

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2023

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.No.905 of 2018

1.Saravanan

2.Venkatachalam

.. Appellants

Vs.

1.Semmayee

2.Poonkodi

3.Murugan

.. Respondents

Prayer: Appeal Suit is filed under Section 96 of the Civil Procedure Code, to set aside the judgement and decree dated in O.S.No.30 of 2014 on the file of the II Additional District Court, Salem, dated 06.10.2017.

For Appellant : Mr.C.Jagadish

For Respondent :
(For R1 & R2) : Mr.K.Siva Subramanian
(For R3) : No Appearance

J U D G M E N T

The lis on hand raises an important question, whether the tribal women in the State of Tamil Nadu can be excluded from their share in the family property under the Hindu Succession Act, 1956.

2.The facts as detailed in the impugned judgment, broadly are not disputed between the parties and more so, the Trial Court decreed the suit in favour of the plaintiff, who claimed equal share in the family property by instituting a suit for partition. The Trial Court invoked the provisions of the Hindu Succession Act, 1956 and held that the Tribal Women are also entitled for equal share in their family property on par with the other male coparceners and the defendants in the suit has chosen to file the present appeal suit.

3.The suit was instituted by the respondent herein: wife and daughter of Mr.Ramasamy, seeking a partition of the suit mentioned property, which belonged to Mr.Ramar @ Ramasamy. The plaintiffs claimed that they are entitled for 2/5 equal and separate shares in the suit mentioned property. The defendants filed a written statement denying the plaint averments. The

defendants denied the right to property to the plaintiffs on the ground that some of the properties were sold in favour of the husband of the second plaintiff and regarding the other properties, there was an oral partition between the parties and therefore, the plaintiffs have no right to claim any share in the suit mentioned property.

4.The Trial Court adjudicated the issues with reference to the documents and evidences and formed an opinion that the defendant had not established their case and therefore, the plaintiffs are entitled for equal share in the suit mentioned property as prayed for.

5.The learned counsel for the appellant, beyond the facts adjudicated by the Trial Court, raised an important legal question that the tribal women are expressly excluded from the application of the provisions of the Hindu Succession Act. Section 2(2) of the Hindu Succession Act, 1956 stipulates “ *Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.*”

Relying on the above provision, the learned counsel for the appellant reiterated that, the scheduled tribe women are expressly excluded from the provisions of the Act and therefore, the Trial Court has erroneously applied the Hindu Succession Act and granted relief in the suit, which is untenable.

6.The learned counsel for the respondent strenuously objected to the said contention by stating that the defendants have miserably failed to establish the custom and practice, if any prevailing amongst the community, where the plaintiff and defendant belong and in the absence of any such proof to establish such custom of practice, the Hindu Succession Act alone should be applied and therefore, the Trial Court is right in granting the relief of partition to the plaintiffs. It is further contended that the tribal women cannot be denied or deprived of equal share on par with other female Hindu in the state of Tamil Nadu and thus, denying the right to the scheduled tribe, will result in unconstitutionality and discrimination. Thus, the Trial Court has rightly proceeded based on the Hindu Succession Act and granted the relief and hence, the appeal suit to be dismissed.

7.Let us now consider the spirit of Section 2(2) of the Hindu Succession Act 1956, with reference to Article 366(25) of the Constitution of India. The said Article contemplates “*Scheduled Tribes means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;*”

8.Article 342 of the Constitution enumerates “Scheduled Tribes” as:

(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification PART XVII

OFFICIAL LANGUAGE CHAPTER I LANGUAGE OF THE UNION”

9. In the present case, the parties to the suit are falling under the category of notified tribes and therefore, it is to be examined, whether the parties have established any custom and practice for the purpose of applying the exclusion clause contemplated under Section 2(2) of the Hindu Succession Act. In the absence of any such custom and practice, which is to be proved, the Courts have no option but to apply Hindu Succession Act, since the parties are professing Hinduism and further there is no other reason whatsoever to deprive equal share to women on par with the male coparceners.

10. Section 2(1) of the Act does not exclude the scheduled tribes from the definition of “Hindu”. Section 2(1) starts as *“This Act applies-”* and Sub Clause (c) stipulates that *“to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.”* Therefore, Section 2(1) of the Act does not

exclude the scheduled tribes from the definition of “Hindu”. Section 2(2) therefore, postpones the application of the Hindu Succession Act till the notification as required under the provision is issued.

11.Let us examine Section 2(2) which expressly stipulates that *“nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of Clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.”* Therefore, when the custom and usage is not established nor prevailing, then the Central Government has to notify, enabling such tribal women to get equal shares in the family property. Mere non-issuance of notification or postponement of issuing notification cannot deprive the scheduled tribe women from getting their right in the family property, more specifically for equal share. Thus, Section 2(2) cannot be construed as a complete bar for invoking the provisions of the Hindu Succession Act. But it paves way for the Central Government to notify the tribal communities, who have already moved forward and whose primitive customs and practice are not prevailing amongst the community for inheritance.

12. When Section 2(2) postpones the application of the Hindu Succession Act till the notification as required under provisions is issued, this by implication means scheduled tribes are also Hindus only and the application of Hindu Succession Act is simply contingent to set a notification. A Scheduled tribe, pure and simple, who is adhering to its custom is to be distinguished from that who has been Hindu, prior to the commencement of the Hindu Succession Act, and the view of this Court is that such Hindu tribals do fall within Section 2(1) (c) of the Act and may be treated as “Hindu” because there is no proof on record to show that such tribals could not have been turned by the Hindu law.

13. Nothing has been shown about the custom and practice prevailing in the community, where the parties to the lis on hand belong. But the tribal women are deprived of adopting the Hindu Succession Act. Therefore, Sub Section (2) of Section 2 of the Hindu Succession Act 1956, will not come in the way of inheritance of the property by the daughters belonging to the tribal area, where Hinduism and Buddhism are followed.

14. Even recently the Supreme Court of India in the case of ***Kamla Neti vs The Special Land Acquisition Officer & Ors., 2022 LiveLaw (SC) 2014***, directed the Government to re-examine the provisions of the Hindu Succession Act which denied a tribal women, the right of succession to her family property. The Bench led by Justice M.R.Shah said that there was no justification to deny a women belonging to the Scheduled Tribe community “*the right of survivorship*” under the Hindu Succession Act. It was observed that “*when the daughter belonging to a non-tribal community is entitled to the equal share in the property of the father, then there is no reason to deny such right to the daughter of the Tribal community. Female tribal is entitled to parity with male tribal in intestate succession.*” Court found it saddening that the tribal women were still denied the equal right to equality after 70 years of the Constitution came into existence. May that as it be, the definition of custom is that, it is an established practice at variance with the general law. A custom varying a general law may be a general, local, tribal or a 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 has effected to modify the general personal law, but it does not over-ride the

statute law unless it is expressly saved by it. Such custom must be ancient, uniform certain, peaceable, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or oppose to the public policy.

15.He who relies upon custom, varying the general law, must plead and prove it. Customs must be established by clear and unambiguous evidence. It is to be proved that it is not opposed to public policy, more specifically not unconstitutional. Section 3(d) of the Hindu Succession Act defines the expression “customs” and “usage”, which signify any rule, which is having been continuously and uniformly observed for a long period of time as obtaining the force of law among Hindus in any local area, tribe community, group or family, provided that the rule is certain and not unreasonable or opposed to the public policy, and it is provided further that in the case of a rule applicable only to a family which has not been discontinued by the family.

16.Therefore, the legislature have not intended for any inequality or unconstitutionality in the matter of inheritance as far as the scheduled tribe women are concerned. The intention of the legislature was to protect the

custom and practices, which all are strongly prevalent amongst the tribal communities and not in respect of the schedule tribes, who came out from such backwardness or customs or otherwise. Section 2(1)(c) is exhaustive and more so, cannot be construed as an exclusion clause. It is inclusive as far as the schedule tribe women are concerned and Section 2(2) only provides an opportunity to adopt custom and practice only if it is certain and not opposing public policy.

17.The rights of inheritance of the tribal women governed by customs and had only evolved through judicial interventions. The right of succession is not directly available to the tribal women, rather it was provided by the judicial innovation of the Chattisgarh High Court, known as the “test of Hinduisation” in the case of *Smt.Butaki Bai & others Vs. Sukhbati & others, dated 02.05.2014*, wherein the Court provided the requirements that need to be fulfilled by tribal women to avail the benefit of Hindu Succession Act. It would have to be proved that:

- (i) the plaintiffs pleading that they have abandoned their law of origin (customary law) has to plead and establish by leading appropriate evidence that they have given up their customary succession, and*
- (ii) to establish further that they have become “Hindus out and out” or*

“sufficiently Hindus” so as to be governed by in matter of succession and inheritance by any school of Hindu law and thereafter to prove.

18.The Patna High Court in the case of ***Budhu Manjhi & another Vs. Dukhan Majhi & other, AIR 1956 PAT 123***, held that it is not necessary that the parties must be completely Hinduised. Even if they had been sufficiently Hinduised so as to be governed by the hindu law of succession, it is enough in matters of inheritence and succession.

19.The Himachal Pradesh High Court in the matter of ***Bahadur Vs. Bratiya & others, AIR 2016 HP 58***, held that gender discrimination violates fundamental rights and daughters are entitled to equal shares in the property. It concluded that the daughters in the tribal areas in the state of Himachal Pradesh shall inherit the property in accordance with the Hindu Succession Act, 1956 and not as per their customs and usage.

20.Section 2(3) of the Hindu Succession Act denotes '*The expression “Hindu” in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.*'

Thus, the whole reading of Section 2 cogently would reveal that the statute never intended to exclude the tribal women completely from the application of the Act but contemplated to enable the tribal community to adopt their custom and practice in the absence of any notification by the Central Government. This would not deprive the tribal women from getting equal share in the family property. In this context, rule of golden interpretation is to be adopted and the negative interpretation depriving equal right which is otherwise guaranteed under the constitution to the tribal women, cannot be adopted. Thus, the golden rule of interpretation, if adopted, would establish that the tribal women are not completely excluded but the statute intended to provide an opportunity to the tribal communities to adopt customs and practices in the matter of inheritance and in the absence of any such certainty in customs and practices, then undoubtedly the Hindu succession Act alone should be applied for the purpose of inheritance and for providing equal share to tribal women.

21.In appeal filed in ***WPPIL/140/2019 on 17 March, 2021 at Uttarakhand High Court by the VAN Gujjar Community*** which was based on whether the tribal community could be ousted from the forest land they

have lived on or not it was held that the tribal community must not be denied their fundamental rights. The State is duty bound to:

(a)take steps for the benefit of the tribal population

(b)to ensure that Fundamental Rights are concretised for the benefit of the Tribal population.

(c)to ensure that the basic fundamental facilities are provided to the tribal population

(d)in light of the Directive the Principles of the Constitution of India to improve the lifestyle and the condition of the tribal population, and

(e)to ensure that the tribal population improves its living standard to the extent it merges with the mainstream of the society, an becomes a part of the productive population of the State.

Hence on these grounds Article 14 and 15 of the Constitution of India applies to the tribal community which includes tribal women as well.

22.In the case of *Maneka Gandhi Vs. Union of India, 1978 AIR 597*, wherein the Apex Court dealt with the personal liberty. The judgment expanded the scope of personal liberty under Article 21 of the Constitution of India, whereby it held that the procedure established by law needed to be

in accordance with the Principles of Natural Justice. In the case of ***Salek Chand (dead) by LRs Vs. Satya Gupta and others(2008) 13 SCC 119***, the Apex Court held that where the 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. Apart from the judgments cited supra, it is to be noted that the backwardness of tribal population in the state of Tamil Nadu is not prevailing to such an extent so as to form an opinion that the custom of such tribal community is to be adopted. There is no such custom and practice established in the present case, by the defendants and therefore, the question of application of custom and practice in the matter of inheritance in the present case would not arise at all.

24. The nature of custom and practice to be established must be not only certain, it must be in practice continuously. In the present case, there is no whisper about such custom or practice in the community in which the

parties are living and in the absence of any such proof, the Trial Court has rightly arrived at a conclusion that the parties to the suit are to be construed as Hindus for the purpose of application of Hindu Succession Act and accordingly, granted the relief of partition and granted equal share to tribal women on par with their counter parts/male coparceners.

25.This Court is of the considered opinion that the relationship between the parties are not in dispute and admittedly the ground mainly raised is the exclusion clause under Section 2(2) of the Act and in view of the elaborate discussion in the aforementioned paragraphs, the said exclusion clause is inapplicable with reference to the facts and circumstances of the case on hand and thus, this Court has no hesitation in arriving at a conclusion that the Trial Court has rightly applied the provision of the Hindu Succession Act and granted the relief of partition in favour of the plaintiffs, which requires no further interference.

26.However, the Government of Tamil Nadu shall initiate necessary steps for the purpose of issuing appropriate notification through Central Government under Section 2(2) of the Hindu Succession Act 1956, to

protect the equal property right of the tribal women in the state of Tamil Nadu.

27. Accordingly, the judgment and decree dated 06.10.2017 passed in O.S.No.30 of 2014 stands confirmed and consequently A.S.No.905 of 2018 stands dismissed. No costs.

22.02.2023

Sha

Index : Yes

Speaking order

Neutral Citation : Yes

Note: *The Registry, High Court, Madras is directed to communicate the copy of this judgment to the Chief Secretary to the Government of Tamil Nadu, Old Sector, Chennai-9 for initiating appropriate action.*

To

1.II Additional District Court, Salem.

Copy to

2. The Chief Secretary to the Government of Tamil Nadu,
Fort St.George,
Chennai – 9.

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S.M.SUBRAMANIAM, J.

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