IN THE HIGH COURT OF JHARKHAND AT RANCHI
S.A. No. 127 of 2014

Prabha Minz daughter of Late Saran Linda, resident of Village- Arah, P.O.- Mahilong Tatisilwai, P.S.- Tatisilwai, District- Ranchi

….. ….. **Plaintiff/Plaintiff/Appellant**

Versus

1. (a) Martha Ekka wife of Late Ajit Ekka,
   (b) Maksima Ekka,
   (c) Aanshi Graysi Ekka,
   Both daughters of Late Ajit Ekka,
   All resident of Susai, P.O. & P.S.- Mandar, District- Ranchi
2. Rites Minz, son of Late Michael Minz,
3. Manju Minz, wife of Late Michael Minz,
4. Rashmi Rina Minz, daughter of Michael Minz,
   Sl. Nos. 2 to 4, are resident of Lal Girja Ghar, Mission Compound, Chakradharpur, P.O. & P.S.-Chakradharpur, District- West Singhbhum (West).
5. (i) Asha Minz, W/o. Late Arthur Minz,
   (ii) Rinku Minz, S/o. Late Arthur Minz,
   (iii Ajit Minz, S/o. Late Arthur Minz
   All resident of Railway Colony , A- Block Quarter, Chakradharpur, P.O. & P.S.- Chakradharpur, District- West Singhbhum.
6. Circle Officer, Namkum (Khijri), P.O. & P.S.- Namkum, District- Ranchi.
7. Halka Revenue Karamchari, Village Arrah, Suresh Das, Namkum (Khijri) Anchal, P.O. & P.S.- Namkum, District- Ranchi.
8. Deputy Commissioner, Ranchi, P.O.- G.P.O., P.S.- Kotwali, District- Ranchi.

…. …. **Defendants/Respondents/Respondents**

CORAM: HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

For the Appellant : M/s Rahul Kumar Gupta, Kundan Kr. Ambastha, Kushal Kumar & Avish Anand Advocates

For the Respondents : Mr. Rajeeva Sharma, Sr. Advocate,
Mr. Ravi Shankar Paswan, Advocate,
Mr. Vinay Kumar Tiwary, Advocate,
Mrs. Rita Kumari, Advocate,
Mr. Atanu Banerjee, Advocate,
Mr. Vikash Kishore Prasad, Advocate,
Mr. Rajeev Ranjan Tiwari, Advocate,
Mr. Ritesh Kumar, Advocate.

CAV ON 24. 02. 2022 **PRONOUNCED ON 22.04. 2022**

1. Appellant is the plaintiff who has preferred the instant appeal against the judgment and decree passed in Title Appeal No. 13/2013 whereby and whereunder the judgment and decree passed in Title Suit No. 1/2003, by Additional Munsif-II, Ranchi has been affirmed .

2. The parties shall be referred to their placement as per the plaint and WS and will include their LRs substituted at different stages.

3. The plaintiff (appellant) filed the suit for the following reliefs:-

(A) That the sale deed No. 10646 dated 25.11.2000 be declared void inoperative and not binding upon the plaintiff being fraudulent and sham and also executed in violation of the mandatory provisions of the C.N.T. Act, 1908.

(B) For declaration that defendant Nos. 2 and 3 are not legal heirs of the Khatiyani raiyat nor are bhaiyads of late Saran Linda, rather they are strangers to the lineage of the Khatiyani raiyat- Maru Oraon of Khata No. 123 of village- Arrah, Thana No. 178, P.S.- Tatisilwai, District- Ranchi.

(C) That the right and title of the plaintiff over the suit land be declared and possession be also confirmed and if dispossessed a decree for recovery of possession be passed.

(D) That permanent injunction restraining defendant No. 1 from interfering in any manner with the possession of the plaintiff over the suit land be granted.

4. The plaintiff is a female member of Oraon tribe and the title and possession to her admitted ancestral property is under challenge on the ground that she is female and has no right of inheritance under customary law applicable to tribals.

5. The suit land detailed in the plaint is measuring 22 decimals, appertaining to plot no. 1911 under khata no. 123. , of village Arrah, thana no.178, District Ranchi.

6. The case of the plaintiff is that the suit land was recorded in the name of **Maru Oraon** along with other plots total land area being 13.64 acres out of which 1.29 acre was acquired for military farm long ago. Maru Oraon died in the year 1945 leaving behind **Saran Linda** the only male heir and the land measuring 11.35 acres appertaining to khata no. 123 was mutated firstly in the shrista of the then landlord of the village Arrah and then after vesting of the Jamindari in the Shrista of the Circle Officer, Namkum Anchal, Ranchi in the name of Saran Linda. Saran Linda died on 07.04.1974 leaving behind three daughters namely, Shanti Guria (since dead), Anita Karuna Minz and **Prabha Minz** (the plaintiff), but no male heir. The name of **Sarani Minz** the wife of Saran Linda was mutated vide Mutation Case No. 24R-27/85-86 on 20.08.1985 and since then the rent receipts are being regularly issued in her name

without any objection from any quarter. Sarani Minz died on 21.05.1998 leaving behind the plaintiff in cultivating possession of all the lands of khata no. 123 including the land of plot no. 1911 on 25.01.1991 which is the only source of her livelihood. The mother of the plaintiff Sarani Minz made the last and only the Will vide deed no. 180/1991. On 19.05.2002 when defendant no. 1 started some construction work on the suit land the proceeding was initiated under section 144 Cr. P.C. vide case no. M.1434/2002 along with others opposite parties. It then came to the knowledge of plaintiff about the execution of the sale deed no. 10646 dated 25.11.2000 by the original **defendant nos.2 & 3** (Michael Minz and Arthur Minz claiming themselves to be *bhaiyad* of Saran Linda the grandsons of the Recorded Tenant Maru Oraon in favour of defendant no. 1 (Ajit Ekka) after obtaining permission under section 46 of the CNT Act. In order to show the defendants nos.2 & 3 where the agnates (bhaiyads), after the death of Sarani Minz on 21.5.98, interpolation was made collusively by the *Halka Karamchari* in the jamabandi by inserting in 1998 the word 'others' (*Wagiarah*). It was on the basis of this interpolation and tampering of record, defendant-5 submitted false and fabricated report which was endorsed by defendant-4, the circle officer in the permission case no. 830-R-8 II/2000-2001/M 504-R 8 II/2000 u/s 46 of the CNT Act for the sale of the land in dispute by Defendant nos.2 and 3. The act of interpolation in the jamabandi of khata no. 123 of village Arrah VO;-page 75 of the Register II was made at the instance of Lawrence Linda ex-mukhiya of Arrah panchayat and one Chandramohan Tiwari of village Arrah in the year 1998. The permission u/s 46 of the C.N.T Act was obtained on the basis of the false affidavit sworn by defendant no.2 and 3 that both the sellers and purchasers were resident of the same village and same thana. By playing fraud permission was obtained under Section 46 of the CNT Act and the suit land was sold by defendant nos. 2 & 3 in favour of defendant no.1.

7. Defendant no.1 to 3 filed their joint WS whereas defendants no.2 to 6 did not appear in the case and the suit proceeded exparte.

8. The main plea of the contesting defendants 1 to 3 is that both the parties are members of Schedule Tribe and are governed by their customary law of succession in which the females are excluded from inheritance and the plaintiff has no right title interest and possession over the suit land.

9. The case of the plaintiff that Maru Oraon died leaving behind Saran Linda as the only male heir has been disputed and it is contended that he died leaving behind his three sons namely Bishram, Saran and Bipda as legal heirs who came in joint possession over the lands of RS Khata No. 123 under District Ranchi and they got their name jointly mutated. Award was jointly prepared in the name of the three brothers in Land Acquisition Case No. 2/1965-66 and they received compensation jointly. It has been admitted that Saran Linda died in 1974. It has been admitted that defendant No. 2 & 3 have sold 22 decimal in RS Plot No. 1911 of Khata No. 123 after getting due permission under section 46 of the CNT Act the transferees have got their name duly mutated. Regarding the WILL in favour of the plaintiff , it is averred that it is not valid and legal. The plaintiff after her marriage with her husband Bhoal Singh in the house of Arun Munda. Being a tribal she had no right to execute the will in favour of her daughter.

10. On the basis of the pleadings of the parties the following main issues were framed :-

III Whether under the Oraon Customary Law daughters are heirs and entitled for succession?

IV Whether the sale deed No. 10645 dated 25.11.2000 can be declared void and not binding upon plaintiff?

V Whether the sale deed is in violation of CNT Act 1908?

VI Whether the defendants are direct heirs of the recorded tenant or not?

11. The learned trial court on Issue No. VI recorded a finding of fact that Maru Oraon had four sons one of them being the father of the plaintiff Saran Minz, and others being fathers of defendant nos. 2 & 3 Bisram Minz. Thus, it has been concluded that the defendant no.2 and 3 were the legal heirs and successors of Maru Oraon. Issue No. IV was answered in the negative on the basis of the commentary by S.C. Roy in the Book “The Oraons of Chhota Nagpur”, 2nd Re-print-2004, Page-228. It has been held that as per the customary law of inheritance as applicable to the Oraon tribe, the females are debarred from inheritance. In view of the findings of Issue No. VI and III other issues were decided in the negative against the plaintiff and the suit was dismissed.

12. The Court of appeal concurred in the finding of fact on these material issues and dismissed the appeal.

13. The appeal had been admitted for hearing on the following substantial questions of law:

A. Whether the trial court and the appellate court have erred in holding that Bishram Minz was the son of Maru Oraon without considering Ext.13 Series i.e. Voter list and Ext.19, the service record of Bishram Minz wherein his father's name has been mentioned as Johar Minz?

B. Whether the alleged custom amongst tribals debarring females from their right of inheritance over the lands left by the ancestors satisfies the test of a binding custom as laid down in the case of ***Laxmibai (Dead) thr. L.Rs. and Anr. Vs. Bhagwantbuwa (Dead) thr. L.Rs. and Ors****.; reported in* ***(2013) 4 S.C.C. 97****?*

14. It is not in dispute that parties are members of the scheduled Tribes and they are governed by their customary laws of succession.

15. Sri Rahul Kumar Gupta the learned Counsel on behalf of the appellant has not seriously contested the findings recorded by both the Courts below that recorded tenant Maru Oraon had four sons including Bishram Oraon. The main argument that has been strongly canvassed is that there is no credible evidence on record to establish that father of Defendant no.2 & 3 Bishram Minz was the very same Bishram Oraon s/o Maru Oraon. There was no unity of identity of these two person. The main evidence to buttress this line of argument is that Bishram Minz father of defendants no.2 and 3 in his service records (Ext 19) has declared the name of his father to be Johur Minz and not Maru Oraon. Further in the voter list of assembly constituency of PWD Dakbunglow, Potka, Chakardharpur of polling booth no.173, distict E.Singhbhum (Ext 13), parentage of Bishram Minz has been shown to be John Minz. It is contended that on these documentary evidence it is established that defendants are the sons of Bisram Minz and grandsons of Johur Minz. There is no evidence to connect these defendants to the recorded tenant or his son Bishram Oraon.

The second limb of argument is on the said customary law of inheritance applicable to member of schedule tribes of Oraon caste, under which it has been pleaded on behalf of the defendants that the females are debarred from inheriting the property of their ancestor. It is argued that all customs do not have a binding force unless and until by its prolonged and uniform use from ancient time it has acquired by continuous and compulsory practice binding force. No custom is valid if it is illegal, immoral,

unreasonable or opposed to public policy. Any customary law which is selectively followed cannot be said to have acquired the force of law. It is submitted that the custom of debarring a female from inheritance is of a remote antiquity but there is no evidence of continuous and consistent practice so as to draw an inference that it has acquired binding force. The judicial precedence is not uniform on this point. There is a very large volume of judgments and orders passed by the civil courts as well as by the revenue courts and also by the High Courts where such a customary law of inheritance debarring females from inheritance has not been recognised and accepted. There are cases where females have been excluded from inheritance on being barred by the customary law. At the same time there are cases where females have been given hereditary rights in the teeth of objection that females had no hereditary right. The divergent judicial pronouncements are evidence of inconsistency on the customary law of inheritance being followed by the tribals. Unless any custom has been consistently and uniformly followed they cannot be held to have binding force. **Joseph Munda Vs Most Fudi :SCC On Line Jhar 382 : AIR 2009 Jhar 115** has been referred to demonstrate that High Court refused to deny right to inheritance to female on the ground that it was barred under customary law. In this case it is evident that not only the revenue Court but also the High Court recognized the right of female inheritance of a member of schedule tribe. It is apparent from this judgment that despite being the daughter the name of Most. Karuna her name was entered in the record of rights and that too after rejecting the objection of the ancestors of the plaintiffs. Secondly, despite being the female heir she was recognised as the heir and subsequently it was also accepted by the ancestors of the plaintiffs in the year 1931. The court refused to apply the said custom debarring female from inheritance.

16. Reliance has been placed on **Laxmibai Vs Bhagwantbuva (2013) 4 SCC 97** wherein it has been held **"12.** Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom. Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law.

Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.

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14. A custom must be proved to be ancient, certain and reasonable. The evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method. Nothing that the courts can take judicial notice of needs to be proved. When a custom has been judicially recognised by the court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872. Material customs must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the court become so notorious, that the courts take judicial notice of it. (See also *Effuah Amissah* v. *Effuah Krabah* [(1936) 44 LW 73 : AIR 1936 PC 147] , *T. Saraswathi Ammal* v. *Jagadambal* [AIR 1953 SC 201] , *Ujagar Singh* v. *Jeo* [AIR 1959 SC 1041] and *Siromani* v. *Hemkumar* [AIR 1968 SC 1299] .)"

17. It is argued that the main source of customary law among tribals in the state of Jharkhand from which it is derived that the females are completely excluded from the hereditary line is the book "Oraon's of Chotanagpur" by Sri S.C. Roy and with respect to Santhal tribes the Gantzer's report. Both these sources are about 100 years old and do indicate even in those times custom of debarring female from inheritance was not uniform and with change in socio-economic condition it was losing traction. The Gantzer's report notes, "The rules against female succession among Santals whether Christians or non-Christians are changing owing to the force of public opinion, and the rules which have been previously accepted, cannot be treated as hard and fast and binding for all time. The change which is occurring is in the direction of ameliorating the condition of women and giving them a more assured footing in the family. During the course of the revision of settlement operations the daughters of a deceased Santal have sometimes been recorded as his heirs not only without opposition from the

agnates but at their request. In other cases it appears from title suit decisions, that arbitrators in Santal cases have found in favour of daughters. This is particularly so in the case of girls who suffer from any physical defects. In dealing with cases of this nature the custom adopted in a particular locality must be carefully considered".

This report has come in the year 1935 and the winds of change in the law of inheritance had been noted by the author of the report. Similarly, in page 223 of the book by Sri S C Roy it has been noted, changes in the economic conditions of Oraon life have introduced important modifications in the two fundamental rules of Oraon customary law of inheritance.

18. It is argued by Senior Counsel Sri Rajeev Sharma on behalf of the respondents that the scope of adjudication in a second appeal is limited one and the questions of fact which have been settled by the concurrent findings of the courts below cannot be reopened. The very foundation of the plaintiff's case that the recorded tenant Maru Oraon had only one son has been demolished on the basis of the evidence on record. It has been proved beyond doubt that Maru Oraon had four sons. It is further submitted that the first substantial question of law regarding non-consideration of Exhibit-19 and 13 would not legally invite the consideration of this court in view of the law settled by Hon'ble Supreme Court in 2014 (1) JLJR 300 SC Swbastio Luis Fernandes Vs KVP Shastri, wherein it has been held that in title suit it is for the plaintiff to establish his claim of ownership. Elementary rule in section 101 of the Evidence Act is inflexible and under section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove to circumstances, if any, which would disentitle the plaintiff to the same. The plaintiff being married daughter of Saran Linda (son of the recorded tenant) had no right of inheritance under the Oraon customary law. In Madhukishwar case reported in AIR 1996 SC 1864 wherein the Supreme Court cautioned the courts to restrain themselves interfering in the tribal customary law of inheritance as that would endanger and bring chaos in the peaceful life of tribal community. It is also argued that the plaintiff has not come with a clean hand having pleaded that the recorded tenant had only one son which has been falsified by exhibit- J wherein the mother of the plaintiff Sarini Linda had filed application dated 30.8.1968 in the land acquisition case number 2/65 – 66 admitting that the

recorded tenant Maru Oraon had four sons. With regard to Exhibit 19 it is argued that change in father's name of Bisram Oraon in the service record was not by itself a conclusive proof that he was not the son of the recorded tenant Maru Oraon. Further, the facts of railway service record of Bishram Oraon is not pleaded in the plaint and therefore Exhibit 19 is beyond the pleadings.

It is argued that the customary law of inheritance of the members of Oraons wherein the females are not permitted inheritance has been stated by Sri S C Roy in his book. In Matis Tirkey Vs Jusuphin Lakra 2008(2) JCR 208 (Jhr) it has been held "the widow does not inherit the properties of her husband and neither does the mother or daughter inherit the property of her father. Widow and unmarried daughter hold the property is in lieu of their maintenance". In the book by S.C Roy the position of customary law has been stated at page 17 – 14, "therefore it can be said that as per customary law prevalent in the Oraon tribal people of this region a married daughter has no right to inheritance".

19. Admitted position that emerges from the pleadings of the parties is that Maru Oraon was the recorded tenant of the suit land. Plaintiff was the heir and descendant of Maru Oraon the recorded tenant is not in dispute. The defendants, however, claim that Maru had not one son Saran Linda, but had three more sons namely Bishram (father of Defendant no. 2 and 3), John and Bipta. All the three brothers succeeded to the property and came in joint possession of the land under khata 123 which was acquired by the Govt. and all the sons of Maru Oraon received compensation.

20. It is not in dispute that plaintiff is the natural heirs and descendants of common ancestors Maru Oraon. This fact has not been disputed by the defendants. What is disputed is her legal rights of inheritance as per the customary law of succession applicable to the Oraon tribes. Both the Courts below have held that under the customary law of inheritance, females were barred from the right of inheritance. Before coming to question of customary laws of succession as applicable to the member of Oraon tribe which has been formulated as second substantial question of law, it shall be incumbent to examine the first substantial question as to whether the defendants where the heirs and descendants of Maru Oraon, in view of the Exhibits and 13 and 19.

21. Plaintiff's case is that Maru Oraon had one son Saran Oraon and the defendant's contend that he had three more namely **Bishram Oraon,** Bipta Oraon and John Oraon. Plaintiff claim title through Saran Oraon as the only son of recorded tenant Maru Oraon and Defendan nos.2 and 3 claim title through Bishram.

22. Once the chain of title by the plaintiff from the recorded tenant is established it becomes incumbent for the defendants to establish their chain of title . It is to this end that it was necessary for the defendants nos. 1 & 2 to establish that Maru Oraon had four sons and secondly, the defendants were his heirs and descendants of one of the son Bishram Oraon. Distinction exists between burden of proof and onus of proof. Burden of proof on pleadings never shifts. It remains constant. Initially burden to proof prima facie case is on the plaintiffs. When he gives such evidence as will support his prima facie case, onus shifts on the defendants to adduce rebutting evidence to meet the case made out by the plaintiffs. As the case continues to develop onus may shift back again on the plaintiff. It has been held in Anil Vs. Gurubukhas AIR 2006 SC 1971 that *in terms of section 102 initial onus is always on the plaintiffs and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstance which would disentitle the plaintiffs to the same.* The main principle governing the burden of proof is that the party who makes a legal claim must prove the operative legal facts for that claim, i.e. the facts that according to the law are ordinarily sufficient reasons for the claim. In theory, the term means two kinds of burdens: the burden of production and the burden of persuasion which is an obligation that remains on a single party for the duration of the court proceedings. The burden of persuasion should not be confused with the evidential burden or burden of production of evidence which is an obligation which may shift between parties over the course of the hearing or trial.

23. Here in the present case it is beyond dispute that plaintiff was in the natural line of descent from the recorded tenant. The defendants too claim title by inheritance, therefore onus to prove their chain of title and the genealogy in support of their claim was on them.

24. The oral evidence on the question whether Bishram was the son of Maru Oraon or not is inconclusive as witnesses of both sides have supported their respective cases.

25. From the side of the defendants the clinching documentary evidence is Ext D/1 which is award of compensation in pursuance of acquisition of the land by the Central Government for the Military Dairy Farm and for which a valuation khatian was prepared in the name of all four sons of Maru Oraon. These evidences do not leave a shred of doubt that Maru Oraon had four sons namely John Oraon, **Bisram Oraon,** Saran Oraon and Bipta Oraon. Findings of fact recorded by the Courts below regarding this does not suffer from any infirmity and is accordingly affirmed.

26. Now coming to the question whether the defendant no.2 and 3 Michael and Arthur respectively were the sons of Bishram Oraon. Learned Courts below have relied on Ext.E which is the permission order u/s 46 of the CNT Act in case M-830 R8 II/ 2000-2001/M-504 R 8II/2000 by which Defendant no.2 and 3 were allowed to sell the land.

27. It is argued on behalf of the appellants/plaintiff that Defendants no.2 and 3 are not the sons of Bishram Oraon whose name figure as the son of Maru Oraon, but they are the sons of Bisram Minj who was son Johur Minj and not of Maru Oraon as contended by the defendants. **Exhibit 19 is the service book** of Bisram Minz the father of defendant no.2 and 3 who was in service of Bengal-Nagpur Railway as fireman, wherein the name of his father is recorded as **Johur Minj** and not as son of Maru Oraon. Further, Ext. 13 is the voter list of Chakardhar Pur which also states that father of Bishram Minz was Johur Minz. It has been argued on behalf of the defendants.

28. The plaintiff discharged her initial onus by leading Ext 13 and 19 to show that father of Bishram Minj father of the defendants was not the son Maru Oraon and therefore it was incumbent on the part of the defendants to have led contrary evidence in support of their case. It is argued on behalf of the appellants that in case of claim of reversionary interest every link in the genealogical tree need to be proved. Defendants no.2 & 3 executed the sale deeds claiming themselves to be the descendants of the recorded tenants, it was for them to have proved each and every link with the original recorded tenant. Reliance has been placed on ***State of Bihar v. Radha Krishna Singh*, (1983) 3 SCC 118 at page 171** wherein it has been held that the onus to prove the genealogy was on the party who claims such reversionary interest. Their lordship's observed **"** By way of introduction, it may be noted that in the present case the onus lies squarely on the plaintiff Radha Krishna Singh

to prove his case by showing that he was the next reversioner of the late Maharaja and that every link in the genealogical tree which he has set out in the plaint was proved. Only after he has discharged his burden by proving the aforesaid facts, could the defendants be called upon to rebut their case".

29. Defendant no.2 Michael Minz has been examined as D.W. 6. He has deposed in para 3 of the cross-examination that he cannot say how many brothers and sisters Mandu Oraon was. Similarly he has expressed ignorance about the profession of Bipta Minz. Mandu Oraon is none other but the grandfather of defendant no.2 and Bipta was his uncle as per their case. The ignorance of these fundamental facts about grandfather and uncle lends credence to plaintiff's case that defendant no.2 and 3 were rank strangers to the family Mandu Oraon.

30. The Trial Court as well as the first Courts of appeal have not considered Ext 19 and 13 and assigned any reason to discard these evidences. The main evidence to have been relied by these Courts is the order passed in (Ext E) permission case under Section 46 of the Chotanagpur Tenancy Act, 1908 (Hereinafter called CNT) wherein permission was granted to Defendant nos. 2 & 3 to transfer the land in favour of defendant no.1 sometime in the year 2000 cannot be regarded as the conclusive prove of inheritance from recorded tenant in view of the contrary evidence. The other evidence relied by the trial Court is evidence of DW 7 which established his residence in the village Arrah by Ext G and Ext G/1 issued by Banking Service Recruitment Board regarding his appointment as employee. Residence in the same village does not necessarily prove that they were the heirs of the recorded tenant Maru Oraon.

31. In order to better appreciate and put the evidence in context the chronology of dates which have not been disputed need to be set out:

a. Maru Oraon recorded tenant dies in 1945
b. Land is mutated in the name of Saran Linda
c. His son Saran Linda dies on 7.4.1974
d. Suit Land mutated in the name of his daughter Sarani Minz on 20.8.1985
e. Sarani Minz executed her last WILL in favour 25.1.1991 vide registered deed no. 180/1991 Exts 1 and 1/A in the name of Sarani Minz with respect to Khata 123, Ext 2 correction slip in the name of Sarni Minz,
f. Sarani Minz dies on 21.5.1998

g. Permission case filed by defendant no.2 &3 under section 46 of the CNT Act in 2000

h. Registered deed of sale executed on 15.11.2000

32. Claim of defendants no.2 & 3 that they were the grandsons of recorded tenant Maru Oraon and their father Bisram Minz was the son Maru Oraon does not inspire confidence for the following reasons:

Firstly, Ext 19 which is entry in the service record, father of the Bisram Minz was Johur Minz. There is no contrary evidence or explanation regarding this on behalf of the defendants. Ext. 13 is the voter list of Chakardhar Pur which also states that father of Bishram Minz was Johur Minz.

Secondly, common ancestor died in the year 1945, but there is no evidence to show that land was ever mutated in the name of Bishram Oraon.

Thirdly, the land was duly mutated in the name of Sarani Minz and her name was entered in Register II and rent is being paid to the state in her name.

Fourthly, in the registered deed of sale by which the 22 decimal of land was sold by defendant no.2 and 3 in favour of defendant no.1, the vendor claims title as heir of Sarani Minz and not as heir and descendant of Bishram Oraon.

Fifthly, revenue records are not documents of title, but they are evidence of possession. Recorded tenant died in the year 1945 and thereafter it was mutated in the name of his son Saran Oraon who died in 1974 and the suit land was mutated in the year 1985 in the name of his daughter Sarani Minz. There is not a piece of documentary evidence to connect defendant no.2 and 3 or his father to the suit land during this long gap of more than 50 years till 2000 when the permission case was filed to transfer the land to defendant no.1.

Sixthly, defendant no.2 who claims to be the grandson of Mandu Oraon has expressed his complete ignorance in his cross-examination about Mandu Oraon and how many brothers and sisters he had.

33. For the reasons discussed above, I am of the considered view that the finding of Courts below was perverse for not considering Ext 19 and 13, nor assigning any reason for discarding the same. There was manifest error in the finding that defendant no.2 and 3 were the grandsons of Maru Oraon

and their father Bisram Minz was his son, mainly only on the basis of order passed by the revenue Court granting permission to them in the proceeding under Section 46 of the CNT Act. From Ext 13 and 19 it is evident that father of Defendant nos. 2 & 3 Bishram Minz was son of Johur Minz and not of the recorded tenant Maru Oraon and therefore a complete stranger having no title to the suit land had no right to transfer part of suit land to defendant no.1. The transfer being made without any title did not transfer any right title and interest in the suit property. The first substantial question of law is therefore answered in the favour of the plaintiff/appellant.

34. The second substantial question of law is whether the customary law of inheritance amongst tribals debarring females from their right of inheritance over the lands left by the ancestors has the binding force as per the test of a binding custom laid down in the case of **Laxmibai (Dead) thr. L.Rs. and Anr. Vs. Bhagwantbuwa (Dead) thr. L.Rs. and Ors**.; reported in **(2013) 4 S.C.C. 97**?

35. In view of the finding on the first substantial question of law in favour of the appellant, a finding on the second substantial question of law survives because, the defendants have questioned the right of the plaintiff on the very ground that the females were not entitled to inheritance. The question raised is of fundamental and seminal significance and it is to be tested in the instant case whether customary law of succession disinheriting female had acquired a binding force of general customary law.

36. An irregular and inconsistent practice of a custom cannot accord it a binding force of general customary law. There is a difference between general and special custom. It has been held in ***Laxmibai v. Bhagwantbuva*, (2013) 4 SCC 97 "** Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom. Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies

upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence".

37. According to Sir John Salmond, "custom is frequently the embodiment of those principles which have commended themselves to the national concerns as principles of justice and public utility . Salmond notes that although custom was an important source of law in early times, it's importance continuously diminishes as the legal system grows. As an instrument of the development of English law in particular, it has now almost ceased to operate, partly because it has to a large extent been superseded by legislation and precedent, and partly because of the stringent limitations imposed by law upon its law–creating efficacy. In earlier times it was otherwise. It was long the received theory of English law that whatever was not the product of legislation had its source in custom. Law was either the written statute law, or the unwritten, common, or customary law. In the language of English law the term custom is more commonly confined to legal custom exclusively, while conventional custom is distinguished as usage. In any talk of custom, therefore, it is always carefully to be noticed whether the matter referred to is legal custom or conventional custom–custom *stricto sensu* or usage. Occasional failure to appreciate and bear in mind the essential nature of this distinction has been responsible for a good deal that is obscure and difficult in the history and theory of customary law. Legal custom is itself of two kinds, being either local custom, prevalent and having the force of law in a particular locality only, or the general custom of the realm, in force as law throughout all England. Salmond, further traces the growth of law from the usage to the statute. Law so originating passes normally through three successive historical stages. In the first stage, the existence of the usage is a question of fact to be determined by the jury upon evidence in the particular case in which it arises. The second stage of development is reached when the courts take judicial notice of the custom in question so that it no longer requires to be specially pleaded or approved in the particular case. It has already been sufficiently proved in previous cases, and has received the authority of precedents established by those earlier cases. The law derived from that custom has accordingly passed out of its earlier stage as customary law pure and simple, and has become case law, having its immediate source in precedent, though it's ulterior and original source was custom. The third and last stage of historical development which

is or may be reached, is that in which the law which has thus its original source in conventional custom, and its secondary source in precedent, is embodied in a statute and so assumes its ultimate form as enacted law.

38. The Hon'ble Supreme Court in Laxmibai case (supra) precisely alluded to this jurisprudential requirement while stating that a custom must be proved to be ancient, certain and reasonable. The evidence adduced on behalf of the party concerned must prove the alleged custom to be uniformly and consistently being followed.

39. The question that beseech consideration is whether the tribal customary law of inheritance excluding inheritance from inheritance has acquired the binding force of general law as per the test and requirement laid down above? Whether they have been uniformly recognised and applied by the courts?

40. A brief reference to some of the cases shall demonstrate that such a custom has not been uniformly accepted and recognised by the Courts. There are cases where they have been recognised as customary law of inheritance, but then there is a very large body of judgments where the courts have refused to give relief of title based on such customary law.

41. In **Narayan Soren Vs Ranjan Murmu 2013 (4) JLJR 18** the plaintiff's case was that in Santhal community a widow is not entitled to adopt any child and if her husband died issueless the properties are inherited by other surviving agnates. The court held that it was specifically pleaded by the defendants/respondents that according to Santhal custom a widow is also competent to adopt a child. The High Court of Jharkhand upheld the finding of the trial court that the defendants by adducing positive evidence proved that a Santhal widow is competent to adopt a child. It will be relevant to quote some of the illuminating passage from this Judgment:

"In the final report on the 'Survey and Settlement Operations in the district of Sonthal parganas, 1898-1907', H. McPherson said:-Although patrilineal system amongst the Santhals is under stress, the author W.G. Archer himself had noticed the growing trend towards the change whereby a landless widow inherited her late husband's land until she remarried. He had also observed how the settlement operation in deference to local custom recognized right of a women by recording them as owner. In Gantzer's Settlement Record, it is mentioned that settlement confers right of widows and daughters beyond

the customary law. In the Bihar District Gazettes of Santhal Parganas, by P.C. Roy Choudhary, the status of a woman has been described as under:- A Santal women plays a very important role in Santal community. Seemingly she occupies an inferior position but she has her rights alongwith obligations according to custom and tradition. The civil condition of a Santhal woman has been undergoing changes along with the impact of modernism. There have been some investigations into the position of a Santal woman by several scholars. Mr. W.G. Archer, who was a Deputy Commissioner of Sanal Parganas some years back has also made some investigations".

Joseph Munda Vs Most Fudi :SCC On Line Jhar 382 : AIR 2009 Jhar 115 has been referred to demonstrate that High Court refused to deny right to inheritance to female on the ground that it was barred under customary law. His Lordship held as under

"22. Admittedly during revisional survey the name of Most. Karuna being the daughter of Rashu Munda was entered in the record of right, which was finally published after rejecting the objection of the ancestors of the plaintiffs. Most. Karuna being the female heir was recognized as raiyat by entering her name in the record of right which was subsequently accepted by the ancestors of the plaintiffs in Sections 144/145 proceeding in the year 1931. In the aforesaid premises the status of Most. Karuna duly entered in the finally published record of right cannot be altered after 58 years by filing suit in 1978 and further the right of Most Karuna or her heirs cannot be taken away by applying the custom that only male descendant will inherit the land left by their ancestors. The provisions of Sections 7 and 8 of the Chotangpur Tenancy Act shall have no application in the instant case.

23. Besides the above if the custom alleged to have been prevalent is strictly made applicable in the facts of the present case, it will amount to serious violation of constitutional right of livelihood of a female, whose right was recognized during revisional survey of 1928 and acquired the status of a recorded raiyat in respect of the suit land".

From this case it is evident that not only the revenue Court but also the High Court recognized the right of female inheritance of a member of schedule tribe. The court refused to apply the said custom debarring female from inheritance.

However, in **Matius Tirkey VS Jusuphin Lakra, 2007 4 JLJR 539** the Court accepted such a custom disinheriting a female and held "Admittedly, the parties are governed by their customary laws under which the widow does not inherit the properties of her husband and neither does the married daughter inherit the properties of her father. If a person dies without a male issue, then his widow and unmarried daughter hold the properties of her husband/father in lieu of their maintenance. This right to hold the properties in lieu of maintenance also entitles a widow a life interest in the properties and she is entitled to remain in possession of the properties as a limited owner and as long as she is in such possession, her possession cannot in any way mature to an absolute title of ownership as against the rightful heirs of the deceased. The widow has therefore, no power to alienate the properties by sale or by gift'. The Court in this case followed the ration of Sinta Munda & others Vs Junathan Munda 1968 0 PLJR 215.

In **Jugal Mahato Vs. The State of Bihar (1988) PLJR 619** the question before the Court was whether a Munda widow has a right to surrender the agriculture holding or not. It was held that she had a right to surrender as a widow having limited interest was also a raiyat for the purpose of provisions of the Chhotanagpur Tenancy Act. The authority of Seo Prasad Sahu was followed in this case wherein it was held that whatever be the personal law governing the raiyat and whatever be his religion, the provisions, of Section 72 of the CNT Act to apply to all raiyats.

The question whether under Oraon customary law the females were barred from inheritance in the light of the commentary by S.C. Rai under the title "The Oraon of Chhota Nagpur", came up for consideration in ***Chuiyya v. Mangari Bai*, 1999 SCC OnLine MP 375 : (2000) 2 MP LJ 441 "4.** 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 the parties to this suit belong to Oraon tribe which is a scheduled tribe. The real question is whether according to the caste custom the plaintiff is entitled to inherit the share of her father in the lands in dispute. She has no brother. It was a peculiar feature of old Hindu Law based on the interpretation of the Vedas and Smritis that a daughter is not entitled to inherit the property of her father if he has left behind a son. In the absence of son the daughter was entitled to inheritance and she used to get "limited

Estate" and on her death it used to pass on to the reversioners of her father. That rule of Hindu Law has been abrogated by section 14 of the Hindu Succession Act, 1956 which confers full heritable capacity on a female heir. In the present case there is no definite evidence that amongst the Oraons a daughter is excluded from inheriting the property of her father in all the circumstances. The evidence adduced by the defendants has been perused by this Court. The witnesses have stated that the daughters have no right of inheritance in their community but they have not cited a single instance in which a daughter has been excluded from inheriting the property of her father even in the absence of his male issue. ……..Therefore, the First Appellate Court has rightly held that the plaintiff is entitled to inherit the share of her father in the lands in dispute. The burden was on the defendants to establish that there is a custom which excludes a daughter from inheritance even in the absence of her brother and even if her husband is brought as Ghar Jamai. A daughter is also entitled to be treated with equality. There should be no disparity in the rights of man and woman in matters of succession and inheritance. That is now recognized in all the systems. The customary law of scheduled tribe has been preserved under section 2(2) of the Hindu Succession Act, 1956 but in a given case 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. It should be established by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone legal title to recognition depends. It is incumbent on a party setting up a custom of allege and prove the custom on which he relies".

42. A brief review of the case laws discussed above shows that the Courts have adopted divergent approach while deciding on matter relating to customary law of inheritance in case of tribals. Each case has been considered on its own merit and there is no uniform or universal recognition to customary law of inheritance among tribals excluding female from the right of inheritance. The cases where such a custom has been recognized draws heavily on legal literature like that by Sri S.C. Roy and the report by

Ganzter. Problem with all these classical sources is that they all refer to a datum about 100 years old. They are to a large extent anachronistic in view of the societal changes, which had been taken note of even in those sources when it was authored. Society do not exist frozen in time and the tribal society too is not untouched by the winds of socio-economic change. Other vehicle of change being education, urbanization, industrial revolution, so on and so forth. Tribal society is not unaffected by these changes and are leaving their mark in every walk of national life. Customs are not fossilized structures, nor are they etched on stone but are living organism rooted in the life of the society. Customs do change with change in occupation, belief and life of the society.

43. Practical fall out of the ambiguity in customary law has engendered property related disputes and litigation in the absence of a male in the line of inheritance. In order to avoid predicament arising of such situation, different exceptions have also been recognised by the courts. The Ghar-dijoa who lived with his son-less deceased father–in–law till his death and assisted him in his cultivation and other affairs till his death has been accepted to have right of inheritance. In Haradhan Murmu Vs State of Jharkhand 2018 SCC Online Jhar 1903, Mangal Soren had no male issue and had three doubters. Mangal Soren married his three daughters in 'Ghar-jamai' for an all his three doubters were given equal shares in the property of Mangal Soren and they were in cultivating the land separately. The Jharkhand High Court held that three married daughters of the recorded tenant through their husbands, all having been married in ghar jamai form of marriage, had right to inherit the property through their husbands having the status of adopted sons under the customary law.

In **Labishwar Manjhi Vs Pran Manjhi (2000) 8 SCC 587** the question before the Hon'ble Supreme Court was whether the parties who admittedly belong to Santhal trial are still continuing with their customary tradition or have they after being Hinduised changed their customs to that which is followed by the Hindus. In view of the evidence that the parties were following customs of the Hindus and not the Santhal customs, therefore Section 2(2) of the Hindu Succession Act was held to be not applicable by excluding the present parties. They were therefore held to be guided by Hindu succession Act.

In ***Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125 at page 140** the vires of the customary law of succession came for adjudication. It was held that customary law excluding female from inheritance was not violative of fundamental right. Their Lordships observed **"13.** Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the others harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil. Traditionally and historically, the agricultural family is identified by the male head and this is what Sections 7 and 8 recognise. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter, and others joint with him have, under Sections 7 and 8, to make way to male relatives within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognised, a right which the female enjoyed in common with the last male holder of the tenancy. It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by, such female descendants can the males in the line of descent take over the holding exclusively. In other words, the exclusive right of male succession conceived of in Sections 7 and 8 has to remain in suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue. It is in this way only that the constitutional right to livelihood of a female can interject in the provisions, to be read as a burden to the statutory right of male succession, entitling her to the status of an intervening limited dependants/descendants under Sections 7 and 8. In this manner alone, and up to this extent can female dependants/descendants be given some succour so that they do not become vagrant and destitute. To this extent, it must be so held. We would rather, on the other hand, refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law. The intervening right of female dependants/descendants under Sections 7 and 8 of the Act is carved out to this extent, by suspending the exclusive right of the male succession till the

female dependants/descendants choose other means of livelihood manifested by abandonment or release of the holding kept for the purpose".

44. The cumulative effect of these judicial precedent demonstrate and reflect beyond doubt that a general customary law of inheritance among Oraon and Santhal tribes has not crystallized in a uniform general customary law having binding force debarring natural female heirs from right of inheritance. Judicial decision also reflects an unease to accept and recognize such inequitable custom. The Courts have refrained to uniformly or consistently recognize the customary law of inheritance excluding female from inheritance so as to hold that they have acquired binding force of general customary law. In every case the claim of title is to be decided on the pleading and proof of customary law regarding the prevailing custom. Ideally it is high time that customary law of succession should be codified and be given a statutory shape. But in the meantime each case has to be judged individually regarding the applicable custom.

45. In the present case the defendants have failed to prove general binding custom among the Oraon tribe that females were excluded from inheritance. This substantial question of law is accordingly answered in favour of the plaintiff.

46. For the discussion in the earlier part of judgment, I find and hold that Defendants nos.2 and 3 being strangers and not the heir and descendant of the recorded tenant had no right and title to execute the sale-deed with respect to the suit property in favour of defendant no.1, which is declared to be null and void.

The Judgment and decree passed by the Courts below is set aside.

The appeal succeeds.

The suit of the plaintiff is decreed. Let the decree be drawn accordingly.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi
Dated the 22nd April, 2022
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