिसे वादीगण बेनूबाई को उपरोक्त परिस्थिति में विवादित भूमि में 1/5 हिस्सा देने को तैयार है ।

15 (स) यह कि, वादीगण वैकल्पिक अनुतोष के रूप में प्रार्थना करते हैं कि अनुतोष कंडिका 1 वादी के पक्ष में डिक्री नहीं दिए जाने की स्थिति में विवादित भूमि पर वादीगण एवं प्रतिवादी क्रं. 1 से 3 प्रत्येक का 1/5 हिस्सा घोषित किया जावे ।"

(41) In view of the above-stated pleading and material available on record, the first appellate court, recorded following finding in the end of paragraph 14 of the

impugned judgment which states as under :-

“14.इसके विपरीत प्रतिवादी बेनू बाई एवं उनके साक्षियों के कथनों से यह सिद्ध होता है कि कैवर अनुसूचित जनजाति में पुत्रियों को अपने पिता की सम्पत्ति में हक हिस्सा प्राप्त होता है । इस तथ्य की पुष्टि स्वयं वादीगण के दावा के चरण 11 में अभिवचनित इन तथ्यों से होती है कि यदि विवादित भूमि में प्रतिवादी क्रमांक 1 से 3 का भी हक हिस्सा होना पाया जाता है तो उस स्थिति में मृतक बिंझवार के पुत्र-पुत्रियों एवं मेहत्तर की पुत्री बेनू बाई का प्रत्येक का वादग्रस्त भूमि में 1/5 अंश होगा जिसके तहत वादीगण बेनू बाई को 1/5 अंश भूमि देने को तैयार हैं । यदि उनके जाति समाज में पुत्रियों को पिता की सम्पत्ति में हक हिस्सा प्राप्त नहीं होने पर रूढ़ि एवं प्रथा प्रचलन में हैं तो वे इस तरह का अभिवचन अपने दावा में क्यों किया इसका कोई कारण नहीं पाया जाता । प्रतिवादी सुमेती बाई प्र०सा० 1 ने बताई है कि यदि न्यायालय वादी एवं प्रतिवादीगण को वादग्रस्त भूमि में बराबर - बराबर बंटवारा दिया जाता है तो उसे कुछ नहीं चाहिये वह अपने भाईयों के पक्ष में अपने हक का त्याग करती है । चूँकि यह साक्षी उत्तरवादी / वादी रूपचंद एवं रूपऊ की सगी बहन है इसलिये वह अपने हिस्से का त्याग अपने भाईयों के पक्ष में करना व्यक्त की है । प्रतिवादी क्र० 2 एवं 3 ने अपने जवाबदावा के चरण 6 में पिता की सम्पत्ति पर पिता की मृत्यु उपरांत पुत्र के साथ पुत्री एवं विधवा को हक हिस्सा प्राप्त होने का अभिवचन किये हैं एवं जवाबदावा की कण्डिका 14 में उनके जाति समाज में प्रचलित प्रथा एवं रीति-रिवाज के अनुसार वादीगण के साथ प्रतिवादीगण क्र० 2 एवं 3 का भी हक हिस्सा नहीं होना अभिवचित किये हैं । प्रतिवादी सुमेती बाई एवं प्रतिवादी क्र० 2 एवं 3 के जवाबदावा में अभिवचित उपरोक्त वर्णित तथ्यों एवं कथनों से भी इस बात की पुष्टि होती है कि पक्षकारों के जाति समाज में प्रचलित प्रथा एवं रूढ़ि के अनुसार पिता के मरने के बाद उसके द्वारा छोड़ी गई सम्पत्ति में पुत्रियों को हक हिस्सा मिलता है । इस तरह से इस बारे में विद्वान अधीनस्थ न्यायालय ने उपलब्ध साक्ष्य की त्रुटिपूर्ण विवेचना कर गलत निष्कर्ष निकाला है और सही राय कायम नहीं किया है ।”

(42) In view of above, the first appellate Court has also recorded a finding that the defendant No. 1 being the daughter of Mehatter (son of late Shri Binjhram Kanwar from his first wife) and defendants No. 2 & 3 being the daughters of Binjhwar Kanwanr all will get share in the suit property, but declined to even grant 1/5th share to legal heirs of plaintiff No. 2, plaintiff No.1, defendant

No. 1 (his LRs), defendant No. 2 & defendant No. 3.

(43) Since the parties have failed to prove any custom governing the succession in their caste, the provisions of the Central Provinces Laws Act, 1875 (henceforth "Act, 1875") would apply. The Central Provinces Laws Act, 1875 has been enacted to regulate the inheritance and marriage, etc. Section 6 of the said Act reads as follows: -

"6. Rules in cases not expressly provided for.- In cases not provided for by section 5, or by any law for the time being in force, the Courts shall act according to justice, equity and good conscience."

(44) Their Lordships of the Supreme Court have also in the matter of M.V. Elisabeth and others v. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa¹² held that where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience. It was observed as under: -

"86. The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of

¹² 1993 Supp (2) SCC 433

imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience."

(45) Now, the question is what is meaning and significance of the expression "justice, equity and good conscience". The Formula "Justice, Equity and Good Conscience"—The origin of the formula lie in the Romeo canonical sources, way back in the 16th Century. Late the formula was applied in Italy, Germany and France. It appealed the English legal system which modified and incorporated it in their own system. The preamble to the Act of Succession enacted in 1536 used the expressions "Equity, reason and good conscience". The East India Company carried the principle to India. In 1688, the Judges appointed in Bombay under the Company's Law were "to behave themselves according to good conscience". The Royal Charters of 1683, 1687, 1726 and 1753 also used the expressions "Equity and Good Conscience" and "Justice and Right". The Regulation of 1781 enjoined that in all cases for which no directions were given the respective Judge "do act according to justice, equity and good

conscience". The principles were to be applied where positive law or custom did not assist the Court to dispense judicial Justice. Indeed, the term "Justice" eludes a precise definition. It means the constant and perpetual disposition to render to every man his due. The Courts are to administer "commutative justice" and "distributive justice" as well. The expression "commutative justice" means that virtue whose object is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, so that no one may be gainer by another's loss. The expressions "distributive justice" means that virtue whose object is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal things nor unequal persons things equal. "Equity" is a system of law or rules more consonant than the ordinary law which opinions current for the time being as to a just regulation of the mutual rights and duties of men living in a civilized society, vide Halsbury's Laws of England, 3rd Edn., Vol. 14, p. 464.

"Equity' according to Blackstone means "that portion of remedial justice which was formerly exclusively administered by a court of Equity as contradistinguished from that portion which was formerly exclusively administered by a court of common law" - vide Blackstone's Commentaries, 429-437. The meaning of the expressions "Justice, equity and good conscience" was summed up by Lord Hobhouse in *Waghela Rajsanji v. Shekh Masludin* (1887) 13 Ind. Appl. 89(96). "Justice, equity and good conscience" could be interpreted to mean the rules of English Law and found applicable to Indian society and circumstances". (See U. Bransly Nongaiang v. U. Drolishon Syiemiong and others¹³.)

(46) In the matter of Chuiyya s/o Jhadi and another v. Mangari Bai and another¹⁴, the M.P. High Court while dealing with the issue of inheritance of property of father by daughter belonging to "Oraon tribe" held as under: -

"It is true that the provisions of Hindu Succession Act, 1956 do not apply to the members of the Scheduled Tribe as per section 2(2) of this Act. It is also true that parties are Scheduled Tribes. In the absence of son the daughter was entitled to inheritance and she used to get "limited

13 (1986) 2 Gauhati Law Reports 487

14 2000(2) M.P.L.J. 441

Estate" and on her death it used to pass on to the reversioners of her father. That rule has been abrogated. Section 14 of the Hindu Succession Act, 1956 confers full heritable capacity on a female heir. There is no definite evidence that amongst the Oraons a daughter is excluded from inheriting the property of her father. There should be no disparity in the rights of man and woman in matters of succession and inheritance. This is recognized in all the systems. It is for the person setting up the plea of exclusion of daughter from inheritance to prove and establish that there is such a caste custom. A custom is a rule which has by long usage obtained the force of law. It must be ancient, certain and reasonable. The daughter is entitled to the share in the lands in dispute."

(47) In view of above-stated legal position, since the provisions of Hindu Succession Act, 1956 is not applicable; and in absence of any law of inheritance or custom prevailing in *kanwar* tribe which the parties belong; the provisions of Section 06 of Act, 1875 would apply; and their rights are required to be decided according to justice, equity and good conscience. Following the principles of law laid down by M.P. High Court in Sukhmani and others v. Jagarnath¹⁵ & Mst. Sarwango and others v. Mst. Urchamahin and others¹⁶, in the property left by Binjhar Kanwar, plaintiff No. 1, legal heirs of plaintiff No. 2, defendant No. 1 (his LRs), defendant No. 2 & defendant No. 3, all five will

15 2000 RN 301

16 AIR 2013 Chhattisgarh 98

have equal share i.e. 1/5th in the suit property, it is held accordingly.

(48) Consequently, judgment & decree passed by the first appellate Court is modified to the extent of not granting decree. It is held that original plaintiff No. 1- Rupchand, plaintiff No. 2 Rupau/ his LRs', defendant No. 1 Benu Bai & defendants No. 2 & 3 namely Rupotin Bai & Sumiti Bai, respectively/legal representatives of plaintiff No. 2 and defendants No. 1 & 2, each one of them will get 1/5th share in the suit property after due partition by the competent revenue officer in accordance with law. Scheduled annexed with the plaint be made part of the decree.

(49) The second appeal is allowed to the extent indicated hereinabove. Parties shall bear their own cost(s).

(50) An appellate decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

