HIGH COURT OF MADHYA PRADESH : JABALPUR

BEFORE HON'BLE SHRI JUSTICE SANJAY YADAV, J.

Second Appeal No.772/1998

Dashrath

versus

Bisahin and another

Shri Ashok Lalwani, learned counsel for appellant.
None for the respondent No.1.
Shri Vikram Johri, P.L. for respondent No.2-State.

J U D G M E N T
(14.10.2016)

Substantial question of law which arises for consideration in this Second Appeal which is directed against the judgment and decree dated 11.7.1998 in Civil Appeal No.11A/1997 whereby, the First Appellate Court has affirmed the dismissal of Civil Suit No.96A/94, are:

1. Whether in view of the fact that it was not disputed that Ramdeen married Shallobai in Churi Form, the Court below was right in dismissing the suit of the appellant on the ground that custom of succession has not been proved?
2. Whether in absence of proof of a custom the appellant shall be entitled to a share in the suit property by virtue of will dated 10.1.1984 executed by Shallobai or otherwise on the basis that she will be entitled to succeed to the half of

the property of Ramdeen as his second wife under section 6 of the C.P Laws Act ?

2. Appellant /plaintiff brought a suit for declaration of title and permanent injunction in respect of land situated at Bhilania bearing Survey No.17,80,138,157,160 and 162 admeasuring 1.34 hectares on the plea that he and the defendant are Gond by caste and are related as brother and sister, and are governed by customs prevalent in Gond Tribe and the provisions of Hindu Law are not applicable to their tribe. That the suit property was owned by Ramdeen Gond. The defendant is the daughter of Ramdeen from her first wife. That after the death of her first wife, Ramdeen had married Shallobai. The plaintiff who is son of Shallobai was 5-8 years at the time of her marriage with Ramdeen and Ramdeeen had adopted the plaintiff. That Ramdeen expired in the year 1983 and Shallobai in the year 1988. That after the death of Ramdeen, Shallobai and the defendant (daughter of Ramdeen) were the joint owner of the suit property. That Shallobai bequeathed her share in suit property in the name of the plaintiff. However, in the year 1993 the defendant obstructed the plaintiff from cultivating the land bequeathed in his favour which led him to file the suit for declaration and permanent injunction.

3. Defendant, however, denied the plaint allegations contending inter alia that said Shallobai was not married to Ramdeen, nor the plaintiff was ever adopted as son by Ramdeen. That the suit property being self acquired property of Ramdeen, after his death, the defendant, sole heir, succeeded to the suit property. The claim it was urged being baseless deserves to be negatived.

4. Pleadings and counter pleadings, led the trial Court frame following issues:

1. क्या वादी वादगस्त भूमि का भूमि स्वामी है?
2. क्या वाद गस्त भूमि का भूमि स्वामी रामढीन था?
3. क्या वादी को रामढीन तथा उसकी पत्नी पौलोबाई ने गोढ पुत्र बनाया है?
4. क्या वादग्रस्त भूमि पर वादी का कब्जा है?
5. क्या प्रतिवादी वादग्रस्त भूमि में वादी के कब्जे में हस्ताक्षर कर रहे है?
6. क्या वादी का वाद परिसीमा काल से वादित है?
7. सहायता एवं व्यय?
8. क्या शैलोबाई ने दिनांक 10.01.1984 का वादी के पक्ष में वसीयतनामा निष्पादित किया? यदि हां तो प्रभाव?

5. As to issue no.3 as to whether the plaintiff was adopted as son by Ramdeen, the trial Court found that the plaintiff could not establish of his being adopted as son. This is borne out from the findings in paragraph 7 which is in following terms:

> "7. पक्षकार गोड जाति है। आदिवासी समाज में हिन्दू उत्तराधिकारी अधिनियम के प्रावधान लागू नहीं होते, ऐसा अभिवचन वादी द्वारा किया गया है। प्रतिवादी की ओर से अधिवक्ता द्वारा किए गये प्रतिपरीक्षण में सतनलाल से कंडिका क्रमांक 17 में जो तथ्य उपवर्णत किये है अहीर, पनका एंव ढीमर जाति में और आदिवासी समाज में

जो रीतिरिवाज है उनमें कोई फर्क नहीं है। इस तथ्य के आधार पर हिन्दू विधि का लागू होने वाला तथ्य मान्य किया जाना था, अपनाई गई युक्ति को सम्बल देना होगा। यह युक्ति रीति या प्रथा जो आदिवासी समाज में रही है, उस पर अध्यारोही प्रभाव डालने वाले साबित होगी ऐसी स्थिति में यह प्रश्न की पक्षकार अर्थात् वादी एवं प्रतिवादी बिसाहिन आदिवासी है, इनमें रीतिरिवाज के आधार पर उत्तराधिकारी और सम्पति का न्याय गमन होता है, ऐसा मानते हुये यह कि वादग्रस्त भूमि रामदीन की थी। यह उभय पक्ष की ओर से स्वीकार किया गया है। ऐसी स्थिति में वाद पद क्रमांक 2 का उत्तर हां में दिया जाता है।

6. In Appeal, the Appellant did not dispute this finding as is evident from paragraph 9 of the judgment in Appeal which records :

"9. अपीलार्थी दशरथ को रामदीन का गोद पुत्र होना अधीनस्थ न्यायालय ने वादप्रश्न क्रमांक–3 के निष्कर्ष में सिद्ध न होना पाया है। अन्तिम तर्क के दौरान अपीलार्थी के विद्वान अधिवक्ता एस.के कनौजे ने उक्त निष्कर्ष को सही होना स्वीकार किया है। इस प्रकार गोद पुत्र के आधार पर अपीलार्थी को स्वत्व प्राप्त होने का प्रश्न शेष नहीं रह जाता।''

7. As to the issue regarding bequeathment of property in favour of the plaintiff, the trial Court on the material evidence on record though found that Ramdeen took Shallobai as his wife (paragraph 8: शैलोबाई को रामदीन ने पत्नी बनाया था। इस बात की पुष्टि साक्ष्य से होती है). However, it found that the Ramdeen having expired in the year 1983 left Shallobai and the defendant as joint owner and being the

joint owner and that the customs followed in the Gond Tribe being akin to Hindu Custom, held that it was not within her right, without there being express partition to have bequeathed the property in favour of the plaintiff. No custom was found to be proved that by virtue of same and as a thumb after the death of husband, the wife get half share in his property. The trial Court found:

> ''9. जहां तक वाद पद क्रमांक 1 और 9 का सवाल हैं। इसमें यह तथ्य की दूसरी पत्नी को भी पति के मर जाने पर संतान के साथ हक प्राप्त होता है ये तथ्य योग्य है। सतनलाल ने कंडिका क्रमांक 6 में इसकी बताता है वादी भी इस तथ्य को व्यक्त करता है। प्रतिवादी साक्ष्य से इस स्थिति में विपरीत तथ्य व्यक्त किए गए है। वादग्रस्त भूमिका भूमिस्वामी रामदीन रहा है। शैलोबाई को रामदीन ने पत्नी बनाया था। इस तथ्य की पुष्टि साक्ष्य से होती है। रामदीन की मृत्यु सन् 1983 में हो गयी। ऐसी स्थिति में वादग्रस्त भूमि का न्याय गमन रामदीन के उत्तराधिकारी अर्थात् उसकी पुत्री जो कौशल्याबाई से उत्पन्न हुयी है बिसाहिन बाई प्रतिवादी क्रामंक 1 तथा शैलोबाई पर होगा। शैलोाबाइ ओर बीसाहिन संयुक्त रूप से वादग्रस्त भूमि में हकदार यदि माने जाते है। तब वर्ष 88 में शैलोबाई की मृत्यु हो जाती है शैलोबाई ने वसीयतनामा प्र.पी–4 निष्पादित दिनांक 10.01.84 में किया है। वर्ष 83 में वादग्रस्त भूमि दोनों को मिली है। वर्ष 84 तक यह संयुक्त रूप से रही है ऐसी स्थिति में जब भूमि का बटवारा नहीं हुआ, तब वसीयतनामा 1/2 हिस्से का किस रूप में किये क्या किया गया, सही स्थिति शैलोबाई को अधिकृत नहीं करती है। पक्षकारों के बीच यद्यपि हिन्दू विधि के पूर्ण रूप से लागू नहीं होती, किन्तु जहां दशरथ कंडिका क्रमांक 13 में यह बताता है कि हिन्दू धर्म व गोडी धर्म में कोई फर्क नहीं है। सभी में सारी रीति रिवाज हिन्दुओं से रहते है। वहां इतना इस रूप में कि जहां पूरी तौर से प्रथा पक्षकारों के बीच सिद्ध नहीं हो पाती, वही सिद्धांत जो कि उत्तराधिकारी से संबंधित है उसे मानते हुये

वादग्रस्त भूमि को पक्षकारों के बीच संयुक्त परिवार की भूमि माना जा रहा है, तब वादग्रस्त भूमिका वसीयतनामा के माध्यम से अंतरण की जा सकने के लिये शैलोबाई को न्याय संगत रूप से अधिकृत नहीं माना जा सकता।''

8. Even the Appellate Court after considering the pleadings contained in paragraph 4 of the plaint and the statement of PW-2 Sutanlal and PW-3 Jogaram found that it could not be established that customary plaintiff's mother acquired any right in the property of Ramdeen. The Appellate Court analysed the pleadings and statements of plaintiff's witnesses and concluded that:

"12. अपीलार्थी ने वाद पत्र की कंडिका ब–4/में दिनांक 23.07.2016 को यह संशोधन किया है कि, गोंडों में यह प्रथा है कि यदि उसकी पत्नी दूसरा मर्द बनाकर चली जाती है तो ऐसा पुरूष गोड जाति के दूसरी महिला को पत्नी बनाकर रख सकता है, और ऐसी महिला पुरूष की मृत्यु के बाद उसकी संपत्ति के उत्तराधिकारिणी होती है। उक्त कस्टम को सिद्ध करने के लिये अपीलार्थी/वादी द्वारा अधीनस्थ न्यायालय में सतनलाल वा.सा.–2 तथा जोगी राम वा.सा–3 के बयान कराये हैं। सतनलाल वादी का चाचा है, जैसा कि उसने अपने प्रति प्रतिपरीक्षण के कण्डिका 10 में स्वीकार किया है। सतनलाल ने बताया है कि, गोंड़ जाति में चूडी पहनाई हुई औरत को भी संपत्ति में हक मिलता है। उसने उदाहरण स्परूप दुकली बाई को चतरू की चूडी पहनाई औरत के रूपमें हक मिलना बताया वादभूमि पर कब्जा होना भी नहीं पाया। प्र.पी–4 के वशीयत नामा को प्रमाणित पातेहुये भी इस वशीयत नामे से कोई स्वत्व अपीलार्थी/वादी के पक्ष में उत्पन्न न होना पाया गया और इस कारण वादी की वाद भमि का स्वामी होना अप्रमाणित पाते हुये वाद निरस्त कर दिया। ''

9. Trite it is that a party who sets up a custom has to prove it. It has been held in **Salekh Chand (Dead) By Lrs vs Satya Gupta: (2008) 13 SCC 119 :**

> 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
>
> 23. Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the alleged custom should be forthcoming. A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case. Where, however a custom is repeatedly brought to the notice of the courts, the courts, may hold that the custom was introduced into law without the necessity of proof in each individual case.

24. Custom is a rule which in a particular family or a particular class or community or in a particular district has from long use, obtained the force of law. Coming to the facts of the case P.W.1 did not speak any thing on the position either of a local custom or of a custom or usage by the community, P.W.2, Murari Lal claimed to be witness of the ceremony of adoption he was brother-in-law of Jagannath son of Pares Ram who is said to have adopted Chandra Bhan. This witness was 83 years old at the time of deposition in the Court. He did not speak a word either with regard to the local custom or the custom of the community. P.W.3 as observed by the lower appellate Court was only 43 years' old at the time of his deposition where as the adoption had taken place around 60 years back. He has, of course, spoken about the custom but that is not on his personal knowledge and this is only on the information given by P.W.2, Murari Lal. He himself did not speak of such a custom. The evidence of a plaintiff was thus insufficient to prove the usage or custom prevalent either in township of Hapur and around it or in the community of Vaish.

...

26. A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and

> binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.
>
> 27. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Riwaj-i- am or Manual of Customary Law. “

10. In the case at hand, having failed to establish the custom in Gond Tribe of a widow succeeding to half of the share in the property of husband, the bequeathment of half of the share in the suit property by Shallobai in favour of plaintiff did not confer any right, title in him as no right, title existed in favour of Shallobai.

11. In view whereof, the concurrent findings and the conclusion arrived at by both the Courts cannot be faulted with.

12. The reliance placed on the decisions in **Jahuri Sah vs Dwarika Prasad Jhunjhun-wala AIR 1967 SC 109**

and **Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi AIR 1960 SC 100** are of no assistance to the Appellant. Because the Appellant has failed to establish that by succession a widow in Gond Tribe is entitled for half share in the property of her husband. Proviso to Sub-Rule (1) of Rule 5 of Order 8 of the Code of Civil Procedure, 1908 carves out an exception to general rule of non traverse contained in Rule 5 of Order 8. It confers discretion on the Court to require any fact said to have been admitted to be proved otherwise than by such admission.

13. It has been held in **Badat and Co. Bombat vs East India Trading Co.: AIR 1964 SC 538 :**

> 11. ... The first paragraph of r. 5 is a re-production of O.XIX, R. 13, of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do 'Justice between those parties, for which Courts are intended, the rigor of r. 5 has been modified by the introduction of the proviso thereto. Under that proviso the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably relying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice..... In

construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non- suiting the plaintiff. The discretion under the proviso must be exercised by a Court having regard to the Justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a Court wherein such pleadings are filed."

14. In **Smt. Sarla Devi W/O Dwarkaprasad vs Birendrasingh AIR 1961 MP 127,** a Division Bench of our High Court observed:

"27..... While it is true that the allegations of fact, which are not denied specifically or by necessary implication, may be accepted to have been admitted, proviso to Rule 5 of Order VIII. C. P. C., provides that the Court may, in its discretion, require any fact so admitted to be proved otherwise that by such admission.

... Further, as held by the Judicial Committee of the Privy Council in Anand Kuar v. Tansukh, ILR 11 All 396 (PC), when a point has been the subject of an issue, the parties shall not be heard to say that the point was not disputed and so required no proof."

15. Further, in **Hari Singh vs Dharam Singh AIR 1980 Delhi 316,** it has been held by Delhi High Court :-

> “8.....It is true that the conjoint effect of Rules 3, 4 and 5 of Order 8 of the Code is that a defendant who wants to deny the facts must do so clearly and explicitly and a vague or evasive reply by the defendant cannot be considered to be a denial of fact alleged by the plaintiffs. Thus, statement that "the plaintiff is put to proof of the several allegations in the plaint" or that "he does not admit correctness of the averments contained in the plaint" is generally speaking not sufficient denial within the meaning of Rules 3 and 4 of Order 8 and by virtue of Rule 5, the Court may relieve the plaintiff of the obligation of proving such allegations in his plaint as are neither specifically denied nor stated to be not admitted in the written statement. However, the rule as to non-traverse in written statement has not to be applied mechanically without applying the judicial mind. It is not a rule of thumb to be followed blindly. This is amply clear from the proviso to sub- rule (1) of Rule 5 which confers discretion on the Court to require any fact "so admitted" to be proved otherwise than by such admission.”

16. In view of the aforesaid factual situation and the principles of law enumerated above, the substantial questions of law are answered against the plaintiff.

17. Consequently, the Appeal fails and is **dismissed**. No costs.

(SANJAY YADAV)
JUDGE

vinod/das