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**(1996) 09 RAJ CK 0030**

**In the Rajasthan High Court**

**Case No :** Civil Second Appeal No's. 9, 10, 11, 78 and 79 of 1990

Asha Ram and Others

APPELLANT

Vs

Bhanwar Lal and Others

RESPONDENT

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**Date of Decision :** 11-09-1996

**Acts Referred:**

Constitution of India, 1950 — Article 13, 14, 15  
Evidence Act, 1872 — Section 57

**Citation :** (1996) 3 RLW 173 : (1997) 1 WLC 113 : (1996) 2 WLN 393

**Hon'ble Judges :** P.P. Naolekar, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## **Judgement**

P.P. Naolekar, J.—As common questions of law and facts are involved except the different accommodations as suit properties, the judgment in this appeal (No. 11/90) shall govern all other appeals. Civil Suit No. 129/64 (Suit No. 67/81 new) for arrears of rent and damages in respect of the shop situated in Sadar Bazar, Balotra was filed by the plaintiffs Sunder Bai and Aichuki Devi. Second Appeal No. 11/90 filed by Asha Ram and Second Appeal No. 79/90 filed by the tenants arise out of this civil suit. Civil Suit No. 146/64 (Civil Suit No. 69/81 new) for arrears of rent and possession of the shop was filed by Sunder Bai and Aichuki Devi. Second Appeal No. 9/90 filed by Asha Ram arises out of that suit. Civil Suit No. 135/64 (Civil Suit No. 68/81 new) for recovery of rent and ejectment from Nohra situated in Balotra was filed by Sundar Bai and Aichuki Devi. Second Appeal No. 10/90 filed by Asha Ram and Second Appeal No. 78/90 filed by the tenants arise out of this civil suit.

2. In order to appreciate the main controversy involved in these appeals the facts emerged on the material on record are summarised thus. One Megh Raj S/o Bhani Ram Agrawal, r/o Balotra had two wives. Megh Raj had two daughters Smt. Sundar Bai and Smt. Aichuki Devi who were the original plaintiffs (died during the pendency of the proceedings and Shiv Ratan and Sita Ram were

brought on record as their legal representatives who are plaintiff-respondents in the appeal). Smt. Sunder Bai and Smt. Aichuki Devi were daughters of Megh Raj by his first wife. Megh Raj died on September 08, 1945. On July 01 1945 Megh Raj executed a will whereby he bequeathed all his property in favour of Smt. Muni Devi, his wife. Megh Raj had two brothers Jamna Das and Shambhu Ram. Appellant Asha Ram (in Appeals No. 9, 10 and 11 of 1978) is son of Jamna Das. After the death of Smt. Muni Devi on 17.02.55, escheat proceedings were started on the ground that she had died issueless. Asha Ram did not file any claim before the Collector, Banner in escheat proceedings. The Collector passed order u/s 6(7) of the Rajasthan Escheat Regulation Act, 1956 directing the objector to establish their claims in the civil court. The daughters/plaintiffs preferred a revision before the Government against the decision of the Collector and by order dated November 27, 1975 (Annex.-4) the plaintiffs were held entitled to the property by the Government of Rajasthan and, consequently, the properties were released in plaintiffs' favour. As the tenants have failed to pay the rent to anybody after the death of Smt. Muni Devi the suits as aforementioned were filed.

3. The plaintiffs alleged that Megh Raj was the original owner of the property in dispute who made a will in favour of his wife Smt. Muni Devi. After the death of Megh Raj Smt. Muni Devi became owner of the suit properties. Muni Devi expired on 17.02.55. After the death of Smt. Muni Devi, daughters Smt. Sunder Bai and Smt. Aichuki Devi became owners of the property. The tenants have not paid rent and are liable to pay the rent and deliver possession.

4. In the written-statement filed by the tenants (who are appellants in Second Appeals No. 78 and 79 of 1990), amongst other defence, it has been alleged that after the death of Smt. Muni Devi no person was legally entitled to recover rent from them and, therefore, the rent was not paid. The plaintiffs are not real daughters of Smt. Muni Devi but are daughters of Megh Raj by other wife. The plaintiffs are not the heirs of Megh Raj and Smt. Muni Bai. The real heir is Asha Ram son of the brother of Megh Raj. According to the custom prevalent in this part of the country (Marwar) the daughters could not inherit the property of their father in the presence of the collateral and thus the plaintiffs' suit for arrears of rent and /or possession is liable to be dismissed.

5. The trial Court considered the question whether the plaintiffs were the lawful heirs of Smt. Muni Devi and Megh Raj and held that the plaintiffs are the legal heirs of Muni Devi and Megh Raj and as such are entitled to institute the suit and obtain the relief claimed. On these findings, the trial Court decreed the suit in favour of the plaintiffs. Being aggrieved by the judgment and decree passed by the trial Court the tenants preferred appeal. The District Judge recorded the finding that Smt. Muni Devi died issueless. The property in suit belonging to Smt. Muni Devi shall devolve upon her husband's heir and not upon the daughters. It is further held that the plaintiffs could not have instituted the suit as according to the custom then prevalent in Marwar State the daughters were debarred from

inheriting the father's property in the presence of the collateral. On these findings, the lower appellate Court held that the plaintiffs had no right, title or interest in the suit property and dismissed the suit reversing the decree passed by the trial Court.

6. The plaintiffs preferred three separate appeals in the High Court. They were registered as Second Appeals No. 306, 307 and 308 of 1968. The High Court felt that an important issue has not been framed and adjudicated upon by the lower appellate Court and framed the following issue in each of the suits:

Whether a custom existed prior to 1956 A.D. among the community of Agrawals of Marwar (former Jodhpur State) to which the plaintiffs and Asha Ram (respondent) belong whereby the daughter was not entitled to inherit the property of her father in the presence of a collateral.

The High Court set aside the judgment and decree of the lower appellate Court and remanded the matter to the trial Court for decision afresh after giving an opportunity to the parties to lead evidence on the issue framed. The judgment further directed that although application of Asha Ram moved under Order 1 Rule 10, C.P.C. was dismissed by the trial Court, now Asha Ram be added as party. That is how Asha Ram was added as party-defendant in the suit before the matter was remanded back to the trial Court for fresh adjudication.

7. Aggrieved by the judgment passed by the High Court SLP was preferred contending that framing of the issue and order of remand by the High Court is contrary to law as the custom that the daughters could not inherit the property of their father in the presence of the collateral in Marwar was well-known and judicially recognised as noted in 1939 M.L.R. 49, Rikhab Das v. Mst. Tippo and, therefore, a Judicially recognised custom is not necessary to be pleaded or proved by further evidence. The Supreme Court has noted that the case of the appellants before the Court was not that the custom among the community of Agrawal of Marwar under which the daughters were not entitled to inherit the property of father in the presence of the collateral. But, this custom was prevalent in the entire territory of former State of Marwar and, therefore, the issue should have been framed as under:

Whether a custom existed prior to 1956 A.D. in the territory of the former Marwar State whereunder the daughter was not entitled to inherit the property of the father in the presence of a collateral ?

and, it is this issue which should go for a trial. The Supreme Court has further observed that if the respondents wish to contend that though this custom prevailed in the territory of Marwar State, it did not apply amongst the community of Agarwals of Marwar or in the family of Megh Raj, it will be open to the respondents to put forward that plea before the trial Court and prove it by leading proper and satisfactory evidence. The order of the Single Judge of the High Court was confirmed with the modification of the issue framed.

8. The matter went back to the trial Court for trial of the issue framed by the Supreme Court and for fresh adjudication. In the trial Court, Asha Ram submitted an application that he may be transposed as plaintiff. The plaintiffs expressly gave consent to such transposition. The trial Court rejected the application of Asha Ram. Aggrieved by the order, Asha Ram preferred revision petition before the High Court. The High Court allowed the revision petition and directed the trial Court to transpose Asha Ram, newly added defendant, as plaintiff in the suit. Before Asha Ram was transposed as plaintiff, he had filed written-statements in the civil suits.

9. After remand, the trial Court gave opportunity to all parties to lead evidence on the issue framed and the parties led evidence. Asha Ram, after remand of the suit, did not enter witness-box nor led evidence. In the changed circumstances that Asha Ram was transposed as plaintiff admitting the claim of the plaintiffs the trial Court as well as the lower appellate Court did not feel it necessary to record any finding on the issue framed by the Supreme Court and decreed the suit of the plaintiffs Shiv Ratan and Sita Ram. Asha Ram filed second appeals challenging the decrees passed in favour of the original plaintiffs and not in his favour whereas two tenants of the tenements have preferred second appeals out of three, challenging the judgment and decree of the Court below. The matter was heard at length and the case was closed for judgment, however, it was felt by this Court that the Court below should have recorded the finding on the issue framed by the Supreme Court and, therefore, passed the following order on 26.07.96:

On hearing the arguments, I am of the view that the issue framed and remitted to the Courts should have been adjudicated and determined by the lower courts. Under the circumstances, the course open to this Court is to remand the case for fresh decision or to determine the issue framed and to decide the appeal in exercise of the powers conferred on this Court under Order 41 Rule 24 C.P.C. Considering the fact of long pendency of the case and that both the parties have already led evidence on the issue framed by the Supreme Court, I propose to decide the issue and finally determine the suit/appeal.

10. The decision of these appeals is mainly centred around the adjudication of the question whether custom did exist prior to 1956 in Marwar of the collateral displacing daughters from inheriting the father's property. Counsel for the respondents urged that the question need not be decided in view of the fact that after coming into force of the Constitution the custom, if any, prevailed excluding the daughters from inheriting the father's property, is hit by Article 14 of the Constitution of India being inconsistent with Article 15(1) whereunder there is constitutional mandate not to discriminate against any citizen on the ground of sex and strongly relied upon this proposition of the case reported in 1956 R.L.W. 81 Thakur Sheokaran Singh v. Daulat Ram.

11. In 1956 R.L.W. 81 (supra), the question for consideration was the rule of DAMDUPAT as known in Hindu Law prohibiting the claim of larger sum on account

of interest than principal in view of Articles 13 and 15(1) of the Constitution and the Court has held that the interest being a question of civil law, and generally not a question of personal law of any class of citizens, the State cannot now enforce a rule which discriminates against certain classes of citizens i.e., Mohanwodans and Christians and the result of enforcing the law of "damdupat" now would be that if the parties are Hindu the benefit would be conferred to them. But, if the parties are not Hindu but belong to some other community the benefit would not go to them. Thus the rule of "damdupat" as known in the Hindu Law is clearly hit by Article 15(1) of the Constitution and as such would be void under Article 14 of the Constitution. On the other hand, counsel for the respondents has relied upon a decision reported in AIR 1980 SC 707, *Krishan Singh v. Mathura and Ors.* In this case, the Supreme Court was called upon to decide the question whether a Shudra could become a sanyasi under the Hindu Law. The Supreme Court held that the law that a Shudra cannot become a sanyasi does not violate Article 14 of the Constitution of India. It has been observed that:

...In our opinion, the learned Judges failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu Law, i.e., *Saritis* and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modified or abrogated by statute.

12. In *The State of Bombay Vs. Narasu Appa Mali*, it was held by the Bombay High Court that personal law is excluded from the purview of Article 13. It was held that the provisions of the personal law which permitted polygamy among the muslim males did not confront with Article 15(1) as it is outside the ambit of Article 15 of the Constitution of India. The Rajasthan case (*supra*) is distinguishable on its own facts. In that case, the Court was called upon to decide the application of the civil law - interest being a question of civil law and not a question of personal law - in the light of Article 15(1) and Article 15 of the Constitution of India and, therefore, the decision has no application in the facts of the present case which is in respect of establishment of the custom under the personal Law, whereas the Supreme Court decision is on the point of personal - law. That apart, this Court would not be required to enter upon the constitutionality of the law if it is possible to dispose of the case and determine rights of the parties before it on other grounds. Reliance is placed on *The State of Bihar Vs. Rai Bahadur Hurdut Roy Moti Lall Jute Mills and Another*,

13. All customs pleaded and of which the Courts do not take judicial notice must be clearly established and proved to be existing. The onus of establishing it is on the party relying upon its existence. It is for the party, who asserts that he is ruled in regard to the particular matter by custom, that he is governed by it and not by personal law, and further to prove what the particular custom is.

Commanding nature of a particular course of conduct emanating from the faith in its propriety produces a uniformity of behaviour in following it; and, the uniformity of behaviour in relation to a particular course of conduct generates the belief that it is imperative, or proper to do so. Be that as it may, when a uniform and persistent usage has come to be evolved molding the life and regulating the dealings, of a section or class of people, or a community, it becomes a custom among that section, or class of people, or the community- and plays its part as their personal law.

14. Hence when the special usage or succession was set up by the appellant-tenants of customary right of succession of collateral as against daughters with reference to the property held by the father it has to be proved by the tenant-appellants. It is of essence to establish the usage, modifying the ordinary law of succession, that they should be ancient and invariable and, it is further essential, that they should be established to be so by clear and unambiguous evidence. For that custom from long usage obtains the force of law it must be ancient, certain and reasonable. In order to establish that the general law of inheritance is overridden by custom the evidence must satisfy the Court that majority of at least given class of persons - look upon the customary rule put forward as binding. That must be established by series of well-known, concordant and continuous insistence so that the common consent of the class in question is clearly demonstrated by a number of instances proved. It is well-settled principle of law that the custom cannot be extended by analogy nor one custom deducted from another nor a custom can be enlarged on parity of reason. The existence of one custom is no evidence of existence of another. The only proof of particular custom is the evidence of that custom and no other. Reliance is placed on *Saraswathi Ammal Vs. Jagadambal and Another*,

15. Let us now examine the oral evidence led in proof of the custom and judge it upon the touchstone of the aforementioned proposition of law. In Civil Suit No. 124/64 (67/89), the tenant-appellants have examined D.W. 1 Bhanwar Lal, D.W.-2 Rameshwar Das and D.W.-3 Bhikam Chand, In Civil Suit No. 135/64 (68/81), D.W.-1 Ram Gopal, D.W.-2 Bhanwar Lal and D.W.-3 Raja Ram were examined; and, in Civil Suit No. 146/64 (69/81), D.W.-1 Hanuman Das, D.W.-2 Rameshwar Das and D.W.-3 Bhikam Chand were examined. None of these witnesses speak about any such custom existing in Marwar prior to 1956 whereunder the daughter is excluded from inheriting the property of father in the presence of a collateral. Some of the witnesses speak about the custom prevalent in Agrawal community in former Marwar State. As the custom pleaded is not in respect of Agrawal community, the custom does not stand proved by analogy. There is no material on record to prove the uniformity and continuity of the usage that it is being followed as law. In the absence of proof of the essential ingredients of the proof of the custom the tenant-appellants have failed to prove the existence of the custom by oral evidence.

16. Faced with this shortcoming, counsel for the appellants Shri Rajendra Mehta

submitted that this Court can take into consideration the decision of the Division Bench reported in 1939 M.L.R. 49, Rikhab Das v. Mst. Tippo, and the other cases referred to therein as evidence of the proof of the custom pleaded by the tenants in support of the oral evidence led. It is true that the decision of the Court has evidentiary value and is admissible in evidence but even if it is admissible in evidence it is of little weight if it is unsupported by actual examples of the usage. The tenant-appellants have not produced any evidence of actual examples of the custom set up and being followed in the State of Marwar and, therefore, in my opinion, the judgment of this Court is of no assistance to prove the custom.

17. Counsel for the appellants then proceeded with the submission that where a custom is repeatedly brought to the notice of the Court the Court may well hold that the custom introduced into the realm of law of the land without insisting upon the necessity of proof in any individual case and place reliance upon 1939 M.L.R. Rikhab Das v. Mst. Tippo, and the decision referred to therein.

18. In AIR 1918 P.C. 81, Raja Rao v. Raja of Pittapur, their Lordships of the Privy Council have held that when a custom or usage, whether in regard to Tensure or contract is repeatedly brought to the notice of the Courts of the country the Court may hold that customary usage to in introduced into the law without the necessity of proof in each individual case. In Ujagar Singh Vs. Jeo, the Supreme Court has held that when a custom is repeatedly recognised by the Court it passes into the law of the land and the proof of it then becomes unnecessary u/s 57 of the Evidence Act. In S.S. Munna Lal Vs. S.S. Rajkumar and Others, the Supreme Court was called upon to decide the question whether the custom recognised among Jains to adopt a son without the express authority of her husband is required to be proved or a judicial notice of that can be taken. The Supreme Court has noted that the custom as pleaded has been recognised by judicial decisions spread over a period longer than a century and a review of the cases decided by different Courts clearly show that the custom is generally applicable to Jains all over India except Jains domiciled in Madars and Punjab. The Supreme Court found that the cases in which the custom is proved to have been established the Courts have arrived at the conclusion after consideration of the evidence led by the parties wherein large number of witnesses were examined at different places. The Court then has reiterated the principle in the following words:

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

The ratio laid down by the aforesaid decisions appears to be that the custom repeatedly brought to the notice of the Court and found established by the Courts will transform into law and can be taken judicial notice of without proof in each individual case.

19. Whether on the principles laid down by the Supreme Court can it be held that

the decision reported in 1939 M.L.R. (supra), and the decisions cited and referred to therein, established a custom to have become a part of the law applicable to the Hindus in Marwar State by long and uninterrupted course of acceptance. It may be said here that the other decisions viz., Akhey Raj and Ors. v. Mst. Parvati & Mst. Radha, decided on 10.06.1927; and, Purushottam v. Bal Chand, decided on 30.06.1916 have not been placed before me for examination. The decision dated 10.06.27 is a decision based solely on the judgment of the Court dated 30.06.16 rendered in Purushottam v. Bal Chand. In 1939 M.L.R. 49, Rikhab Das v. Mst. Tippto, it has been observed:

The applicant's learned Counsel has urged that according to custom recognised by the courts of this State, daughters and sisters are excluded from inheritance and in this connection he has referred us to the case of Akheyraj and Ors. (plaintiffs) v. Mst. Parvati and Mst. Radha (defendants) decided by a Division Bench of this Court on 10.6.1927 (vide D.C. Civil Appeals No. 7, 101 & 142/23, 24) in which relying on the judgment of this Court dated 30th June 1916 in Purushottam v. Balchand, it was held that according to the custom prevailing in Marwar the daughters and their heirs have no right to inherit the property of their father. The learned Counsel for the respondents concedes before us that in the presence of the collaterals daughters and sisters cannot, according to local custom, inherit property left by a father or a brother as the case may be.

20. The question, in fact, referred to the Full Bench in 1939 M.L.R.49 (supra) for consideration was whether sister and sister's son can be recognised as heir in Marwar. Thus the Court was not called upon to decide the question of the daughters inheritance nor their exclusion in the presence of the collateral. The decision has not been arrived at that according to the custom prevalent in Marwar the daughters or their heirs have no right to inherit the property of the father on examination of the evidence placed before the Court. The reference of the decisions that according to custom prevalent in Marwar the daughters or their heirs have no right to inherit the property, has been made for the purposes of drawing analogy of proof of the custom whether sister or sister's son can be recognised as heir and, in fact, the reference has been answered in the affirmative. The custom, as pleaded by counsel for the appellants to be existing, has neither been discussed nor proved as such and has been taken for granted on the basis of concession made by counsel for the respondents for the purpose of analogy. The judgment proceeded on concession and not analysis or examination of relevant provision would neither be evidence nor a binding precedent. The decision is an authority for what is actually decided. What is of essence in a decision is its ratio and not every observation found therein. Thus I do not find that the decision in 1939 M.L.R. 49, Rikhab Das v. Mst. Tippto, and the decisions referred to therein, are decisions by which a judicial notice of the custom pleaded by the tenants can be taken and the parties can be exempted from proving the custom by leading evidence. For the aforesaid reasons, I am of the view that the tenant- appellants have completely failed to prove the existence of the custom as pleaded by them.

21. It is then submitted by counsel for the respondents that the appeals filed by Asha Ram deserve dismissal in view of the admissions made by him in favour of the plaintiffs admitting their right, title and interest in the property whereas it is submitted by counsel for Asha Ram that there is no admission made in favour of the plaintiffs. In any case, if it is taken to be an admission it is an admission in the matter of law which does not bind the party making the admission.

22. In para 3 of the plaint it is alleged by the plaintiffs that the plaintiffs are heirs being the daughters of Mst. Muni Devi w/o late Megh Raj. This allegation is admitted by Asha Ram. In the additional plea raised in the written-statement it is alleged that according to the Hindu Law and the law applicable in respect of caste and gotra (clan) and family custom, the daughters of Megh Raj are his heirs and, he does not have any interest and will have no interest in the suit property. If the defendants are stating that he has a better right than the plaintiffs their allegation is wrong. He concludes by stating that if the Court comes to the conclusion that the plaintiffs do not have any right in the property than decree be granted in his favour. Asha Ram was also examined as a witness and stated that two daughters of Megh Raj viz., Sunder Bai and Aichuki Devi are his heirs and are entitled to inherit the property of Megh Raj.

23. An admission by a party is substantive evidence of the fact admitted and admission duly proved is admissible in evidence irrespective whether the party making the admission appears in the witness-box or not. It has been held in AIR 1977 SC 1714 Sita Ram Bhau v. Ramchandra Nago Patil. That if an admission is clear and unequivocal it is the best evidence against the party making it. In the written-statement filed after the remand of the case by the Supreme Court and in the evidence Asha Ram made an admission of the daughters' light of inheritance in their father's property in preference to him according to Hindu Law, his caste, gotra and family custom; and, he has also admitted that he has no right, title or interest in their life- time. This admission in the written-statement was made after the issue was re-cast by the Supreme Court. Thus, at the time of framing of the issue the admission made in the written-statement was not before the Supreme Court, therefore, it cannot be argued that inspite of admission before the Court, the Supreme Court framed the issue and it is thus open for Asha Ram to argue on the question of daughter's title inspite of admission made by him. I am, therefore, of the view that Asha Ram is bound by his admission made in favour of the daughters-plaintiffs.

24. Now the question is whether the admission made by Asha Ram can be said to be an admission in law and, therefore, not binding upon him. It may be seen that the admission of the plaintiffs' title is not only based on Hindu law but is based on custom in the caste, family and gotra (clan) that the daughters shall be the heirs and not the collateral. The question whether the custom does or does not prevail is a matter on which the members of the family, caste or community would be in the best position to pronounce the opinion. The question of succession based upon custom does not stand on the same footing as the

question of law. The admission made by the appellant is not an admission of law but the admission of fact on the basis of which the law has to be applied and as such is binding on him. I am of the opinion that in view of the admission Asha Ram cannot be permitted to challenge the title of the plaintiffs. However, that will not be the position so far as the tenant-appellants are concerned as they are not claiming any right through Asha Ram to bind the admission of Asha Ram to them.

25. As a result of the foregoing discussion, the appellants have failed to prove the custom, as pleaded by them, and in the absence of the custom excluding the daughters from inheriting the father's property in the Marwar State prior to 1956 A.D. the law applicable to the Hindus under the Hindu Law shall apply and the daughters shall be entitled to inherit the father's property being preferential heirs and not Asha Ram - a brother's son. Asha Ram is also bound by the admission made in favour of the plaintiffs and cannot set up an independent title in himself. Accordingly, the appeals are dismissed although for a different reasons than that of lower appellate Court with costs, throughout. The respondents shall be entitled to counsel's fee of Rs. 500/- in each case, if certified by the counsel.