REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3050 OF 2010

RATHNAMMA & ORS. .....APPELLANT(S)

VERSUS

SUJATHAMMA & ORS. .....RESPONDENT(S)

J U D G M E N T

HEMANT GUPTA, J.

1. Defendant No.2, defendant No.5 and legal heirs of defendant No.4 are in appeal aggrieved against the judgment passed by High Court of Karnataka on 3rd April, 2008 dismissing their second appeal maintaining the judgment and decree passed by the First Appellate Court on 2nd July, 2005 whereby the suit for partition filed by plaintiff Sujathamma was decreed.

2. The following Genealogical Tree would be necessary to appreciate the dispute between the parties:-

"**GENEALOGICAL TREE**

Sonnappa
(Defendant No. 1)

Son Hanumanthappa (dead)	Daughter Sonnamma (Def No. 1(a))	Daughter Kenchamma (Def No.1(b))	Daughter Lakshmamma (Def No.1(c))

(*Sujathamma is the daughter of Muniyappa and Sonnamma)

Son Venkatarayappa (dead) — Rathnamma (Def No. 2)

Gowramma (Def No. 3)	Rajappa (Def No. 4)	Naryanaswamy (Def No. 5)

Note :

*Sujathamma claims to be married to Hanumanthappa."

3. Defendant No. 1 Sonnappa died during the pendency of the suit leaving behind two sons - Venkatarayappa and predeceased son - Hanumanthappa and three daughters - Sonnamma, Kenchamma and Lakshmamma. Sonnamma, Kenchamma and Lakshmamma have been brought on record as legal heirs of defendant No. 1. The plaintiff - Sujathamma, maternal grand-daughter of Sonnappa, claims to have married Hanumanthappa on 7th March, 1986. Hanumanthappa died on 15th October, 1986. The claim of the plaintiff is that she is entitled to the share of the estate of Sonnappa, as wife of deceased Hanumanthappa. It is the said

assertion which was accepted by the First Appellate Court and maintained by the High Court.

4. The plaintiff filed the civil suit with the assertion that the parties are related to each other as members of joint Hindu Undivided Family. The plaintiff asserted that the first defendant i.e. Sonnappa is her fathter-in-law. Since the property is said to be ancestral property and that property stands in the name of the first defendant Sonnappa, therefore, plaintiff claims that she is entitled to the share of Hanumanthappa as his wife.

5. The daughter of the first defendant was married to the father of the plaintiff. The stand of the defendants is that the father of the plaintiff managed to obtain signatures of the first defendant by way of malafide practices and that the first defendant never consented for the marriage of his second son Hanumanthappa as he was suffering from juvenile diabetes mellitus coma, cardio respiratory arrest and such other symptoms. The plaintiff was about 14 years of age at the time of death of Hanumanthappa and that she was not fit for marriage. It was asserted that if any document is produced by the plaintiff to show that she was married, it is a concocted one. By way of a separate written statement, defendant Nos. 2 to 5 denied the allegations of the plaintiff. It was pleaded as under:

> "12. The plaintiff is not entitled to any reliefs. The true facts of the case are that the plaintiff is grand daughter of first defendant and the plaintiff's mother,

> first defendant and plaintiff colluded with each other and they have filed this suit in order to grab the properties, the plaintiff is not at all wife of the said late Hanumanthappa. Even as on the date of the death of said Hanumanthappa, the said plaintiff was aged about 14 years. Even the said Hanumanthappa was also suffering from Juvenile Diabetes Mellitus coma, Cardio respiratory arrest and such other symptoms. Even he was not in position to marry or to give consent for marriage since 6 years and never marriage of the plaintiff with late Hanumanthappa had been taken place."

6. The parties went to trial with one of the issues being whether the plaintiff is wife of late Hanumanthappa. To prove the said issue, the plaintiff examined herself as PW-1. PW-2 is the father of the plaintiff whereas PW-3 to PW-5 are the witnesses of an agreement to marriage dated 7th March, 1986, who were examined to prove plaintiff's marriage with Hanumanthappa. PW-6 was examined to prove the age of the deceased Hanumanthappa. PW-7 to PW-9 are the daughters of deceased defendant No. 1. As per the birth certificate (Ex.P/30), the date of birth of Hanumanthappa is 20th June, 1966, that makes him 19 years 9 months at the time of his marriage. On the other hand, the plaintiff in her statement stated her age as 15 years at the time of marriage. However, the defendants have produced Ex.D/3, Register of Admission of the School, by confronting PW-6, Headmaster of the School. As per Ex.D/3, the plaintiff was born on 5th June, 1975. As per the plaintiff, an agreement of marriage was registered on 7th March, 1986. The witnesses examined by the plaintiff have deposed that the

marriage was registered on the said date.

7. Admittedly, Hanumanthappa died on 15th October, 1986 i.e. within eight months of the alleged marriage. The plaintiff, apart from the oral evidence, relies upon a photograph (Ex.P/28) wherein the plaintiff and Hanumanthappa are seen together. PW-2 to PW-5 have deposed that the photograph (Ex.P/28) was taken in Malur after performing marriage in Sub-Registrar's office. The learned trial court found that Hanumanthappa was 19 years 9 months old at the time of marriage and the plaintiff, as admitted by her in cross-examination, was 15 years of age at the time of marriage. It was, thus, held that the plaintiff and the deceased have not attained the qualifying age at the time of registration in the office of Sub-Registrar and, thus, marriage was *void ab initio*. It is also held that there is no evidence of performance of necessary marriage ceremonies in terms of Section 7 of the Hindu Marriage Act, 1955[1], therefore, mere registration of an agreement of marriage is not sufficient to prove marriage. The trial court also took into consideration the statement of plaintiff admitting that the deceased was suffering from some diseases earlier to the marriage and her father performed marriage in a hurry with an intention to get the property. Plaintiff deposed that she belongs to Vokkaliga community and marriages were performed in the house and no marriage in the family was performed in the Sub-Registrar's office. The learned trial court held that the marriage of the plaintiff with

1 for short, 'Act'

the deceased is said to be proved but marriage is *void ab initio* in terms of Section 24 of the Special Marriage Act, 1954 as both have not attained the qualifying age for marriage. In the result, the trial court dismissed the suit and held that defendant Nos. 2 to 5 are entitled to 1/3rd share of the total scheduled property.

8. Both sets of parties went in appeal. The learned First Appellate Court affirmed the findings of the trial court that marriage of the plaintiff with deceased Hanumanthappa is established and that Ex.D/3, the date of birth certificate of the plaintiff is not admissible as it is not an authentic document. In the absence of proof of date of birth, the First Appellate Court held that the trial court committed an error in coming to the conclusion that the plaintiff has not attained the age of marriage. The learned First Appellate Court held that Ex.P/1 is not a proof of solemnization of marriage under the provisions of the Special Marriage Act, 1954 as it is only a contract of marriage which was registered. No marriage certificate has been issued by the competent authority, therefore, the parties cannot be deemed to have married under the Special Marriage Act, 1954. However, the First Appellate Court held that since the parties are Hindus and that if the marriage is neither void or voidable under the Act, therefore, the provisions of age of marriage are only directory in nature and not mandatory. The marriage was held to be valid, consequently, the suit was decreed.

9. The High Court in second appeal held that there was a marriage

between plaintiff and Hanumanthappa and that the certificate (Ex. P/1) is neither marriage certificate nor issued to evidence the marriage in terms of provisions of the Special Marriage Act, 1954 but only a piece of evidence supporting the version of the plaintiff that her marriage has taken place with Hanumanthappa. The High Court said that in law, a customary Hindu marriage can be proved only on establishing that the parties to the marriage had gone through the necessary observances but since the defendants have denied the marriage itself, they cannot be permitted to turn around to contend that it was not a valid marriage.

10. Learned counsel for the defendants argued that the plaintiff never asserted that she married Hanumanthappa either under the Special Marriage Act, 1954 or a marriage under custom. In fact, the plaintiff has not pleaded that she married Hanumanthappa except asserting that defendant No. 1 is her father-in-law. The defendant No. 1 Sonnappa is maternal grand-father of the plaintiff, whereas Hanumanthappa was son of defendant No. 1, meaning thereby, the claim of the plaintiff is that she married her Uncle. It is not disputed that Hanumanthappa was suffering from various diseases and died within eight months of the alleged marriage. The stand of the defendants is that there was no marriage and that the story of marriage was created to take the share of the deceased Hanumanthappa in the property.

11. Before we proceed further, some relevant provisions of the Hindu Marriage Act, 1955 need to be extracted hereunder:

> "5. **Conditions for a Hindu marriage.** –
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> (i) xx xx xx
>
> (ii) at the time of the marriage, neither party,-
>
> (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or
>
> (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
>
> (c) has been subject to recurrent attacks of insanity or epilepsy;
>
> (iii) xx xx xx
>
> (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
>
> (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;
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> xx xx xx
>
> 7. **Ceremonies for a Hindu marriage.-** (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.
>
> xx xx xx
>
> 11. **Void marriages.**- Any marriage solemnized after the commencement of this Act shall be null

> and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v), Section 5."

12. One of the issues framed was whether the plaintiff is wife of Hanumanthappa. Since the entire claim of the plaintiff is based upon her marriage with Hanumanthappa, the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence is the established principle of law. This Court in ***Varada Bhavanarayana Rao*** v. ***State of A.P.***[2], held that in terms of Section 102 of the Evidence Act, 1872[3], the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. It was held as under:-

> "15. That being the position, the question on which of the contending parties the burden of proof would lie has to be decided on the relevant provisions of the Evidence Act. Section 101 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proof of that fact shall lie on any particular person."

13. We find that the High Court has committed illegality in holding that since the defendants have denied marriage, it cannot be asserted by the defendants that the marriage of the plaintiff with

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2 AIR 1963 SC 1715

3 for short the "Evidence Act"

Hanumanthappa was not a valid marriage. The plaintiff has led evidence to the effect that the marriage was solemnized in the office of Sub-Registrar vide Ex.P/1. Ex.P/1 has been rightly found to be not a certificate of registration of marriage under the Special Marriage Act, 1954 and that there is no evidence that any ceremony has taken place. In the agreement of marriage (Ex.P/1), it is only stated that both parties are of same caste and with the permission and consent of both of their fathers, they have entered into this agreement of marriage. This type of marriage is not recognized in law as Section 7 of the Act contemplates that the marriage can be solemnized in accordance with customary rites and ceremonies of either party thereto and where such rites and ceremonies include the Saptpadi, the marriage becomes complete and binding when the seventh step is taken.

14. The plaintiff has not led any evidence of solemnization of marriage as provided under sub-clause (2) of Section 7 of the Act or by leading any evidence of customary rites and ceremonies. The burden to prove marriage was on the Plaintiff alone. The defendants have denied marriage of the Plaintiff, therefore, the burden to prove marriage was on the plaintiff alone. Apart from such fact, the marriage cannot be said to be taken place in terms of Section 5(v) of the Act which is to the effect that the parties are not s*apindas* to each other, unless the custom or usage governing each of them permits of a marriage between the two. Such marriage is a void marriage but, on a petition, preferred by either party thereto.

15. Hanumanthappa, a party to the marriage died soon after the so-called marriage. Therefore, the question required to be examined is whether the alleged marriage which is between the persons of less than 21 years and 18 years and between the prohibited degree is a valid marriage. The plaintiff will be entitled to the estate of Hanumanthappa only if she proves her valid marriage. The plaintiff has not pleaded any custom permitting marriage within the prohibited degree nor there is any proof of solemnization of any marriage by customary ceremonies and rites, therefore, the plaintiff will not be entitled to succeed only on the basis of alleged registration of an agreement of marriage. In the absence of customary ceremonies or the custom permitting marriage between the prohibited degree, the plaintiff has no legal right to claim the share in the property only on the basis that some of the witnesses produced by her admitted that she married Hanumanthappa.

16. This Court in a judgment reported as ***Salekh Chand (Dead) by LRs*** v. ***Satya Gupta & Ors.***[4] while dealing with the claim of adoption under the Hindu Adoption and Maintenance Act, 1966, held as under:

> "21. In *Mookka Kone* v. *Ammakutti Amma*[AIR 1928 Mad 299] it was held that where custom is set up to prove that it is at variance with the ordinary law, it has to be proved that it is not opposed to public policy and that it is ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy. It is not disputed that even under the old Hindu Law,

4 (2008) 13 SCC 119

adoption during the lifetime of a male issue was specifically prohibited. In addition, I have observed that such an adoption even if made would be contrary to the concept of adoption and the purpose thereof, and unreasonable. Without entering into the arena of controversy whether there was such a custom, it can be said that even if there was such a custom, the same was not a valid custom.

22. It is incumbent on party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. It must be established inductively and not by a priori methods. Custom cannot be a matter of theory but must always be a matter of fact and one custom cannot be deduced from another. It is a well-established law that custom cannot be enlarged by parity of reasoning.

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

24. Custom is a rule which in a particular family or a particular class or community or in a particular district has from long use, obtained the force of law. Coming to the facts of the case PW 1 did not speak anything on the position either of a local custom or of a custom or usage by the community; PW 2, Murari Lal claimed to be witness of the ceremony of adoption, he was brother-in-law of Jagannath, son of Pares Ram who is said to have adopted Chandra Bhan. This witness was 83 years old at the time of deposition in the court. He did not speak a word either with regard to the local custom or the custom of the community. PW 3 as observed by the lower

> appellate court was only 43 years old at the time of his deposition whereas the adoption had taken place around 60 years back. He has, of course, spoken about the custom but that is not on his personal knowledge and this is only on the information given by PW 2 Murari Lal. He himself did not speak of such a custom. The evidence of the plaintiff was thus insufficient to prove the usage or custom prevalent either in the township of Hapur and around it or in the community of Vaish."

17. In the present case, the plaintiff has not proved custom of marriage to her mother's brother and/or judicial precedent recognizing such marriage. In the absence of any precedent or custom of such marriage, no judicial notice can be taken of a custom as argued by the learned counsel for the plaintiff. In the absence of any pleading or proof of custom, the argument that in Vokkaliga community, such marriage can be performed cannot be accepted as no judicial precedent was brought to the notice of the Court that such a custom exists in the Vokkaliga community nor there is any instance quoted in evidence of existence of such custom.

18. The burden to prove the marriage was on the plaintiff. The plaintiff has failed to prove the marriage. The entire case is based upon an agreement of marriage in which there is no assertion regarding solemnization of the customary ceremonies or the rites or that the parties had performed saptpadi in the manner contemplated under Section 7 of the Act, therefore, the plaintiff cannot succeed the estate of Hanumanthappa on the basis of a marriage which she has failed to prove.

19. Consequently, the present appeal is allowed while restoring the judgment and decree of the learned Trial Court.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

NEW DELHI;
NOVEMBER 15, 2019.