

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.255 of 2010

1. Maniyar Sai, S/o Dhola Ram Uraon, aged about 42 years, R/o Jalhal, Tahsil Katghora, District Korba (C.G.)
2. Somar Sai, S/o Dhola Ram Uraon, aged about 35 years,
3. Ram Sai, S/o Sudhu Ram Uraon, aged about 45 years,

Both No.2 & 3 by Occupation Agriculturist, Both are R/o Village Jamgawa, Tahsil Ambikapur, District Surguja (C.G.)

(Plaintiffs)
---- Appellants

Versus

1. Jangi Bai (Died and deleted)
2. Dalbir, S/o Ghana Ram, aged about 48 years, by Caste Uraon, Agriculturist, R/o Village Jamgawa, Tahsil Ambikapur, District Surguja (C.G.)
3. The State of Chhattisgarh, Through Collector Surguja, At Ambikapur, District Surguja (C.G.)

(Defendants)
---- Respondents

For Appellants: Mr. A.K. Prasad, Advocate.

For Respondent No.2: -

Mr. Manoj Paranjpe and Shubhank Tiwari, Advocates.

For Respondent No.3 / State: -

Miss Anjali Singh Chauhan, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

19/02/2020

1. This second appeal preferred under Section 100 of the CPC by the plaintiffs / appellants herein was admitted for hearing by formulating the following substantial questions of law: -

“(1) Whether the first appellate Court has committed an

illegality by passing a decree for declaration in favour of the defendants without there being any counter claim by the defendants?

(2) Whether the finding recorded by the first appellate Court that the plaintiffs are not the grand sons of late Chida Uraon is perverse?"

[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 Chida Uraon. The plaintiffs claim that Chida Uraon had two sons namely, Dhola Uraon & Sudhu Uraon and one daughter namely, Jangi Bai – defendant No.1. Plaintiffs No.1 & 2 are sons of Dhola Uraon and plaintiff No.3 is son of Sudhu Uraon. It was pleaded by the plaintiffs that in Uraon caste, they are governed by the custom and in their prevalent custom, father's property is only inherited by his sons and daughters would not get any share in the property of their father and as such, the plaintiffs being the grand-sons of Chida Uraon would succeed to the property left by Chida Uraon and defendant No.1 being the daughter would not inherit and get any share in the property of her father Chida Uraon and therefore the plaintiffs be declared exclusive title-holders and possession holders of the suit land shown in Schedule A appended with the plaint and the defendants be restrained from interfering with their possession in which the defendants filed their written statement denying the plaint allegations stating inter alia that the plaintiffs are not grand-sons of Chida Uraon and defendant No.1 will exclusively inherit the property of her father and there is no custom in Uraon caste excluding daughters from inheriting the property of their father and therefore she would only

succeed the property of her father.

3. The trial Court after appreciating oral and documentary evidence available on record, decreed the suit of the plaintiffs holding that the plaintiffs are grand-sons of Chida Uraon by whom the suit property was held and daughters do not succeed to the property of their father in Uraon aboriginal tribe, as the provisions of the Hindu Succession Act, 1956 would not apply, against which defendants No.1 & 2, both, preferred first appeal under Section 96 of the CPC which was allowed by the first appellate Court and it was held that the plaintiffs are not grand-sons of Chida Uraon and defendant No.1, who is the only sole daughter of Chida Uraon, would succeed to the property and granted declaration in her favour which has been challenged by the plaintiffs by way of filing second appeal under Section 100 of the CPC in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.
4. Mr. A.K. Prasad, learned counsel appearing for the appellants herein / plaintiffs, would submit that both the defendants did not prefer any counter-claim claiming any partition in the schedule property, therefore, the first appellate Court is absolutely unjustified in granting declaration and thereby partition in favour of the defendants, particularly defendant No.1. He would further submit that the first appellate Court is absolutely unjustified in holding that the plaintiffs are not the grand-sons of Chida Uraon by giving perverse finding by ignoring oral and documentary evidence available on record. He would rely upon a decision of this Court in the matter of Ramdev Ram v. Dhani Ram and

others¹ to buttress his submission.

5. Mr. Manoj Paranjpe, learned counsel appearing for respondent No.2 herein / defendant No.2, would submit that the first appellate Court is absolutely justified in holding that defendant No.1 is also entitled for the property left by her father as such, the judgment & decree of the first appellate Court deserves to be maintained.
6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
7. For the sake of convenience, substantial question of law No.2 will be taken-up first.

Answer to substantial question of law No.2: -

8. The plaintiffs claimed that they are grand-sons of Chida Uraon which the defendants disputed, but ultimately, the trial Court relying upon oral and documentary evidence available on record, held that the the plaintiffs are grand-sons of Chida Uraon, however, the first appellate Court reversed that finding.
9. The question is, whether the finding of the first appellate Court holding that the plaintiffs are not grand-sons of Chida Uraon, deserves to be maintained?
10. In order to prove relationship, the plaintiffs have filed documents – voters list Exs.P-5 to P-8 which are copies of voters list in which father of plaintiff No.3 – Sudhu Uraon has been shown to be son of Chida Uraon in Ex.P-5. Likewise, father of Dhola Uraon – father of plaintiffs

1 2016(3) C.G.L.J. 574

No.1 & 2, has also been shown to be Chida Uraon in Ex.P-6. Likewise, in Ex.P-7, Dhola Uraon has been shown to be son of Chida Uraon and in Ex.P-8 Sudhu Uraon has also been shown to be son of Chida Uraon. As such, from the aforesaid documents, fathers of the three plaintiffs – Dhola Uraon & Sudhu Uraon have been shown to be sons of Chida Uraon and it is not disputed that the plaintiffs are sons of Dhola Uraon and Sudhu Uraon.

11. Section 35 of the Indian Evidence Act, 1872, states as under: -

“35. Relevancy of entry in public record or an electronic record made in performance of duty.—An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, it itself a relevant fact.”

12. Under Section 35 of the Evidence Act, when it is the duty of public officer to make some entries in any public or other official book, it is admissible in evidence to prove the truth of facts entered as well as the fact that the entries were made by the officer. The principle is that it should be public enquiry, a public document and made by public officer; in performance of public duty specially enjoined by law (per Lord Blackburn in C.F. Sturla v. Freccia² and Lilley v. Pettit³.)

13. In the matter of State of Bihar v. Radha Krishna Singh⁴, their Lordships of the Supreme Court laid down the following three conditions to be fulfilled before a document can be held to be admissible under Section

35 of the Evidence Act: -

2 (1850) 5 App Cas 623, 644

3 (1946) 1 All ER 593

4 AIR 1983 SC 684

(1) the document must be in the nature of an entry in any public or other official book, register or record;

(2) it must state a fact in issue or a relevant fact; and

(3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties specially enjoyed by the law of the country in which the relevant entry is kept.

14. The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. (See Brij Mohan Singh v. Priya Brat Narain Sinha and others⁵ and Ram Prasad Sharma v. The State of Bihar⁶.)

15. The Orissa High Court in the matter of Raghunath Behera v. Balaram Behera and another⁷ has clearly held that electoral roll being a public document is admissible evidence and it is not necessary to prove source of information on the basis whereof facts stated in the roll were recorded, nor is it necessary that the person who prepared electoral roll has to be examined. It was further held that they are entitled to the extraordinary degree of confidence partly because they are required by law to be kept, and partly because their contents are of public interest and notoriety; but principally because they are made under the sanction of oath of office, or at least under that of official duty by accredited agents appointed for that purpose.

5 AIR 1965 SC 282

6 AIR 1970 SC 326

7 AIR 1996 Orissa 38

16. Likewise, in the matter of Chitru Devi v. Smt. Ram Dei and others⁸, the Himachal Pradesh High Court in paragraph 23 has clearly held that the electoral roll is a public document and admissible in evidence unless it is rebutted by cogent and reliable evidence. The plaintiff has failed to rebut the entries recorded in the electoral roll and on the basis of the documentary evidence proved on record. As such, it is established position on record that entry in public record / voters' list is prepared by the competent official of the election department in the discharge of his official duties which is admissible under Section 35 of the Indian Evidence Act, 1872 and if it is not challenged before the competent authority in any proceedings, voters list is admissible and reliable in evidence.

17. In the matter of Kirtan Sahu, after him Uma Sahuani and others v. Thakur Sahu and others⁹ it has clearly been held by the Full Bench of the Orissa High Court that electoral roll prepared under the Representation of the People Act is a public record within Section 35 of the Evidence Act and a public document within Section 74(1)(iii) of the Act and is admissible in evidence as such and it is not necessary to call in evidence the author thereof or a person supplying the information to prove the roll as its genuineness will be presumed under this section when it is produced before the Court.

18. In the instant case, the aforesaid documents Exs.P-5 to P-8 would clearly show that the plaintiffs' fathers are sons of Chida Uraon and no contrary evidence controverting Exs.P-5 to P-8 has been brought on record and as such, it can be held relying upon Exs.P-5 to P-8 that Dhola Uraon

⁸ AIR 2002 HP 59

⁹ AIR 1972 Orissa 158

and Sudhu Uraon, who are fathers of the plaintiffs, respectively, are sons of Chida Uraon and the plaintiffs are grand-sons of Chida Uraon. As such, the first appellate Court is absolutely unjustified in holding that the plaintiffs are not grand-sons of Chida Uraon disbelieving Exs.P-5 to P-8. Therefore, the finding of the first appellate Court in that regard deserves to be set aside and is accordingly set aside. The second substantial question of law is answered accordingly.

Answer to substantial question of law No.1: -

19. Now, the substantial question of law remains for consideration would be, whether the first appellate Court is justified in holding that defendant No.1 Jangi Bai would also get the property mentioned in Schedule A of the plaint, as, admittedly, it was the property of her father?
20. The plaintiffs pleaded that in Uraon caste, the provisions of the Hindu Succession Act, 1956 would not apply by virtue of Section 2(2) of the said Act and in Uraon caste, daughters do not inherit the property of their father and only sons would inherit the property exclusively to the exclusion of daughters which the trial Court accepted, but the first appellate Court reversed holding that the plaintiffs have failed to establish that in Uraon caste, daughters do not get share in the property of their father and thereby held that since defendant No.1 is the only successor / heir of Chida Uraon, as the first appellate Court had held that the plaintiffs are not grand-sons of Chida Uraon, which has been set-aside in the foregoing paragraph by this Court and reversed the finding of the first appellate Court and it was also held that defendant No.1 is also entitled for share in the property of her father. Though the finding with regard to exclusion of daughter – defendant No.1 in the

property of her father has been sought to be questioned in this second appeal, but no substantial question of law has been framed in this regard by the Court while entertaining the second appeal. But for the sake of convenience, a careful perusal of the evidence would show that on behalf of the plaintiffs only Ram, S/o Sudhu – one of the plaintiffs aged 45 years, has been examined who has stated that in father's property, daughters are not entitled to inherit, whereas Dhansai (PW-2), aged 90 years, has not stated any single word that daughters would not inherit the property of their father. Likewise, another witness of the plaintiffs – Jangu Singh (PW-3) is also silent about the custom prevalent in Uraon caste excluding daughters from inheriting the property of their father. Bandhu (PW-4) is also silent about the custom excluding daughters from inheriting the property of their father.

21. The Supreme Court in the matter of Saraswathi Ammal v. Jagadambal and Another¹⁰ has 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.

22. Again, in the matter of Salekh Chand (Dead) by LRs. v. Satya Gupta and Ors.¹¹, 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.

23. In the matter of Ratanlal @ Babulal Chunilal Samuska v. Sunderabai

¹⁰ AIR 1953 SC 201

¹¹ (2008) 13 SCC 119

Govardhandas Samsuka¹², 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.”

24. In the matter of Madhu Kishwar and others v. State of Bihar and others¹³ 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 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.”

25. In the matter of Indian Young Lawyers Association and others v. The state of Kerala and others¹⁴ (Sabarimala Temple Case), the Supreme Court 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.””

26. In a latest decision of the Bombay High Court in the matter of Babulal Bapurao Kodape and another v. Sau. Resmabai Narayanrao Kaurati and

another¹⁵, it has been 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.

27. As such, it was incumbent on the plaintiffs to establish a valid custom excluding defendant No.1 – daughter from inheriting the property of her father which in the considered opinion of this Court, the first appellate Court has rightly held that the plaintiffs have failed to plead and establish. The said finding recorded by the first appellate Court is in accordance with law. The first appellate Court has rightly held that the plaintiffs would not be entitled for decree of the entire property shown in Schedule A of the plaint and defendant No.1 would also be entitled for share in the property of Schedule A which is held by her father. Therefore, judgment & decree of the first appellate Court is partly modified holding that the plaintiffs are grand-sons of Chida Uraon and the plaintiffs along with defendant No.1 will also be entitled for the suit property shown in Schedule A of the plaint. The first substantial question of law is answered accordingly.

28. The appeal stands disposed of with the aforesaid modification. Parties are directed to bear their own cost(s).

29. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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