सत्यमेव जयते

न्यायालय

सहायक कलक्टर/उपखण्ड अधिकारी

गुढामालानी

(पीठासीन अधिकारी –केशव कुमार मीना आर.ए.एस.)

वाद संख्याः– 2024 / 514 दर्ज तिथिः– 20.11.2024

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2. जोरो पुत्री धोकला पत्नी मानाराम
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Signature Not Verified

Digitally signed by Keshav Kumar Meena
Date: 2026.04.05 15:11:08 IST
Reason: SelfAttested

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25. मांगा पुत्र कृष्ण
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.....प्रतिवादीगण

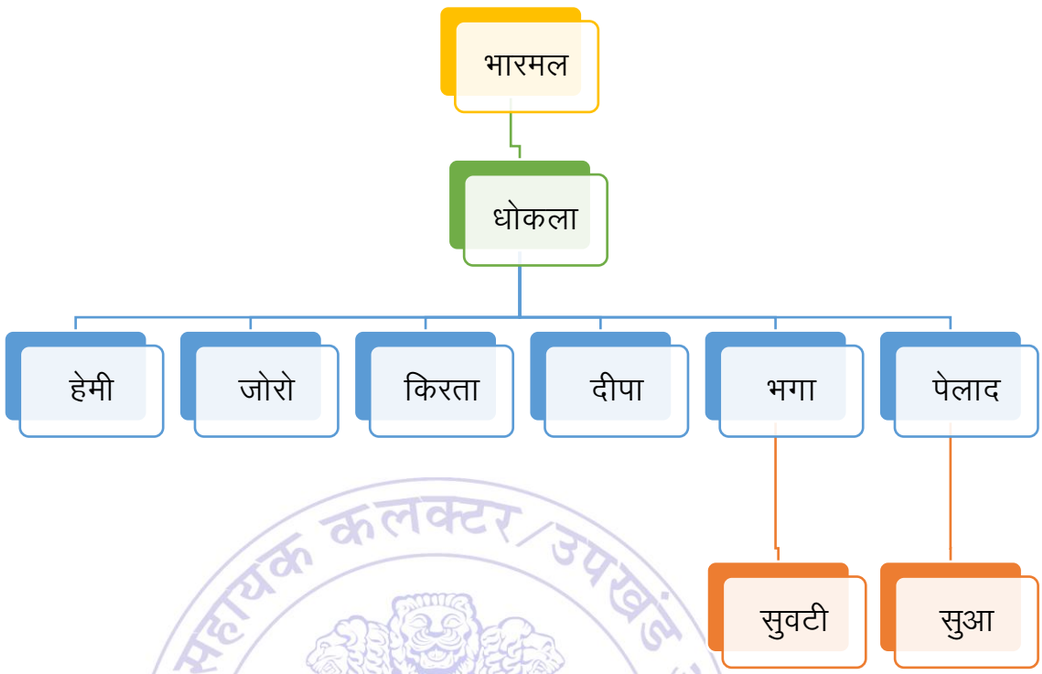
उपस्थित अधिवक्ता
वादीः— श्री हरिशचन्द्र चौधरी
प्रतिवादीः— एकतरफा

राजस्व वाद अन्तर्गत धारा—88, 188
राजस्थान काश्तकारी अधि0—1955

—:निर्णयः—

दिनांकः—27.03.2026

1. आज यह पत्रावली दावा बाबत् इस्तकराहक्क अन्तर्गत धारा—88, 188 राजस्थान काश्तकारी अधिनियम—1955 का वास्ते निर्णय हेतु पेश हुई। हस्तगत वाद पत्र निणर्यन हेतु प्रकरण का सारतः सूक्ष्म विवरण इस प्रकार से हैः—
    - कि आराजी खसरा संख्या 170 / 10.8860 है0, 35 / 3.1404 है0, 101 / 4.0792 है0, 101 / 2 / 6.0460 है0, 54 / 0.7851 है0, 54 / 1 / 0.7770 है0, 55 / 0.0728 है0 मौजा बेरीगांव एवं खसरा संख्या 281 / 6.5316 है0 मौजा गादेवी तहसील गुड़ामालानी में वादीनी एवं प्रतिवादीगण के पूर्वज धोकला के नाम से बंदोबस्त के समय की खातेदारी आराजी दर्ज रिकार्ड रही है।
    - कि उक्त आराजी वादीगण व प्रतिवादी के पूर्वज धोकला की खातेदारी आराजी थी। धोकला की मृत्यु होने के पश्चात् फौतगी नामांतरकरण हेमी, जोरो, किरता, भगा, दीपा, पेलाद के नाम दर्ज होना था परंतु धोकला की मृत्यु होने के पश्चात् फौतगी नामांतरकरण अकेले वादीगण के भाईयों किरता, भगा, दीपा, पेलाद करवा लिया गया। जबकि वादीगण भी धोकला की पुत्री होने के कारण नामांतरकरण में नाम दर्ज करवाने की हकदार थी। परंतु वादीगण का नाम नामांतरकरण में दर्ज नहीं किया गया। वादीगण व प्रतिवादी का पारिवारिक सजरा निम्न प्रकार है—



- कि उक्त आराजी में प्रतिवादी संख्या 01–04 को बिना विभाजन, बिना सहदायकों की सहमति के बयनामा निष्पादित करवाने का अधिकार नहीं था। इसी प्रकार उक्त आराजी में प्रतिवादी संख्या 01–04 को बिना विभाजन, बिना सहदायकों की सहमति के बयनामा निष्पादित करवाने का अधिकार नहीं था। उक्त बयनामा में वादीगण के पक्षकार नहीं होने के कारण वादीगण उक्त बयनामा से पाबंद व जिम्मेदार नहीं है। इस कारण वादीगण उक्त विवादित बयनामा को आरंभ से शून्य, अवैध व निष्प्रभावी घोषित करवाने के अधिकारी है। विधि का सुस्थापित सिद्धांत है कि पिता के जीवित रहते हुए पुत्र व पुत्री अपने अधिकारों की घोषणा करवाते हुए विभाजन करवाने हेतु अधिकृत है। इस संबंध में राज्य सरकार द्वारा परिपत्र दिनांक 08.09.1997 द्वारा विधिक स्थिति को स्पष्ट किया हुआ है। इस आधार पर वादीगण अपने हिस्से की पैतृक भूमि में घोषणा करवाने के अधिकारी है। साथ ही प्रतिवादी वादीगण के हिस्से की आराजी में किसी प्रकार की दखलअंदाजी नहीं करने हेतु स्थाई निषेधाज्ञा प्राप्त करने के अधिकारी हैं।
- कि वादीगण के उक्त आधारों पर निम्न अनुतोष निवेदित हैः–
    1. उक्त आराजी खसरा संख्या 170/10.8860 है0, 35/3.1404 है0, 101/4.0792 है0, 101/2/6.0460 है0, 54/0.7851 है0, 54/1/0.7770 है0, 55/0.0728 है0 मौजा बेरीगांव एवं खसरा संख्या 281/6.5316 है0 मौजा गादेवी तहसील गुड़ामालानी में वादीगण का 2/48 हिस्सा घोषित किया जाकर खातेदार घोषित किया जावे।

2. मुतनाजा आराजी के संबंध में निष्पादित बयनामा को वादीगण के अधिकारों के प्रति आरंभ से शून्य, अवैध व निष्प्रभावी घोषित किया जावे।
3. वादीगण के पक्ष में एवं प्रतिवादीगण के विरूद्ध स्थाई निषेधाज्ञा जारी की जावे।
4. अन्य अनुतोष।

- वाद पत्र दर्ज रजिस्टर किया जाकर प्रतिवादीगण को जरिये सम्मन तलब किया गया। प्रकरण में समस्त प्रतिवादीगण के बावजूद विधिवत तामिल अनुपस्थित रहने से शेष प्रतिवादीगण के विरूद्ध एकतरफा कार्यवाही अमल में लाई गई।

2. प्रकरण में उक्त प्रकार से कार्यवाही किये जाने पर विचारण आरम्भ किया गया। प्रकरण में वादीगण द्वारा साक्ष्य स्वरूप कोई दस्तावेज प्रस्तुत नहीं किए। प्रकरण में वादीगण द्वारा साक्ष्य स्वरूप कोई गवाह प्रस्तुत नहीं किये। प्रकरण में प्रतिवादीगण के विरूद्ध एकतरफा कार्यवाही अमल में लाई गयी। साथ ही प्रतिवादीगण द्वारा भी कोई साक्ष्य प्रस्तुत नहीं किये गये।

3. तत्पश्चात पत्रावली पर विद्वान अधिवक्ता पक्षकारान की बहस सुनी गई। दौराने बहस विद्वान अधिवक्ता वादी द्वारा अपने दावे के तथ्यों को दौहराते हुए दावा डिक्री करने का निवेदन किया। मैनें विद्वान अधिवक्ता उभयपक्षकारान की बहस पर मनन किया गया एवं पत्रावली पर संलग्न दस्तावेजात् का ध्यानपूर्वक अवलोकन किया गया। अब प्रकरण का अनुतोषवार विश्लेषण किया जाना अपेक्षित है। इस संबंध में सर्वप्रथम प्रथम अनुतोष के संबंध में विश्लेषण किया जाना अपेक्षित है। प्रकरण में प्रथम अनुतोष निम्न प्रकार हैः—

> *1. आराजी खसरा संख्या 170/10.8860 है0, 35/3.1404 है0, 101/4.0792 है0, 101/2/6.0460 है0, 54/0.7851 है0, 54/1/0.7770 है0, 55/0.0728 है0 मौजा बेरीगांव एवं खसरा संख्या 281/6.5316 है0 मौजा गादेवी तहसील गुड़ामालानी में वादीगण का 2/48 हिस्सा घोषित किया जाकर खातेदार घोषित किया जावे।*

4. प्रथम अनुतोष को साबित करने का भार वादी के उपर है। प्रकरण में यह निर्विवादित है कि वादीगण व प्रतिवादी संख्या 01—04 एक ही परिवार के सदस्य हैं तथा एक ही पुरूष पूर्वज धोकला के वारिस हैं। धोकला की मृत्यु के पश्चात् फौतगी नामांतरकरण केवल प्रतिवादी संख्या 01—04 के नाम दायर किया गया। जबकि वादीगण के धोकला की प्रथम श्रेणी की विधिक वारिस होने के बावजूद भी नामांतरकरण में नाम नहीं आया। जिससे वादीगण के धोकलाराम की विधिक वारिस होने के आधार पर खोतदारी अधिकारों की घोषणा का अनुतोष चाहा गया है। इस प्रकार वादी द्वारा हिन्दु उत्तराधिकार अधिनियम—1956 की धारा—08 के तहत खातेदार अधिकार की घोषणा का अनुतोष चाहा गया है। इस प्रकार प्रकरण में वादीगण द्वारा पुत्रियों को पुत्रों के समान अधिकार निहित होने के आधार पर धोंकलाराम की विरासत में प्रतिवादीगण

पुत्रों के समान वादीगण पुत्रियों को समान अधिकार के तहत घोषणा व प्रतिवादी द्वारा किये गये बेचान को निरस्त करवाने का अनुतोष चाहा गया है।

Direct Applicability of HSA-1956

5. प्रकरण में पत्रावली के अवलोकन से ज्ञात होता है कि वादीगण भील समुदाय से संबंधित है। यहां उल्लेखनीय है कि भील समुदाय अनुसूचित जनजाति के तहत अधिसूचित है। इस स्थिति में अनुसूचित जनजाति समुदाय पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में कानूनी स्थिति को समझना आवश्यक है। इस संदर्भ में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रांसगिक प्रावधान का अवलोकन किया जाना अपेक्षित है। इस संदर्भ में हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) का उद्धरण निम्न प्रकार है–

2. Application of Act.—

(1)This Act applies—

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and (c) 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.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) 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.

6. अब हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के संदर्भ में अनुसूचित जनजाति समुदाय पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में माननीय संवैधानिक न्यायालयों द्वारा की गई व्याख्या व न्यायिक दृष्टांतों के माध्यम से कानूनी स्थिति को समझना आवश्यक है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा रिट पीटिशन संख्या 219 / 1986 उनवान ***Madhu Kishwar & Ors vs State Of Bihar*** में दिये गये अल्पमत निर्णय दिनांक 17.04.1996 में हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के संदर्भ में अनुसूचित जनजाति समुदाय पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

> *15. Agricultural land is the foundation of a sense of security and freedom from fear. Assured possession is a lasting road for development, intellectual, cultural and moral and also for peace and harmony. Agriculture is the only sources of livelihood for the tribes, apart from collection and sale of minor forest produce. Land is their most important natural asset and imperishable endowment from which the tribals derive their sustenance, social status, a permanent place of abode and work. The Scheduled Tribes predominantly live in Andhra Pradesh, Maharashtra, Bihar, Gujarat, Orissa, Madhya Pradesh, Rajasthan and North Eastern States, though they spread to other States sparsely.*
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> *xxx*
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> *18. When male member has the right to seek partition and at his behest, fragmentation of family holding is effected, why not the right to inheritance/succession be given to a female? On agnatic theory, she gets a shadow, but not substance. Right to equality and social justice is an illusion. The denial is absolutely inconsistent with public policy, unfair, unjust and unconscionable. The reason of fragmentation of holding or division of tenancy right would hardly be a ground to discriminate against a woman from her right to inherit the property of the parent or husband. In V. Tulasamma v. Sesha Reddy, this Court, cognizant to equality in intestate succession by Hindu woman, held that after the advent to independence old human values assumed new complex; women need emancipation; new social order need to be set up giving women equality and place of honour, abolition of discrimination based on equal right to succession is the prime need of the hour and temper of the times. In Chiranjeet Lal v. Union of India, this Court held that the guarantee against the denial of equal protection of the law does not mean that identically the same rule of law should be made applicable to all persons within the territory of India in spite of difference in circumstances or conditions. It means that there should be no discrimination between one person and another. It is with regard to the subject matter of the legislation. In State of West Bengal v. Anwar Ali Sarkar, it was held that the prohibition under Article 14 is to secure all persons against arbitrary laws as well as arbitrary application of laws. It applies to procedural and substantive law. Maneka Gandhi v. Union of India, reiterates its creed on grounds of justice, equity and fairness lest law becomes void, oppressive, unjust and unfair.*
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> *xxx*
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> *41. The Christians in India are governed by the Indian Succession Act, 1925. It is stated that by operation of Section 1 notification issued under the Government of India Act of 1935, the operation thereof stood excluded to the tribal Christians residing in the State of Bihar. There is no such prohibition in other States. Even otherwise, though the principles of Indian Succession Act are strictly inapplicable, the general principles therein being consistent with justice, equity and good conscience should equally be applicable to the tribal Christians of the Bihar State.*

42. I would hold that the provisions of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christian. However, the right of alienation will be subject to the relevant provisions like the Act, the Bihar Scheduled Areas Regulation, 1969, Santhals (Amendment) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lineal descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lineal descendent is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act.

7. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा रिट पीटिशन संख्या 219 / 1986 उनवान ***Madhu Kishwar & Ors vs State Of Bihar*** में दिये गये बहुमत निर्णय दिनांक 17.04.1996 में हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के संदर्भ में अनुसूचित जनजाति समुदाय पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

We have read with great admiration the opinion of our learned brother K, Ramaswamy, J. prepared after deep and tremendous research made on the conditions of the tribal societies in India, leave alone the State of Bihar, and in drawing a vivid picture of the distortions which appear in the regulation of succession to property in tribal societies, when tested on the touchstone of the codified Hindu law now existing in the form of The Hindu Succession Act, 1956 etc. It is worth-while to account some legislation on the subject. The Hindu Succession Act governs and prescribes rules of succession applicable to a large majority of Indians being Hindus, Sikhs, Buddhists, Jains etc. whereunder since 1956, if not earlier, the female heir is put at par with a male heir. Next in the line of numbers is the Shariat Law, applicable to Muslims, whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets. Then comes the Indian Succession Act which applies to Christians and by and large to people not covered under the aforesaid two laws, conferring in a certain manner heirship on females as also males. Certain chapters thereof are not made applicable to certain communities. Sub-section (2) of section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government by means of a notification in the official gazette. Section 3(2) further

provides that in the Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females. (Emphasis supplied).

General rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females. Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted ex abundantl cautela. Even under Section 3 of the Indian Succession Act the State Government is empowered to exempt any race, sect or tribe from the operation of the Act and the tribes of Mundas, Oraons, Santals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat Law is applicable to the custom governed tribals. And custom, as is well recognized, varies from people to people and region to region.

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 v and each case must be examined when full facts are placed before the Court.

With regard to the statutory provisions of the Act, he has proposed to the reading down of section 7 and 8 in order to preserve their constitutionality. This approach is available from page 36 onwards of his judgment. The words "male descendants" wherever occurring, would include "female descendants". It is also proposed that even though the provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 in terms would not apply to the Scheduled Tribes, their general principles composing of justice, equity and fairplay would apply to them. On this basis it has been proposed to take the view that the Scheduled Tribe women would succeed to the estate of paternal parent, brother or husband as heirs by intestate succession and inherit the property in equal shares with the male heir with absolute rights as per the principles of Hindu Succession Act as also the Indian Succession Act. However much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route of return on the Court's entering the thichet, it is for better that the court kept out of it. It is not far to imagine that there would follow a bee-line for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are indeed

susceptible of providing differential treatment, not necessarily equal. Nonuniformities would not in all events violate Article 14. Judge-made amendments to provisionary over and above the available legislature, should normally be avoided. ***We are thus constrained to take this view, even though it may appear to be conservative, for adopting a cautious approach, and the one proposed our learned brother is, regretfully not acceptable to us.***

8. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील संख्या 13516 / 2024 उनवान ***Tirith Kumar vs Daduram*** में दिये गये दिनांक 19.12.2024 में हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के संदर्भ में अनुसूचित जनजाति समुदाय पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

3. The parties to the present lis claim to be Hindus and therefore ask that they be governed by Hindu law in matters of inheritance. The High Court has disallowed this contention on the ground that the parties are members of the Sawara tribe, which is a notified tribe under Article 342 of the Constitution of India. The constitutional position in regard to Articles 341 and 342, which deal with scheduled castes and tribes, respectively, has been delineated by a Constitution Bench of this Court in M.R. Balaji v. State of Mysore6 in the following terms:

"20. ...It was realised that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them. Article 34(1) provides for the issue of public notification specifying the castes, races or tribes which shall, for the purposes of this Constitution, be deemed to be Scheduled Castes either in the State or the Union territory as the case may be. Similarly Article 342 makes a provision for the issue of public notification in respect of Scheduled Tribes. Under Article 338(3), it is provided that references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other Backward Classes as the President may, on receipt of the report of a commission appointed under Article 340(1) by order, specify and also to the Anglo-Indian community. It would thus be seen that this provision contemplates that some Backward Classes may by the Presidential order be included in Scheduled Castes and Tribes."

We may also notice the observations in State of Maharashtra v. Milind7 in this context:

"11. By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said articles is to

provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some orders were issued under the said articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by amendment Acts passed by Parliament." (Emphasis supplied)

Recently, a seven-judge Bench in State of Punjab v. Davinder Singh8 also made a reference to these judgments.

4. As is clear from the aforesaid extracts, the lists made under Articles 341 and 342 are to be amended only with the permission of the President. So, naturally, for a tribe to be notified as a scheduled tribe, a notification to that effect has to be issued and vice versa, i.e. for a tribe to be de-notified as well. The High Court noted that the parties did not produce any notification demonstrating that the Sawara tribe stands de-notified. There is no possibility of a different view on this question.

5. The HSA, 1956, at the very outset, details as to whom the legislation would apply, and it clearly states that scheduled castes and tribes shall be outside its purview of application. Section 2(2) thereof reads as under:

"2. Application of Act.— (1)This Act applies— … (2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

6. The words of the section are explicit. The HSA, 1956, cannot apply to scheduled tribes. This position of law is well settled. We may reproduce with profit the observations made in certain judgments of this Court.

6.1 In Madhu Kishwar v. State of Bihar, MM Punchhi, J as his Lordship then was, noted the application of Section 2(2) of HSA as follows:

"4. …Sub-section (2) of Section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless otherwise directed by the Central Government by means of a notification in the Official Gazette. Section 3(2) further provides that in the Act, unless the context otherwise requires, words importing the masculine gender

shall not be taken to include females. (emphasis supplied) General rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females.
Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted ex abundanti cautela. Even under Section 3 of the Indian Succession Act the State Government is empowered to exempt any race, sect or tribe from the operation of the Act and the tribes of Mundas, Oraons, Santhals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region."

The aforesaid position was reiterated by a Bench of three learned judges in Ahmedabad Women Action Group (AWAG) v. Union of India.

6.2 We find that the aforesaid position has been consistently adopted by the High Courts as well. Reference may be made to Bhuri v. Maroti11, Bhagwati v. Cheduram, and Bini B. (Dr.) v. Jayan P.R. Here only we may clarify that this reference to judgments of the High Courts shall not be construed as a comment upon their merits.

7. Therefore, the Courts below clearly erred on this count, and the High Court took the correct view. Having observed this, the High Court then proceeded to grant a portion as property to Mardan's daughters and their descendants on the grounds of justice, equity and good conscience, apparently but without explicit mention, taking cue from the dissenting judgment Madhu Kishwar (supra) by Ramaswamy, J., wherein he held as under:

"38. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality…

x x x

56. I would hold that the provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women would succeed to the estate of their parent,

brother, husband, as heirs by intestate succession and inherit the property with equal share with the male heir with absolute rights as per the general principles of the Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christians…"

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9. Having considered the pronouncements of this Court as aforesaid, and keeping in view the fact that Mardan passed away in the year 1951, that is, prior to the enactment of HSA, 1956, we find no error in the judgment of the High Court applying the provisions of the Central Provinces Laws Act, 1875 and more particularly Section 6 thereof which postulates the application of the principle of justice, equity and good conscience, to account for possibilities not covered by Section 5 of the Act.

9. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा रिट पीटिशन संख्या 6901 / 2022 उनवान ***Kamala Neti (Dead) Thr. Lrs. vs Special Land Acquisition Officer*** में दिये गये दिनांक 09.12.2022 में हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के संदर्भ में अनुसूचित जनजाति समुदाय पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

6. A short question which is posed for consideration of this Court is whether the appellant/petitioner being the daughter is entitled to the share in the compensation with respect to the land acquired, on survivorship basis under the provisions of Hindu Succession Act?

At the outset, it is required to be noted that the appellant belongs to tribal community and is a member of Scheduled Tribe. As per Section 2(2) of the Hindu Succession Act, the Hindu Succession Act will not be applicable to the members of the Scheduled Tribe. Therefore, as such as rightly observed by the High Court the appellant cannot claim any right of survival under the provisions of the Hindu Succession Act. Therefore, so long as Section 2(2) of the Hindu Succession Act stands and there is no amendment, the parties shall be governed by the provisions of Section 2(2) of the Hindu Succession Act. *Therefore, though on equity we may be with the appellant being daughter and more than approximately 70 years have passed after the enactment of the Hindu Succession Act and much water has flown thereafter and though we are prima facie of the opinion that not to grant the benefit of survivorship to the daughter in the property of the father can be said to be bad in law and cannot be justified in the present scenario, unless Section 2(2) of the Hindu Succession Act is amended, the parties being member of the Scheduled Tribe are governed by Section 2(2) of the Hindu Succession Act. It is observed and held by this Court in the case of Mohan Koikal (supra) that when there is a conflict between the law and equity, the law would prevail. Equity can only supplement the law. There is a gap in it but it cannot supplant the law.*

6.1 If the claim of the appellant on the basis of the survivorship under the Hindu Succession Act is accepted in that case it would tantamount to amend the law. It is for the legislature to amend the law and not the Court.

6.2 Now so far as the reliance placed upon the decision of this Court in the case of Madhu Kishwar (supra) by the learned counsel for the appellant is concerned, at the outset it is required to be noted that by the majority decision this Court refused to strike down the provisions of Chota Nagpur Tenancy Act, 1908 which

provided the succession to property in the male line of heirs and denying the right to Succession to the daughter, on the touchstone of Article 14. However, this Court read into the said provisions and observed and held that the intervening right of female dependents/descendants under Sections 7 and 8 of the Act shall be carved out, by suspending the exclusive right of the male succession till the female dependent/descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose. This Court by observing so disposed of the writ petition. However, by disposing the writ petition this Court issued direction to the State of Bihar to comprehensively examine the question on the premise of our constitutional ethos and the need voiced to amend the law.

6.3 This Court also directed to examine the question of recommending to the Central Government whether the Central Government consider it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the Indian Succession Act in so far as the applicability of these provisions to the Scheduled Tribes in the State of Bihar is concerned.

6.4 However, Mr. Justice K. Ramaswamy in his concurrent judgment has further observed and held that the provisions of the Hindu Succession Act and the Indian Succession Act would apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Thereafter it is held that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with the male heir with absolute rights as per the general principles of the Hindu Succession Act, 1956, as amended and interpreted by this Court. However, it is required to be noted that the same is minority view.

7. ***Under the circumstances in view of Section 2(2) of Hindu Succession Act and the appellant being the member of the Scheduled Tribe and as the female member of the Scheduled Tribe is specifically excluded, the appellant is not entitled to any right of survivorship under the provisions of Hindu Succession Act. No error has been committed by the High Court. The appeal therefore deserves to be dismissed and is accordingly dismissed.***

7.1 Before parting, we may observe that there may not be any justification to deny the right of survivorship so far as the female member of the Tribal is concerned. When the daughter belonging to the non-tribal is entitled to the equal share in the property of the father, 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. To deny the equal right to the daughter belonging to the tribal even after a period of 70 years of the Constitution of India under which right to equality is guaranteed, it is high time for the Central Government to look into the matter and if required, to amend the provisions of the Hindu Succession Act by which the Hindu Succession Act is not made applicable to the members of the Scheduled Tribe.

10. इसी प्रकार माननीय छत्तीसगढ़ उच्च न्यायालय द्वारा द्वितीय अपील संख्या 825 / 2014 उनवान ***Smt. Butaki Bai & Others v. Sukhbati*** में दिये गये दिनांक 02.05.2014 में हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के संदर्भ में अनुसूचित जनजाति समुदाय पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

7. This question of law relates to Section 2 of the Hindu Succession Act, 1956. Section 2 of the Act of 1956 relates to applicability of that Act to certain class of person and runs as under:--

"2. Application of Act.-- (1) This Act applies --
(a) to any person, who is a Hindu by religion in any of its forms or developments including a Virashiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.
(b) to any person who is a Buddhist, Jaina or Sikh by religion; and
(c) 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.

Explanation.-- The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:--
(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion?
(b) any child, legitimate or illegitimate one of whose parents is a Hindu, Buddhists, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;
(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

"(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

8. A careful reading of sub-section (2) of section 2 leaves no manner of doubt that the Act of 1956 would not be applicable to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution of India, unless Central Government by notification in the Official Gazette otherwise directs. It would be appropriate to look into Article 366(25) and Article 342 of the Constitution of India, it states as under:--

"Clause (25) of Article 366.-- "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 Castes for the purposes of this Constitution.

Article 342 -- Scheduled Tribes
"(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.

9. A list of Scheduled Tribes is contained in Constitution of India Scheduled Tribe Order 1950 as amended w.e.f. 1-11-2000 by virtue of Section 20 of M.P. Reorganization Act, 2000 which provides that on and from the appointed day, the Constitution Scheduled Tribe Order 1950 shall stand amended as directed in 4th Schedule. The Tribe-Halba is mentioned in entry seventeen in relation to Chhattisgarh in above order. It is also not in dispute that the Halba Tribe is a Scheduled Tribe within the meaning of Constitution of India notified by President of India and it is a Scheduled Tribe within the definition of Article 366(25) of the Constitution. Thus, the provisions of Hindu Succession Act, 1956 do not pro-tanto apply to the members of Scheduled Tribe as per Section 2(2) of the Act of 1956, because of non-obstante clause in Section 2(2) of Act of 1956, as the customary law of the Scheduled Tribe has been preserved by the legislature.

10. The Supreme Court in case of Madhu Kishwar and others v. State of Bihar and others, (1996) 5 SCC 125 : (AIR 1996 SC 1864), after noticing sub-section (2) of Section 2 of Act of 1956, held as under:--

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

11. Thus it is held that provisions of Hindu Succession Act, 1956 will not apply to the parties, as they are Halba scheduled tribes, which is scheduled tribe within the meaning of Article 366(25) of the Constitution of India and Central Government has not issued any notification directing otherwise and applying the provisions of Hindu Succession Act to them. This substantial question of law is answered accordingly.

11. इस प्रकार हिन्दु उत्तराधिकार अधिनियम–1956 के प्रांसगिक प्रावधान धारा–2 (2) तथा उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि वर्तमान में इस संबंध में विधिक स्थिति स्पष्ट होकर इस प्रकार है कि हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान अनुसूचित जनजाति पर लागू नहीं होते है। जब तक भारत की संसद हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के तहत कोई विशेष अधिसूचना जारी नहीं करती है। तब तक हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान अनुसूचित जनजाति पर प्रभावी नहीं होते है। इस संबंध में इस प्रकार विधिक स्थिति स्पष्ट व वर्तमान में प्रभावी है।

12. प्रकरण में पत्रावली के अवलोकन से ज्ञात होता है कि वादीगण भील समुदाय से संबंधित है। यहां उल्लेखनीय है कि भील समुदाय अनुसूचित जनजाति के तहत अधिसूचित है। यहां यह भी उल्लेखनीय है कि भारत की संसद द्वारा हिन्दु उत्तराधिकार अधिनियम–1956 के धारा–2 (2) के तहत अनुसूचित जनजाति के तहत अधिसूचित जनजाति भील जनजाति पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधानों को प्रभावी करने वाली कोई विशेष अधिसूचना आदिनांक तक जारी नहीं की है। इस कारण भारत की संसद द्वारा हिन्दु उत्तराधिकार अधिनियम–1956 के धारा–2 (2) के तहत अनुसूचित जनजाति के तहत अधिसूचित जनजाति भील जनजाति पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधानों को प्रभावी करने वाली कोई विशेष अधिसूचना आदिनांक तक जारी नही होने से हिन्दु उत्तराधिकार अधिनियम–1956 के

धारा–2 (2) के तहत प्रतिबंध होने के कारण अनुसूचित जनजाति के तहत अधिसूचित जनजाति भील जनजाति पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान प्रभावी नहीं होते है। इस कारण उक्त विधिक स्थिति के संदर्भ में वादीगण पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रत्यक्षतः लागू नहीं होने से इस बिन्दु पर वादीगण को किसी प्रकार का अनुतोष प्रदान नहीं किया जा सकता है।

When Tribals become hindusied: Indirect Applicability

13. अब प्रकरण में अनुसूचित जनजाति पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधानों के प्रभावी होने के संबंध में एक और दृष्टिकोण का अवलोकन किया जाना अपेक्षित है। उल्लेखनीय है कि अनुसूचित जनजाति पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधानों के प्रभावी होने के संबंध में एक और दृष्टिकोण का मत है कि अगर अनुसूचित जनजाति का कोई सदस्य अगर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाज को अपना लेता है या अनुसूचित जनजाति के रीति रिवाजो का परित्याग करते हुए हिन्दु धर्म के रीति रिवाजों का अपने जीवन में पर्याप्त रूप से समावेशन कर लेता है तो उस स्थिति में अनुसूचित जनजाति के उस व्यक्ति विशेष पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान लागू होते है।

14. सर्वप्रथम इस संबंध में काननी स्थिति की व्याख्या का अवलोकन किया जाना अपेक्षित है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा 2000 (8) SCC 587 उनवान ***Labishwar Manjhi vs Pran Manjhi*** में दिये गये दिनांक 19.07.2000 में किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु रीति रिवाज के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

> *6. The question which arises in the present case is, whether the parties who admittedly belong to Santhal tribe are still continuing with their customary tradition or have they after being Hinduised changed their customs to that what is followed by the Hindus. It is in this context when the matter came first before the High Court, the High Court remanded the case for decision in this regard. After remand, the first appellate court recorded the findings, that most of the names of their families of the parties are Hindu names. Even P.W. 1 admits in the cross examination that they perform the pindas at the time of death of anybody. Females do not use vermillion on the forehead after the death of their husbands, widows do not wear ornaments. Even P.W. 2 admits that they perform Shradh ceremonies for 10 days after the death and after marriage, females use vermillion on their foreheads.* ***The finding is that they are following the customs of the Hindus and not of the Santhal's. In view of such a clear finding, it is not possible to hold that Sub-section 2 of Section 2 of Hindu Succession Act excludes the present parties from the application of the said Act. Sub-section 2 only excludes members of any Scheduled Tribe admittedly as per finding recorded in the present case though the parties originally belong to the Santhal Scheduled Tribe they are Hinduised and they are following the Hindu traditions. Hence, we have no hesitation to hold that Sub-section 2 will not apply to exclude the parties from application of Hindu Succession Act.***

15. इसी प्रकार माननीय तेलंगाना उच्च न्यायालय द्वारा सिविल रिवीजन पीटिशन 3413 / 2023 उनवान ***Kadavath Srikanth, vs Kadavath Ashwitha*** में दिये गये दिनांक 22.01.2024 में किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

> *25. There is no challenge to the contentions of the petitioner and the respondent that they have been following the Hindu traditions and customs. In fact, in the petition filed under Section 13(B) of the Act, the petitioner and the respondents specifically contended that their marriage was solemnized as per the rights and customs of Hindu Community. Further, the material filed by the petitioner i.e., wedding card and photographs shows that the marriage of the petitioner and the respondent was solemnized as per the Hindu Customs.*
>
> *26. The Hon'ble Supreme Court in Labishwar Manjhi v. Pran Manjhi, the Delhi High Court in Satprakash Meena v. Alka Meena, and the High Court of Andhra Pradesh in Chittapuli v. Union Government, have held* ***that the provisions of exclusion under Section 2(2) of the Act are meant to protect customary practices of recognized Tribes. However, if the parties are following Hindu traditions, customs and that they are substantially Hinduised, they cannot be relegated to customary Courts, that too, when they themselves admit that they are following Hindu rites, customs and traditions.***

16. इस संबंध में माननीय दिल्ली उच्च न्यायालय द्वारा CM APPL. 332/2021 उनवान ***Satprakash Meena vs Alka Meena*** में दिये गये दिनांक 07.07.2021 में हिन्दु उत्तराधिकार अधिनियम–1956 की धारा–2 (2) के संदर्भ में अनुसूचित जनजाति समुदाय पर हिन्दु विवाह अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

> *28. Thus, in the above decision the following factors were considered by the Supreme Court viz.,*
>
> - *The names of the parties and their families are Hindu names;*
> - *At the time of death of a family member Pindas are performed;*
> - *Women do not wear vermilion after the death of the husband;*
> - *Widows do not wear ornaments.*
> - *Shradh Ceremonies are performed for 10 days after death.*
>
> *29. On the basis of these practices, the Supreme Court held that the parties were Hinduised as they were following Hindu traditions. Thus, the exclusion under Section 2(2) of the HSA, 1956 was held to not apply to the parties and they would be governed by the provisions of the HSA. It is relevant to note that the exclusion in Section 2(2) of HMA and Section 2(2) of HSA, 1956 are identical in wording.*
>
> *xxx*
>
> *42. In so far as the provision Section 2(2), HMA,1955 is concerned, it is clear that the provisions of the Act would not apply to the members of the Scheduled Tribal community unless the Scheduled Tribe is a notified tribe. It is the admitted position between parties that the said community is not a notified tribe. Section 2(2) reads as under:-*
>
> *"(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article*

366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

43. The Act, however, applies to any person who is Hindu by religion and includes a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana even followers of Brahma Prathana of Arya Samaj. It also applies to Buddhists, Jains and Sikhs by religion. The HMA, 1955 regulates all aspects of marriages applicable to Hindus including restitution of conjugal rights of judicial separation, divorce etc. If the HMA, 1955 does not apply to any particular individual or any parties, such parties would be relegated to their respective customary practices or community Courts. In fact, in Nihoto Sema (supra), the High Court of Gauhati considered this issue in relation to parties belonging to the Naga tribes but were professing Christian religion. The Court framed the following question:

"3.The question is whether the Indian Divorce Act, 1869 is applicable to the State of Nugaland (sic Nagaland)."

44. In para 26, the Court observed that there is nothing to show even in the texts that there is any customary form of divorce prevalent amongst the Sema Nagas. Thereafter the Court held in para 28 as under:-

"...In this Case, the Additional Deputy Commissioner in his order clearly held that when the parties are unwilling to go to the customary courts, the Court cannot compel the parties to go to the panchayat. This is obviously a case where the wife has been complaining that her husband has been guilty of adultery coupled with cruelty and sought divorce and that the husband-petitioner took the child (daughter, aged about 3 ½ years) away from the Nursery School without the knowledge and consent of the respondent (wife) and separated the child from the mother and prayed for the custody of the child. This appears to be a case where the marriage is irretrievably broken and persuasion is no proper remedy."

xxx

47. The word `Hindu' is not defined in any of the statutes. It is in view of the fact that there is no definition of Hindu, that the Supreme Court has held in Labishwar Manjhi (supra) that if members of Tribes are Hinduised, the provisions of the HMA, 1955 would be applicable. The manner in which the marriage has been conducted in the present case and the customs being followed by the parties show that as in the case of Hindus, the marriage is conducted in front of the fire. The Hindu customary marriage involves the ceremony of Saptapadi which has also been performed in the present case. The various other ceremonies, as is clear from the marriage invitation are also as per Hindu customs. If members of a tribe voluntarily choose to follow Hindu customs, traditions and rites they cannot be kept out of the purview of the provisions of the HMA, 1955. Codified statutes and laws provide for various protections to parties against any unregulated practices from being adopted. In this day and age, relegating parties to customary Courts when they themselves admit that they are following Hindu customs and traditions would be antithetical to the purpose behind enacting a statute like the HMA, 1955. The provisions of exclusion for example under Section 2(2) are meant to protect customary practices of recognised Tribes. However, if parties follow Hindu customs and rites, for the purpose of marriage, this Court is inclined to follow the judgment of the Supreme Court in Labishwar Manjhi (supra) to hold that the parties are Hinduised and hence the HMA, 1955 would be applicable. Moreover, nothing has been placed before the Court to show that the Meena community Tribe has a specialised Court with proper procedures to deal with these issues. In these facts, if the Court has to choose between relegating parties to customary Courts which may or may not provide for proper procedures and safeguards as against codified statutes envisioning adequate safeguards and procedures, this Court is inclined to lean in favour of an interpretation in favour

of the latter, especially in view of the binding precedent of the Supreme Court in Labishwar Manjhi (supra) which considered an identical exclusion under the HSA,1956.

48. In so far as the judgment in Dr. Surajmani Stella Kujur (supra) is concerned, the said decision dealt with an offence of bigamy which was pleaded to be contrary to the customs in the Santhal Tribe. The said custom had not been established on record and hence the Court held that since the custom was not established by the parties, an offence could not be created by a mere pleading of a custom. Moreover, even in Dr. Surajmani Stella Kujur (supra), the Supreme Court clearly holds that for determination of civil rights, customs may be proved and can form the basis. Thus, insofar as divorce proceedings are concerned, if proper tribal customs are not established or the following of Hindu customs or rites is admitted by the parties, there is no reason to hold that the provisions of the HMA, 1955 would not apply.

17. इस संबंध में माननीय छत्तीसगढ़ उच्च न्यायालय द्वारा द्वितीय अपील संख्या 825 / 2014 उनवान ***Smt. Butaki Bai & Others v. Sukhbati*** में दिये गये दिनांक 02.05.2014 में किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का अपने जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

12. The determination of the first substantial question of law that provisions of Hindu Succession Act, 1956 shall not apply to the parties to the suit being Halba scheduled tribes. The further question to be considered is whether parties have become "Hindus out and out" or have become "sufficiently Hinduised" so as to be governed in the matter of succession and inheritance by principles of Hindu Law or still they are governed by their tribal customary law?

13. Undoubtedly, it is possible that aboriginal tribes of non Hindu origin may have become sufficiently Hinduised so that in the matter of succession and inheritance, they are governed by the Hindu law except so far as any custom at variance with Hindu law is proved.

14. It is well settled that no ceremony of purification is pre-requisite of Hinduisation. In the case of Chunku Manjhi and others v. Bhabani Majhan and others, AIR 1946 Pat 218, it has been observed by the Division Bench of the Patna High Court, which runs thus :

> *"To sum up, the position is that it is possible in law that aborigines of non-Hindu origin can become sufficiently Hinduised so that in matters of inheritance and succession they are prima facie governed by the Hindu law except so far as any custom at variance with such law is proved, that for the purpose of Hinduisation any formal ceremony of conversion is not necessary, that the test as to whether people of non-Hindu origin have become Hindus out and out consists not in their, following the religious rules of the Srutis and Smritis or their completely giving themselves up to Brahmanical rules and rituals but in their acknowledging themselves to be Hindus and, in adopting Hindu social usages, the retention of a few relics of their ante-Hinduism period notwithstanding. In cases where complete Hinduisation is proved, the parties are to be prima facie governed by the rules of the Hindu law, and the burden of proving that any special custom*

obtained in the community either as a relic of their non-Hindu period or otherwise is upon the party who sets it up."

It has also been observed therein that:

"the question whether a family or a tribe of non-Hindu origin has been so far Hinduised as to attract the provisions of the Hindu law in matters of inheritance and succession, is a mixed question of law and fact."

It has also further been observed that:

"the Hindu Law of Inheritance (Amendment) Act, 1929, applies also to those persons who but for the passing of the Act, would have been subject to the law of Mitakshara. Thus, it applies to Santhals of Chota Nagpur who are Hindus and are governed by the Mitakshara School of Hindu Law in matter of inheritance of succession."

15. In the case of Budhu Majhi and another v. Dukhan Majhi and others, AIR 1956 Pat 123, it has been observed 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 Hindu Law of succession, it is enough. It has also been observed that:

"Adoption of Hindu names, employment of priests, performance of pujas, such as Durga Puja, Mansa Puja, Kali Puja etc. offering of pindas, observing of mourning, performance of funeral ceremonies are sufficient proof of a family, aboriginal in origin, having adopted Hinduism in its entirety. The test as to whether people of Hindu origin have become Hindus out and out consists not in their following the religious rules of Srutis and Smritis or their completely giving themselves up to Brahmanical rules and rituals but in their acknowledging themselves to be Hindus and in adopting social usages, the retention of a few relics of their ante Hinduism period notwithstanding. A formal conversion is not a pre-requisite to a person becoming a Hindu."

16. In case of Langa Manjhi and others v. Jaba Manjhain and others, AIR 1971 Pat 185, it has been observed that :

"The term Hindu is not an anthropological one but is used in a theological sense as distinguished from national or racial sense, and, therefore, many persons of aboriginal tribes and origins have been absorbed in the Hindu faith and have come under the sway of Hindu Law."

It has further been observed that:

"Now, the well established position of law is that it is possible that aboriginals of non-Hindu origin can become sufficiently Hinduised so that in matter of inheritance and succession they are prima facie governed by Hindu Law, except so far any custom at variance with such law is proved.....In cases it is established that the parties of non-Hindu origin have been Hinduised, prima facie, they are governed by the rules of Hindu law and the burden of proving that the old custom of that community still exists is upon the party who sets it up..... whether a person is Hinduised completely or otherwise is a question of fact and cannot be gone into in Second Appeal."

17. In this connection the ratio of the case of Dhani Majhi and another v. Ranga Majhi and others, 1999 AIHC 2156, is also referred hereto in which it has been observed that :

"the parties have become Hinduised by efflux of time and they are governed by Hindu law and as such when they become Hindus long before 1926 then they can be said to be governed by the Hindu Succession Act, 1956 also."

18. The Supreme Court in case of Labishwar Manjhi v. Pran Manjhi, (2000) 8 SCC 587, has observed that when evidence disclosed that parties belonging to Santhal Tribe were following customs of Hindus and not of Santhals, provision of Hindu Succession Act would apply to inheritance of property. It has also been observed therein that :

"The finding is that they are following the customs of the Hindus and not of the Santhals. In view of such a clear finding, it is not possible to hold that sub-section (2) of Section 2 of Hindu Succession Act excludes the present parties from the application of the said Act. Sub-section (2) only excludes members of any Scheduled Tribes, admittedly as per finding recorded in the present case though the parties originally belong to the Santhal Scheduled Tribe they are Hindus and they are following the Hindu traditions. Hence, we have no hesitation to hold that sub-section (2) will not apply to exclude the parties from application of Hindu Succession Act."

19. It, therefore, appears from the ratio of the case referred to above that it is the well recognized principle of law that if a Halba tribe though a Scheduled Tribe if sufficiently Hinduised shall be governed by Hindu Succession Act, 1956 in the matter of succession and inheritance.

20. The burden of proof is initially upon the plaintiff to show that parties have become "sufficiently Hinduised" or "Hindus out and out" so as to be governed in matter of succession and inheritance by any school of Hindu Law and once it is proved, then burden will be shifted to defendants to prove that the parties are still governed by the tribal customary law.

21. The question of law applicable to Hindus being primarily one of personal as distinguished from geographical custom, strong proof is required for establishing that rule of origin has been given in favour of different system of law.

22. The Nagpur High Court in case of Sonabai v. Lakhmibai, AIR 1957 Nagpur 76, noticing and following, the decision of Privy Council reported in (1902) ILR 29 Cal 433 (PC), has held as under :

"10. Strong proof is required for establishing that the law of origin has been given up in favour of a different system of law : Parbati Kumari Debi v. Jagadis Chunder Dhabal(A)."

23. The Patna High Court in case of Krittibash Mahton and others v. Budhan Mahtani and others, AIR 1925 Pat 733, has held as under :

"In cases relating to inheritance among aboroginals in Manbhum it is always necessary to enquire whether even if Hinduised (slightly, partially, or completely) they have abandoned the tribal custom as to inheritance (usually they have not, even where, as is unusual, Hinduization is complete) and then if they have abandoned the tribal custom what particular school of Hindu Law they have adhered to."

25. On the basis of foregoing analysis, the following proposition would emerge:-

(i) that the plaintiffs pleading they have abandoned their law of origin (customary law) has to plead and establish by leading appropriate legal 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.

(iii) that they have adhered to any particular school of Hindu law.

32. Thus, in view of the foregoing discussion, this Court is of the considered opinion that the plaintiff has failed to establish that members of the Halba ***scheduled tribe, have given up her customary succession and have become "Hindus out and out" or "sufficiently Hinduised" and in the matter of succession,*** *they are governed by any particular school of Hindu law, consequently, the legislative bar enacted under sub-section (2) of Section 2 of Act of 1956 will apply in full force and provision of the Hindu Succession Act, 1956 will not apply to parties to suit i.e. Halba Scheduled Tribes in absence of notification by Central Government applying the provision of Act of 1956 to them.*

18. उक्त संदर्भ में उक्त दृष्टिकोण पर माननीय न्यायालयों द्वारा प्रतिपादित उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में कानूनी स्थिति के संदर्भ में ज्ञात होता है कि किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान प्रभावी होते है।

19. यहां यह उल्लेखनीय है कि किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान प्रभावी होने के लिए आवश्यक है कि ऐसा दावा करने वाला व्यक्ति पर्याप्त साक्ष्य व सबूत से इस तथ्य को साबित करे कि किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन कर लिया है। इस संबंध में ऐसा दावा करने वाले व्यक्ति को उक्त तथ्य को साबित करते समय प्रस्तुत किये जाने वाले कारकों व परिस्थितियों के बारे में न्यायालयों द्वारा कई महत्वपूर्ण कारकों व परिस्थितियों की उपस्थिति होने के बारे में स्पष्ट किया गया है।

20. अब किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के बारे में हस्तगत प्रकरण के तथ्यों का विवेचन अपेक्षित है।

21. यहां उक्त बिन्दु पर विवेचन से पूर्व दावे के तथ्य को साबित करने के संबंध में कानूनी स्थिति का अवलोकन किया जाना अपेक्षित है। प्रकरण में भारतीय साक्ष्य अधिनियम–2023 के प्रासंगिक प्रावधानों तथा प्रांसगिक न्यायिक दृष्टांत का अवलोकन करने पर कानूनी स्थिति स्पष्ट होती है कि जहां आपराधिक प्रकरणों में निर्णयन संदेहरहित प्रमाणन के आधार पर किया जाता है। वही सिविल प्रकृति के मामलों में संभावनाओं की प्रबलता / प्रधानता के आधार पर निर्णयन किया जाता है। साथ ही यह भी कानूनी स्थिति है कि दावे के अभिवचन साक्ष्य नहीं होते है। दावाकर्त्ता व्यक्ति को अपने दावे के समर्थन में पृथक से साक्ष्य प्रस्तुत करते हुए अपने दावे के तथ्य को साबित करने का दायित्व होता है।

22. इसके साथ ही यह भी कानूनी स्थिति स्पष्ट होती है कि सबूत का भार तथा प्रमाण का भार में अंतर है। किसी सिविल दावे में सबूत का भार प्रमुखतः वादी पर होता है। सबूत का भार स्थानांतरित नहीं होता है। जबकि प्रमाण का भार स्थानांतरित होता है। किसी सिविल दावे में किसी तथ्य को साबित करने का भार उस तथ्य के आधार पर दावा करने वाले व्यक्ति पर होता है। जब किसी तथ्य को किसी व्यक्ति द्वारा प्रमाण का भार पूर्ण करते हुए साबित करने का दायित्व पूर्ण किया जाता है तो प्रमाण का भार प्रतिद्वंदी पर आ जाता है। अब प्रतिद्वंदी को उक्त तथ्य विशेष के खण्डन हेतु साबित करने का भार होने के कारण अगर प्रमाण प्रस्तुत करते हुए प्रमाणन का भार पूर्ण किया जाता है तो प्रमाण का भार वापस स्थानांतरित हो जाता है। इस प्रकार प्रमाण का भार स्थानांतरित होता रहता है। यह एक अनवरत प्रक्रिया है। जो व्यक्ति प्रमाणन का भार का दायित्व पूर्ण करने में असफल रहता है उसके विरूद्ध उक्त तथ्य को साबित माना जाता है।

23. उक्त विधिक स्थिति के संदर्भ में हस्तगत प्रकरण में वादी द्वारा अपनी जनजाति के रीति रिवाजों के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन के बारे में कोई अभिवचन नहीं किया है। साथ ही वादी द्वारा अपनी जनजाति के रीति रिवाजों के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन के बारे में कोई साक्ष्य या सबूत प्रस्तुत नहीं किये है। इस कारण वादी द्वारा अपनी जनजाति के रीति रिवाजों के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन के तथ्य को साबित करने में वादी असफल रहे है। इस प्रकार किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो के स्थान पर हिन्दु धर्म के रीति रिवाजों का पालन करते हुए पर्याप्त रूप से हिन्दु रीति रिवाजों का जीवन में समावेशन करने की स्थिति में हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधान की अनुप्रयोज्यता के लिये आवश्यक कारक व परिस्थितियां प्रकरण में उपस्थित नहीं है। इस आधार पर भी वादी का दावा हिन्दु उत्तराधिकार अधिनियम–1956 के तहत पोषणीय प्रतीत नहीं होता है।

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24. अब प्रकरण में अनुसूचित जनजाति पर अपने रीति रिवाजो के प्रभावी होने के संबंध में एक अन्य दृष्टिकोण का अवलोकन किया जाना अपेक्षित है। उल्लेखनीय है कि

प्रत्यक्षतः अनुसूचित जनजाति पर हिन्दु उत्तराधिकार अधिनियम–1956 के प्रावधानों के प्रभावी नहीं होते है। साथ ही अनुसूचित जनजाति समुदाय पर भारतीय उत्तराधिकार अधिनियम–1925 के प्रावधान भी लागू नहीं होते है। यहां यह भी उल्लेखनीय है कि ऐसी स्थिति में अनुसूचित जनजाति समुदाय पर अपने स्वयं के पुराने रीति रिवाज ही लागू होते है। यहां यह भी उल्लेखनीय है कि अनुसूचित जनजाति के कोई निर्धारित रीति रिवाज नहीं है। इस संबंध में रीति रिवाजो की स्थिति तथा अनुसूचित जनजाति के रीति रिवाज एवं उनकी अनुप्रयोज्यता के बारे में विधिक स्थिति का अवलोकन किया जाना अपेक्षित है।

25. सर्वप्रथम इस संबंध में कानूनी स्थिति की व्याख्या का अवलोकन किया जाना अपेक्षित है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील 2008 / 2003 उनवान ***Laxmibai (Dead) Thru Lr'S. & Anr vs Bhagwanthbuva*** में दिये गये दिनांक 29.01.2013 में रीति रिवाजो की स्थिति एवं उनकी अनुप्रयोज्यता के बारे में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

> *7. 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.*
>
> *8. In Dr. Surajmani Stella Kujur v. Durga Charan Hansdah AIR 2001 SC 938, this Court held that custom, being in derogation of a general rule, is required to be construed strictly. A party relying upon a custom, is obliged to establish it by way of clear and unambiguous evidence. (Vide: Salekh Chand (Dead) thr. Lrs. v. Satya Gupta & Ors. (2008) 13 SCC 119).*
>
> *9. 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.*
>
> *10. In Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya, 14 Moo. Ind. App. 570, it was held: "It is essential that special usage, which modifies the ordinary law of succession is ancient and invariable; and it is further essential that such special usage is established to be so, by way of clear and unambiguous evidence.*

It is only by means of such evidence, that courts can be assured of their existence, and it is also essential that they possess the conditions of antiquity and certainty on the basis of which alone, their legal title to recognition depends."

11. In Salekh Chand (supra), this Court held as under:

"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. 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. 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."

12. In Bhimashya & Ors. v. Smt. Janabi @ Janawwa, (2006) 13 SCC 627, this Court held:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm……it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

xx xx xx xx

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life; fashion is arbitrary and capricious, it decides in matters of trifling import; manners are rational, they are the expressions of moral feelings. Customs have more force in a simple state of society. Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by limitation or prescription; the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom."

26. इसी प्रकार माननीय बंबई उच्च न्यायालय द्वारा AIR1983BOM391 उनवान ***Anirudh Jageorao vs Babarao Irbaji*** में दिये गये दिनांक 20.01.1983 में रीति रिवाजो की स्थिति एवं उनकी अनुप्रयोज्यता के बारे में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

In Butterworths's Words and Phrases Legally Defined, Second Edition, Volume I, at page 392 under the heading "Custom" it is' inter alia, stated:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. As regards the matter to which it relate, a custom takes the place of the general common law, and is in respect of that matter the local common law within particular locality where it obtains."

A little later, a distinction between the terms "custom" and "usage" has been brought out. It is stated (Para 393):

"The terms "custom" and "usage" are often used interchangeably. Strictly speaking, there is a clear technical distinction between the two. Usage represents the twilight stage of custom. Custom beings where usage ends. Usage is an

international habit of action that has not yet received full legal attestation. Usages may be conflicting, custom must be unified and self-consistent. Viner's Abridgment, referring to custom in English law, has the matter in a nutshell: 'A custom, in the intendment of law, is such a usage as the hath obtained the force of a law" (Starke's International Law (6th Edn. 34)." Clause (a) of Section 3, however, does not preserve this distinction between custom and usage but places both on the same footing by defining each of these expressions in the same terms. What is required to make an act or conduct amount to custom or usage within the meaning of Clause (a) of Section 3 is that it must be a rule which, having been continuously and uniformly observed for of law among Hindus in any local area, trible, community, group or family, provided that this rule is certain and not unreasonable or opposed to public policy and provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family. The question of family does not arise in the present case. The evidence led by the appellant to prove custom has been held to be insufficient and the finding of fact on this point is against the appellant. The appellant's case is really based either upon a custom which has become a part of the Bombay School of Hindu Law or on the relevant text of the Bombay School of Hindu law declaring or setting out a custom which prevailed in the region to which it applies.

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On this aspect of the case, Vimadalal, J., referred to the Supreme Court decision in R. B. S. S. Muninalal v. S. S. Rajkumar, AIR 1962 Second 1493. In that case it was held (page 1498) :---

"..... It is well settled that where a custom is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom introduced into the law without the necessity of proof in each individual case."

After citing this case Vimadalal, J., proceeded to hold as follows (page 271) :---

"..... The position, therefore, is that where the custom in question has been repeatedly recognised by Courts of law, the Court may, in another case, hold that custom as proved without the necessity of independent proof in that case, but even where the case law relied upon falls short of that, a judicial decision in which such a custom has been recognised can certainly be regarded as affording corroboration of the evidence of the witnesses who have deposed to the same in another case".

27. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा सिविल अपील 6378/2013 उनवान ***Ratanlal v. Sundarabai*** में दिये गये दिनांक 22.11.2017 में रीति रिवाजो की स्थिति एवं उनकी अनुप्रयोज्यता के बारे में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

12. India has a strong tradition of respect for difference and diversity which is reflected under the Hindu family laws as it is applicable to diverse communities living from the southern tip to northern mountains, from western plains to eastern hills. Diversity in our country brings along various customs which defines what India is. Law is not oblivious of this fact and sometimes allows society to be governed by customs within the foundation of law. It is well known that a custom commands legitimacy not by an authority of law formed by the State rather from the public acceptance and acknowledgment. This Court in Thakur Gokal Chand v. Pravin Kumari, has explained the ingredients of a valid custom in the following manner-

"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 so long that the memory of man runneth not to the contrary" should not be

strictly applied to Indian condition. 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".

Black's Law Dictionary defines customary law as "customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws."1 Privy Council in The Collector of Madura v. Moottoo Ramalinga Sathupathi, MIA 397 (1868), has observed that "under the Hindu System of law, clear proof of usage will outweigh the written text of law".

13. As per the settled law under Section 3(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 1 Bryan A. Garner, Black's Law Dictionary (10th Eds.), p. 468. 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.

28. इसी प्रकार माननीय सर्वोच्च न्यायालय द्वारा रिट पीटिशन संख्या 219 / 1986 उनवान ***Madhu Kishwar & Ors vs State Of Bihar*** में दिये गये अल्पमत निर्णय दिनांक 17.04.1996 में अनुसूचित जनजाति के रीति रिवाजो की स्थिति एवं उनकी अनुप्रयोज्यता के बारे में विधिक स्थिति के बारे में व्याख्या की गई है। उक्त न्यायिक दृष्टांत के प्रांसगिक पैरा का उद्धरण निम्न प्रकार है–

32. It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing

in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate. More than 80 per cent of the population is still below poverty line and they did not come at par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court.

29. उक्त संदर्भ में उक्त न्यायिक दृष्टांतों के अवलोकन से ज्ञात होता है कि कानूनी रूप से अनुमत रीति रिवाज एवं उपयोग के बारे में विधिक स्थिति स्पष्ट होती है जिसके महत्वूपर्ण अवयव एवं बिन्दु निम्न प्रकार है–

1. *किसी समुदाय के रीति रिवाज का पहला महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज लंबे समय से समुदाय के द्वारा उपयोग में लिये जा रहे हो तथा ऐसा उपयोग बिना अपवाद के किया जा रहा हो।*
2. *किसी समुदाय के रीति रिवाज का दुसरा महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज अनवरत रूप से समुदाय के द्वारा उपयोग में लिये जा रहे हो।*
3. *किसी समुदाय के रीति रिवाज का तीसरा महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज निश्चित रूप से समुदाय के द्वारा उपयोग में लिये जा रहे हो।*
4. *किसी समुदाय के रीति रिवाज का अगला महत्वपूर्ण व अनिवार्य अवयव है कि वह रीति रिवाज तार्किक एवं सार्वजनिक नीति से सुसंगत हो।*
5. *किसी समुदाय के द्वारा लंबे समय से, अनवरत रूप से तथा निश्चित रूप से उपयोग में लाए जा रहे रीति रिवाज को उस समुदाय द्वारा एक तरह से कानूनी एवं नियमों रूप प्रदान कर दिया गया हो।*
6. *किसी समुदाय के द्वारा लंबे समय से, अनवरत रूप से तथा निश्चित रूप से उपयोग में लाए जा रहे रीति रिवाज के विरूद्ध जाकर किसी व्यक्ति द्वारा किया गया कोई कार्य एक तरह से उस समुदाय के द्वारा तीव्र विरोध को जन्म देने वाला या वह संबंधित कार्य को समुदाय द्वारा अमान्यता प्रदान की गई हो।*
7. *अगर किसी समुदाय के द्वारा लंबे समय से, अनवरत रूप से तथा निश्चित रूप से उपयोग में लाए जा रहे रीति रिवाज को उस क्षेत्र के न्यायालयों द्वारा पहचान प्रदान करने की स्थिति में वह रीति रिवाज एक तरह से कानून या विधि की प्रास्थिति प्राप्त कर लेते है। ऐसे रीति रिवाजों को पृथक से साबित करने की आवश्यकता नहीं होती है।*

30. यहां उक्त बिन्दु पर विवेचन से पूर्व दावे के तथ्य को साबित करने के संबंध में कानूनी स्थिति का अवलोकन किया जाना अपेक्षित है। प्रकरण में भारतीय साक्ष्य अधिनियम–2023 के प्रासंगिक प्रावधानों तथा प्रांसगिक न्यायिक दृष्टांत का अवलोकन करने पर कानूनी स्थिति स्पष्ट होती है कि जहां आपराधिक प्रकरणों में निर्णयन संदेहरहित प्रमाणन के आधार पर किया जाता है। वही सिविल प्रकृति के मामलों में संभावनाओं की प्रबलता / प्रधानता के आधार पर निर्णयन किया जाता है। साथ ही यह भी कानूनी स्थिति है कि दावे के अभिवचन साक्ष्य नहीं होते है। दावाकर्त्ता व्यक्ति को अपने दावे के समर्थन में पृथक से साक्ष्य प्रस्तुत करते हुए अपने दावे के तथ्य को साबित करने का दायित्व होता है।

31. इसके साथ ही यह भी कानूनी स्थिति स्पष्ट होती है कि सबूत का भार तथा प्रमाण का भार में अंतर है। किसी सिविल दावे में सबूत का भार प्रमुखतः वादी पर होता है। सबूत का भार स्थानांतरित नहीं होता है। जबकि प्रमाण का भार स्थानांतरित होता है। किसी सिविल दावे में किसी तथ्य को साबित करने का भार उस तथ्य के आधार पर दावा करने वाले व्यक्ति पर होता है। जब किसी तथ्य को किसी व्यक्ति द्वारा प्रमाण का भार पूर्ण करते हुए साबित करने का दायित्व पूर्ण किया जाता है तो प्रमाण का भार प्रतिद्वंदी पर आ जाता है। अब प्रतिद्वंदी को उक्त तथ्य विशेष के खण्डन हेतु साबित करने का भार होने के कारण अगर प्रमाण प्रस्तुत करते हुए प्रमाणन का भार पूर्ण किया जाता है तो प्रमाण का भार वापस स्थानांतरित हो जाता है। इस प्रकार प्रमाण का भार स्थानांतरित होता रहता है। यह एक अनवरत प्रक्रिया है। जो व्यक्ति प्रमाणन का भार का दायित्व पूर्ण करने में असफल रहता है उसके विरूद्ध उक्त तथ्य को साबित माना जाता है।

32. अब किसी अनुसूचित जनजाति के सदस्य के द्वारा उस जनजाति विशेष के रीति रिवाजो की अनुप्रयोज्यता के बारे में हस्तगत प्रकरण के तथ्यों का विवेचन अपेक्षित है। उक्त विधिक स्थिति के संदर्भ में हस्तगत प्रकरण में अपनी जनजाति के रीति रिवाजों में पिता की निर्वसीयती मृत्यु होने पर उस पिता की संपत्ति के विरासत में न्यागत होने की स्थिति में पुत्रों के समान पुत्रियों को समान अधिकार प्राप्त होने के रीति रिवाज के बारे में तथ्य को प्रमाणित करने का भार वादी के उपर है। प्रकरण में पत्रावली के अवलोकन से ज्ञात होता है कि वादी द्वारा अपनी जनजाति के रीति रिवाजों में पिता की निर्वसीयती मृत्यु होने पर उस पिता की संपत्ति की विरासत में न्यागत होने की स्थिति में पुत्रों के समान पुत्रियों को समान अधिकार प्राप्त होने की रीति रिवाज के बारे में तथ्य के बारे में कोई अभिवचन नहीं किया है। साथ ही वादी द्वारा अपनी जनजाति के रीति रिवाजों में पिता की निर्वसीयती मृत्यु होने पर उस पिता की संपत्ति की विरासत में न्यागत होने की स्थिति में पुत्रों के समान पुत्रियों को समान अधिकार प्राप्त होने की रीति रिवाज के बारे में कोई साक्ष्य या सबूत प्रस्तुत नहीं किये है। इस कारण वादी द्वारा अपनी जनजाति के रीति रिवाजों में पिता की निर्वसीयती मृत्यु होने पर उस पिता की संपत्ति की विरासत में न्यागत होने की स्थिति में पुत्रों के समान पुत्रियों को समान अधिकार प्राप्त होने की रीति रिवाज के बारे में तथ्य को साबित करने में वादी असफल रहे है। इस प्रकार वादी द्वारा अपनी जनजाति के रीति रिवाजों में पिता की निर्वसीयती मृत्यु होने पर उस पिता की संपत्ति की

विरासत में न्यागत होने की स्थिति में पुत्रों के समान पुत्रियों को समान अधिकार प्राप्त होने की रीति रिवाज की अनुप्रयोज्यता के लिये आवश्यक कारक व परिस्थितियां प्रकरण में उपस्थित नहीं होती है। इस आधार पर भी वादी का दावा वादी द्वारा अपनी जनजाति के रीति रिवाजों में पिता की निर्वसीयती मृत्यु होने पर उस पिता संपत्ति की विरासत में न्यागत होने की स्थिति में पुत्रों के समान पुत्रियों को समान अधिकार प्राप्त होने की रीति रिवाज के तहत पोषणीय प्रतीत नहीं होता है।

33. प्रकरण में साथ ही प्रकरण में हाल जमाबंदी के अवलोकन से ज्ञात होता है कि प्रतिवादी संख्या 01–04 द्वारा अपनी आराजी का बेचान किया जा चुका है। इस प्रकार प्रतिवादी संख्या 01–04 के द्वारा अपनी संपत्ति के बेचान के पंजीबद्ध दस्तावेज को हिन्दु उत्तराधिकार अधिनियम–1956 के तहत अधिकार निहित अभिकथित करते हुए आरंभ से शून्य व अवैध घोषित किया जाना विधिसंगत नहीं है। इस प्रकार प्रार्थी का दावा विधिसंगत प्रतीत नहीं होता है। इस आधार पर वादीगण का पंजीकृत बयनामा द्वारा अंतरित संपति में वादीगण का कोई हक न्यायालय नहीं पाता है। इस आधार पर अनुतोष संख्या 01 व 02 वादीगण के विरूद्ध निर्णित किया जाता है।

34. प्रकरण में अगला अनुतोष प्रतिवादीगण के विरूद्ध स्थाई निषेधाज्ञा जारी करने से संबंधित है। प्रकरण में वादी के अनुतोष के विवेचन हेतु तथ्यों का गहन विश्लेषण से पूर्व राजस्थान काश्तकारी अधिनियम–1955 की धारा–188 का उद्धरण यहॉ प्रतीत होता है। जो कि निम्न प्रकार हैः–

> ***188. Injunction against wrongful ejectment—***
> *(1) Any tenant whose right to or enjoyment of the whole or a part of his holding is invaded or threatened to be invaded by his landholder or any other person may bring a suit for the grant of a perpetual injunction.*
> *(2) The court may after making the necessary enquiry grant a perpetual injunction in the following cases, namely-*
> *(a) if there exist no standard for ascertaining the actual damage caused or likely to be caused by the invasion;*
> *(b) if the invasion is such that pecuniary compensation does not afford adequate relief;*
> *(c) where it is probable that pecuniary compensation cannot be got for the invasion.*
> *(d) where the injunction is necessary to prevent a multiplicity of proceedings.*

35. उक्त राजस्थान काश्तकारी अधिनियम–1955 की धारा–188 के अवलोकन से स्पष्ट है कि धारा–188 के अन्तर्गत किसी खातेदारी आराजी पर खातेदारी अधिकारो की आमदरफत में किसी प्रकार का व्यवधान/अतिक्रमण किया जा रहा हो/किया जाने वाला हो उस स्थिति में व्यवधान उत्पन्न/अतिक्रमण करने वाले व्यक्ति को स्थाई निषेधाज्ञा से पाबंद किए जाने के प्रावधान बनाए गए है। राजस्थान काश्तकारी अधिनियम–1955 की धारा–188 की उपधारा–2 में स्थाई निषेधाज्ञा जारी किए जाने हेतु निम्न चार परिस्थितियां बताई गई हैः–

परिस्थिति	विवरण
1.	जब हो रहे / होने वाले संभावित अतिक्रमण / व्यवधान / घुसपैठ से होने वाले नुकसान के आंकलन हेतु कोई मानक / मापदण्ड अस्तित्व में नहीं हो।
2.	जब अतिक्रमण / व्यवधान / घुसपैठ इस प्रकार का हो कि नुकसान की आर्थिक भरपाई / क्षतिपूर्ति पर्याप्त राहत / संतुष्टि प्रदान नहीं करता हो।
3.	जब इस तथ्य की संभावना हो कि अतिक्रमण / व्यवधान / घुसपैठ से होने वाले नुकसान की आर्थिक भरपाई / क्षतिपूर्ति की प्रदानगी संभव नहीं होगी।
4.	जब निषेधाज्ञा राजस्व विवादों की बहुलता को रोकने हेतु आवश्यक हो।

36. उक्त विधिक प्रावधानों के परिप्रेक्ष्य में प्रकरण का विश्लेषण किया जाना आवश्यक है। वादी का यह कथन है कि उक्त आराजी पर प्रतिवादीगण द्वारा जबरन कब्जा कर उसके उपयोग व उपभोग में व्यवधान किया जाता है या उस पर निर्माण किया जाता है तो वादीगण को स्पष्ट रूप से नापूर्ति होने वाली क्षति संभावित है। प्रकरण में अनुतोष संख्या 01 के वादीगण के पक्ष में साबित नहीं होने के कारण मुतनाजा आराजी पर वादी का स्वामित्व साबित नहीं होता है। इस कारण वादी का स्थायी निषेधाज्ञा का अनुतोष भी प्रथम दृष्टया साबित नहीं होता है। अतः

आदेश है कि

वादीगण का दावा बाबत इस्तकरारहक्क व हुक्म–ए–इमतिनाई खारिज किया जाता है।

निर्णय की पृथक से पर्चा डिक्री तैयार की जाये।

आज 27.03.2026 को यह निर्णय मेरे द्वारा खुले न्यायालय में सुनाया जाकर हस्ताक्षर एवं मोहर युक्त जारी किया गया।

(केशव कुमार मीना आर.ए.एस)
सहायक कलक्टर
गुढामालानी

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सत्यमेव जयते

न्यायालय

सहायक कलक्टर/उपखण्ड अधिकारी

गुढामालानी

(पीठासीन अधिकारी –केशव कुमार मीना आर.ए.एस.)

वाद संख्याः– 2024 / 514 दर्ज तिथिः– 20.11.2024

1. हेमी पुत्री धोकला पत्नी चेनाराम
   जाति भील निवासी बेरीगांव निवासी नया नगर
2. जोरो पुत्री धोकला पत्नी मानाराम
   जाति भील निवासी बेरीगांव हाल निवासी गुड़ामालानी तहसील गुड़ामालानी जिला बाड़मेर
   .....वादी

बनाम

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2. दीपा पुत्र धोंकला
3. सुआदेवी पत्नी प्रहलादराम
4. सुवटी पत्नी भगाराम निवासी बेरीगांव
5. गीगी देवी पत्नी आसुराम निवासी गुड़ामालानी
6. अनरीदेवी पत्नी केवाराम
7. केलूदेवी पत्नी भगाराम
8. गोमतीदेवी पत्नी भगाराम
9. केवा पुत्र कमा
10. कस्तुरा पुत्र कमा
11. केसा पुत्र कालूराम
12. गोरखा पुत्र पता
13. जाला पुत्र पता
14. जोरा पुत्र पदमा
15. झमकुदेवी पत्नी सताराम
16. ढफीदेवी पत्नी नरसीराम
17. तगा पुत्र कमा
18. तुलछी पत्नी सवा
19. पूनमाराम पुत्र कालूराम
20. पार्वती पत्नी कृष्ण फौत के कायम मुकाम
21. भंवराराम पुत्र कालूराम
22. मका पुत्र भारमल
23. मगा पुत्र पदमा

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24. मेहरा पुत्र पदमा
25. मांगा पुत्र कृष्ण
26. मोहन पुत्र कृष्ण
27. मोहन पुत्र कमा
28. रूपा पुत्र कमा
29. लक्ष्मीदेवी पत्नी कालुराम फौत के कायम मुकाम
30. वजा पुत्र कमा
31. वाला पुत्र सवा
32. सगताराम पुत्र कालूराम
33. सूजा पुत्र पता
34. सुन्दर पत्नी पताराम
35. सोरमदेवी पत्नी सांवलाराम
36. अणदु पत्नी वागाराम
37. अणसी पुत्री वागाराम
38. कमला पत्नी मगाराम
39. कोशलाराम पुत्र तगाराम
40. गुलाबीदेवी पत्नी तगाराम
41. गोरधन पुत्र ठाकरा
42. जगदीश पुत्र ठाकरा
43. तुलछा पुत्र अजा
44. दूदाराम पुत्र कलाराम
45. देशू पत्नी रणछोड़ा
46. नगा पुत्र अजा
47. पना पुत्र रणछोड़ा
48. फगलु पुत्र बीजला
49. बाजू पत्नी ठाकरा
50. भंवराराम पुत्र तगाराम
51. मफा पुत्र अजा
52. मेरा पुत्र कमा
53. मूलाराम पुत्र वागाराम
54. माया पुत्री वागाराम
55. मोतीराम पुत्र वागाराम
56. रमेश पुत्र अजा
57. वस्ता पुत्र ठाकरा
58. सुखराम पुत्र कानाराम
59. सताराम पुत्र कलाराम
60. सुरता पुत्र बीजला
61. सरवन पुत्र कलाराम
62. सीता पत्नी अजा
63. हलीदेवी पत्नी कलाराम
64. हरजीराम पुत्र कमूराम
65. रूखमो पत्नी पदमा

66. हड़मान पुत्र कमा
    जाति भील निवासी बेरीगांव तहसील गुड़ामालानी जिला बाड़मेर
67. हेमीबेन पत्नी अखाजी जाति भील निवासी राधनपुर तहसील व जिला राधनपुर
68. मैनेजर भूमि विकास बैंक शाखा बालोतरा
69. मैनेजर एसबीआई शाखा गुड़ामालानी
70. राजस्थान सरकार जरिये तहसीलदार गुड़ामालानी।

.....प्रतिवादीगण

उपस्थित अधिवक्ता
वादीः— श्री हरिशचन्द्र चौधरी
प्रतिवादीः— एकतरफा

राजस्व वाद अन्तर्गत धारा—88, 188
राजस्थान काश्तकारी अधि0—1955

—:पर्चा डिक्रीः—

वादीगण का दावा बाबत इस्तकरारहक्क व हुक्म—ए—इमतिनाई खारिज किया जाता है।

पक्षकारान अपना—अपना खर्चा स्वयं वहन करेंगे।

यह पर्चा—डिक्री आज दिनांक 27.03.2026 को मेरे द्वारा लिखवाई जाकर हस्ताक्षर एवं मुहर युक्त जारी की जाकर खुले न्यायालय में सुनाई गई।

(केशव कुमार मीना आर.ए.एस)
सहायक कलक्टर
गुढामालानी

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