

Madhu Kishwar and Others

Vs

State of Bihar and Others

Writ Petn. (C) No. 5723 of 1982 with 219 of 1986

(Kuldip Singh, M.M. Punchhi, K. Ramaswamy JJ)

17.04.1996

JUDGEMENT

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K. RAMASWAMY, J :-

1. These two writ petitions raise common question of law: whether female tribal is entitled to parity with male tribal in intestate succession? The first petitioner is an Editor of a Magazine "Manushi" espousing the causes to ameliorate the social and economic backwardness of Indian women and to secure them equal rights. Petitioners Nos. 2 Smt. Sonamuni and 3 Smt. Muki Dui are respectively widow and married daughter of Muki Banguma, Ho tribe of Longo village, Sonua Block, Singhbhum District in Bihar state. The petitioner in Writ Petition No. 219/ 86, Juliana Lakra is an Oraon Christian tribal women from Chhota Nagpur area. They seek declaration that Sections 7, 8 and 76 of the Chhota Nagpur Tenancy Act, 6 of 1908, (for short, the 'Act') are ultra vires Articles 14, 15 and 21 of the Constitution of India. They contend that the customary law operating in the Bihar state and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. Their discrimination based on the customary law of inheritance is unconstitutional, unjust, unfair and illegal. Even usufructuary rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought to bear brunt at the behest of lineal descendants or their extermination. Even married or unmarried daughters are excluded from inheritance, when they were subjected to adultery by non-tribals; they are denuded of the right to enjoy the property of her father or deceased husband for life. The widow on remarriage is denied inherited property of her former husband. They have elaborated by narrating several incidents in which the women either were forced to give up their life interest or became target of violent attacks or murdered. Petitioner Nos. 2 and 3 in the first writ petition sought police protection for their lives and interim directions were given.

2. When this court has taken up the matter for hearing, in light of the stand of the respondents taken at that time to suitably amend the Act, by order dated December 16, 1986, the case was adjourned with the hope that the State Government would suitably amend Sections 7 and 8 of the Act. By further order dated August 6, 1991, this court after being apprised of the State Government constituting a Committee to examine the desirability to amend the Act giving equal rights of inheritance to women, further adjourned the hearing awaiting the report of the Committee. The State-level Tribal Advisory Board consisting of the Chief Minister, Cabinet Ministers, legislators

and parliamentarians representing the tribal areas, met on July 23, 1988 and decided as under:

"The tribal society is dominated by males. This however, does not mean that the female members are neglected. A female member in a tribal family has right of usufruct in the property owned by her father till she is unmarried and the same is the property of her husband after the marriage. However, she does not have any right to transfer her share to any body by any means whatsoever. A widow will have right to usufruct of the husbands' property till such time she is issueless and, in the event of her death the property will revert back to the legal heirs of her late husband. In case of a widow having offspring the children succeed the property of the father and the mother will be a care taker of the property till the children attain majority. The Sub-Committee also felt that every tribal does have some land and in case the right of inheritance in the ancestral property is granted to the female descendants, this will enlarge the threat of alienation in the tribal land in the hands of non-tribals. The female members being given right of transfer of their rights in the origin of malpractices like dowry and the like prevalent in the other non-tribal societies."

3. When the matter was taken up for final disposal and the resolution of the Board was brought to the notice of this Court, by order dated October 11, 1991, this court further expressed thus:

"Scheduled tribe people are as much citizens as others and they are entitled to the benefit of guarantees of the Constitution. It may be that the law can provide reasonable regulation in the be that matter of succession to property with a view to maintaining cohesiveness in regard to Scheduled Tribes and their properties. But exclusion from inheritance would not be appropriate. Since this aspect of the matter has not been examined by the State of Bihar and the feasibility of permitting inheritance and simultaneously regulating such inheritance for the purpose of ensuring that the property does not go out of the family by way of transfer or otherwise we are of the view that in the peculiar facts of the case the State of Bihar should re-examine the matter."

4. The State Government reiterated its earlier stand, as stated in an affidavit filed in this behalf. Sections 6,7,8, and 76 of the Act are as follows :

"6 Meaning of raiyat.--(1) "Raiyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners; and includes the successors in-interest of persons who have acquired such a right, but does not include a Nundari Khunt-Kattidar.

Explanation :- Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(2) A person shall not be deemed to be as raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari Khunt- Kattidar.

(3) In determining whether tenant is a tenure-holder or a raiyat, the court shall have regard to--

(a) local customs, and

(b) the purpose for which the right of tenancy was originally acquired.

7. (1) Meaning of 'raiyat having khunt-khatti rights'__ "Raiyat having kunt katti rights" means a raiyat in occupation of, or having any subsisting title to, land reclaimed from jungle by the original founders of the village or their descendants in the male line, when such raiyat is a member of the family which founded the village or a descendant in the male line of any member of such family :

Provided that no raiyat shall be deemed to have kunt katti rights in any land unless he and all his predecessors-in-title have held such land or obtained a title thereto by virtue of inheritance from the original founders of the village.

(2) Nothing in this Act shall prejudicially affect the rights of any person who has lawfully acquired a title to a khunt kattidari tenancy before the commencement of this Act.

8. Meaning of Mundari khunt-kattidar.-- "Mundari Khunt- Kattidar means a Mundari who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members of his family, and includes--

(a) the heirs male in the line of any such Mundari when they are in possession of such land or have any subsisting title thereto; and

(b) as regards any portions of such land which have remained continuously in the possession of any such Mundari and his descendants in the male line, such descendants.

76. Saving of custom. -- Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions."

In Ramalaxmi Ammal v. Shivanadha Perumal Sheroyar,(1872) 14 Moors Indian Appeals 570 (585), the Judicial Committee had held that custom is the essence of special usage modifying the ordinary law of succession that it should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone the legal title to recognition depends. in Abdul Hussain Khan v. Bibi Sona Dero, (1917-1918) 45 Ind App 10:(AIR 1917 PC 181) when it was pleaded that by customs of the family, the sister of an intestate Mohammedan was excluded from inheritance in favour of a male paternal collaterals, by operation of Section 26 of the Bombay Regulation IV of 1827, (a usage was in question in the suit), the Board held that the custom was not established to exclude the sister of the deceased from inheritance.

5. By operation of Article 13(3) (a) of the Constitution law includes custom or usage having the

force of law. Article 13(1) declares that the preconstitutional laws, so far as they are inconsistent with the fundamental rights shall, to the extent of such inconsistency, be void. The object, thereby, is to secure paramountcy to the Constitution and give primacy to fundamental rights. Article 14 ensures equality of law and prohibits invidious discrimination. Arbitrariness or arbitrary exclusion are sworn enemies to equality. Article 15(1) prohibits gender discrimination. Article 15(3) lifts that rigour and permits the State to positively discriminate in favour of women to make special provision, to ameliorate their social, economic and political justice and accords them parity. Article 38 enjoins the State to promote the welfare of the people (obviously men and women alike) by securing social order in which justice,-- social, economic and political -- shall inform of all the institutions of national life. Articles 39(a) and (b) enjoin that the State policy should be to secure that men and women equally have the right to an adequate means of livelihood and the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 38(2) enjoins the State to minimise the inequalities in income and to endeavour to eliminate inequalities in status, facilities and opportunities not only among individuals but also amongst groups of people. Article 46 accords special protection and enjoins the State to promote with special care the economic and educational interest of the Scheduled Castes and Scheduled Tribes and other weaker sections and to protect them from social injustice and all forms of exploitation. The Preamble to the Constitution charters out the ship of the State to secure social, economic and political justice and equality of opportunity and of status and dignity of person to every one.

6. The General Assembly of the United Nations adopted a Declaration of December 4, 1986 on "The Right to Development" to which India played a crusading role for its adoption and ratified the same. Its preamble cognises that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfilment of human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic social and political rights.

7. Article 1(1) assures right to development, an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6(1) obligates the State to observe all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion. Sub-article (2) enjoins that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil political, economic, social and political rights. Sub-article (3) thereof enjoins that "State should take steps to eliminate obstacle to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights. Article 8 casts duty on the State to undertake,..... all necessary measures for the realisation of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources and fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

8. Human Rights are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development

of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth culturally socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Vienna Convention on the Elimination of all forms of all forms of Discrimination Against Women (for short" CEDAW") was ratified by the U.N.O. on December 18, 1979. The Government of India who was an active participant to CEDAW ratified it on June 19, 1993 and acceded to CEDAW on August 8, 1993 with reservation on Articles 5(e), 16(1), 16(2) and 29 thereof. The Preamble of CEDAW reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity, Poverty of women is a handicap. Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc. Article I defines discrimination against women to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Article 2(b) enjoins the State parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate , prohibiting all discriminations against women" to take all appropriate measures including legislation, to modify, or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause (C) enjoins to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that "the State parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women." Article 14 lays emphasis to eliminate discrimination on the problems faced by rural women so as to enable them to play " in the economic survival of their families including their work in the non-monetized sectors of the economy and shall take ... all appropriate measures " Participation in and benefit from rural development in particular, shall ensure to such women the right to participate in the development programme to organize self groups and co-operatives to obtain equal access to economic opportunities through employment or self-employment etc. Article 15(2) enjoins to accord to women equality with men before the law, in particular, to administer property..."

9. The Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(b) defines human rights to mean" the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international Conventions and enforceable by courts in India." Thereby the principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and the Human Rights Act and become enforceable. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and

fundamental freedoms.

10. Article 5(a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2(f) denudes its effect and enjoins to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-a-vis Articles 1,3, 6 and 8 of the Declaration of Right to Development. Though the directive principles and fundamental rights provide the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW, the State should by appropriate measures including legislation, modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

11. Article 15(3) of the Constitution of India positively protects such Acts of actions. Article 21 of the Constitution of India reinforces "rights to life." Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally, in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51A (h) and (j) of the Constitution of India, not only facilities and opportunities are to be provided for, but also all forms of gender based discrimination should be eliminated . It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights.

12. Bharat Ratna Dr. B. R. Ambedkar stated, on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to, and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitute conscience of the Constitution. Covenants of the United Nation add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins this Court to breath life into the dry bones of the Constitution, international Conventions and the Protection of Human Rights Act, to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights.

13. As per the U.N. Report 1980 "woman constitute half the world population, perform nearly two thirds of work hours, receive one tenth of the world's income and own less than one hundredth per cent of world's property". Half of the Indian population too are women. Women have always been discriminated and have suffered and are suffering discrimination in silence. Self-sacrifice and self-

denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them to accept their ascribed social status. Among women, the tribal women are the lowest of the low. It is mandatory, therefore, to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity. We keep it at the back of our mind.

14. 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.

15. The empirical study to Anthropologists and Sociologists reveals that the customary laws of the tribes and not uniform throughout Bharat. Even in respect of intestate succession, they are not uniform. Though the customs of the tribes have been elevated to the status of law, obviously recognised by the founding fathers in Article 13(3) (a) of the Constitution, yet it is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights. In *Sant Ram v. Labh Singh*, (1965) 7SCR 756: (AIR 1965 SC 314), this Court held that the custom as such is effected by Part III dealing with fundamental rights. In *Bhau Ram v. Baijnath Singh*, (1962) Supp (3)SCR 724 : (AIR 1962 SC 1476) it was held that law of pre-emption based on vicinage is void. In *G. Dasaratha Rama Rao v. State of A.P.*, (1961) 2 SCR 931:(AIR 1961 SC 564) this Court held that discrimination based on the ground of descent only offends Article 16(2).

16. In India agricultural land forms the bulk of the property. In most of the tenancy laws, women have been denied the right to succession to agricultural lands. The discernible reason in support thereof appears to be to maintain unity of the family and to prevent fragmentation of agricultural holdings or diversion of tenancy right. In *Atam Prakash v. State of Haryana*, (1986) 2 SCC 249:(AIR 1986 SC 859) testing the validity of Section 15 of the Punjab preemption Act. 1930, for the aforesaid reasons, this Court held that the right of pre-emptiosn based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition, quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession, are today irrelevant. Classification on the basis of unity and integrity of either the village community or the family or on the basis of the agnatic theory of succession, cannot be upheld. Due to march of history, the tribal loyalties have disappeared and family ties have been weakened or broken and the traditional rural family oriented society is permissible. Accordingly Section 15(1), clauses (1) to (3), violates fundamental rights and were declared ultra vires.

17. When male member has the right to seek partition and at this 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*, AIR 1977 SC 1944 at 1961 this Court, cognizant to equality in intestate succession by Hindu woman, held that after the advent of 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*, 1950 SCR 869 : (AIR 1951 SC 41) 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 inspite 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*, 1952 SCR 284 : (AIR 1952 SC 75) 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*, (1978) 2 SCR 621 : (AIR 1978 SC 597) reiterates its creed on grounds of justice, equity and fairness lest law becomes void, oppressive, unjust and unfair.

18. Eugene Smith in his *Indian Constitution* has stated that secularisation of law is essential to the emergence of modern Indian State, foundation of which stands on twin principles of democracy and secularism. He further stated that " the existence of different personal law contradicts the principles of non-discrimination by the State". Non-discrimination is based on the philosophy of the individual, not the group, as the focal point the basic unit of the nation. The civilisation, culture, custom, usage, religion and law are founded upon the community life for man's well being. The man will obey the command of the community by consent. The law formulates the principles to maintain the order in the society to avoid friction. Democracy brings about bloodless revolution in the social order through rule of law. Therefore, when women are discriminated only on the ground of sex in the matter of intestate succession to the estate of the parent or husband, the basic question is whether it is founded on intelligible differentia and bears reasonable or rational relation or whether the discrimination is just and fair. Our answer is no and emphatically no.

19. In *State of Bihar v. Kameswar Singh*, (1952 SCR 889 : (AIR 1952 SC 252) this Court had held that in judging the reasonableness in imposing restrictions Court would take into consideration public purpose in Article 39. In *Kasturi Devi v. State of Karnataka, (or Kasturilal v. State of J & K)* (1980) 4 SCC 1 : (AIR 1980 SC 1992) this Court held that if law is made to further socio-economic justice it is prima facie reasonable and in public interest. In other words, if it is in negation, it is unconstitutional. In *Chandra Bhavan Boarding House v. State of Mysore*, (1970) 2 SCR 600 : (AIR 1970 SC 2042) it was held that " the mandate of the Constitution is to build a welfare society and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizen are not met. In *Narendra Prasadji v. State of Gujarat*, (1975) 2 SCR 317 : (AIR 1974 SC 2098), it was held that not right in an organised society can be absolute. Enjoyment of one's rights must be consistent with the enjoyment of the rights of others. In a free play of social forces, it is not possible to bring about a voluntary harmony; the State has to step in to set right the imbalance and the directive principles, though not enforceable; mandate of Article 38, to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in intestate succession bases on sex.

20. In *Thota Sesharathamma v. Thota Manikyamma*, (1991) 3 JT (SC) 506 construing Section 14 of the Hindu Succession Act 1956 and its revolutionary effect on the right to ownership of the land by

Hindu woman, this Court held that the validity of Section 14(1) drawn from the pre-existing limited estate held by a Hindu woman must be tested on the anvil of socio-economic justice, equality of status and by overseeing whether it would subserve the constitutional animation. Article 15(3) relieves the State from the bondage of Articles 14 and 15(1) and charges it to make special provision to accord socio-economic equality to woman.

21. The Hindu Succession Act revolutionised the status of a Hindu female and used Section 14(1) as a tool to undo past injustice to elevate her to equal status with dignity of person on par with man and removed all fetters of Hindu woman's limited estate which blossomed into full ownership. By legislative fiat the discrimination in intestate succession meted out to woman was done away with. The Court should, therefore, endeavour to find out whether the disposition clauses in the instrument will elongate the animation of Section 14 and would permeate the aforesaid constitutional conscience to relieve the Hindu female from the Sashtric bondage of limited estate. Articles 14, 15 and 16 frowns upon discrimination on any ground and enjoin the State to make special provisions in favour of the woman to remedy past injustice and to advance their socio-economic and political status. Economic necessity is not a sanctuary to abuse woman's person. Section 14, therefore, gives to every Hindu woman full ownership of the property irrespective of the time when the acquisition was made, namely, whether it was before or after the Act had come into force, provided, she was in possession of the property. Discrimination on the ground of sex in matters public employment was buried fathom deep and is now a relic of the past by decisions of this court. In *C. B. Muthamma v. Union of India*, (1980) 1 SCR 668: (AIR 1979 SC 1868) ; *Air India v. Nagesh Mirza*, (1982) 1 SCR 438 : (AIR 1981 SC 1829) and a host of other decisions are in that path. True that clauses (h) and (j) of para 3 of Schedule 6 of the Constitution give power to District or Regional Councils in North Eastern States to alter law relating to inheritance and customs; they too are bound by the law declared under Article 141 of the Constitution to be consistent with Articles 15(3), 14 and Preamble of the Constitution.

22. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46, and 15(1) & (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society . Contours of law in an evolving society must constantly keep changing as civilisation and culture advances. The customs and mores undergo change with march of time. Justice to the individual is one of the highest interest of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

23. 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 into 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. Therefore, law is the foundation on which the potential of the society stands. In *Sheikriammada Nalla Koya v. Administrator. Union Territory of Laccadives*. AIR 1967 Kerala 259, K. K. Mathew, J., as he then was, held that customs which are immoral are opposed to public policy, can neither be recognised

nor be enforced. Its angulation and perspectives were stated by the learned Judge thus (At p.262):

"It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at the given moment, and that in arriving at the decision, the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A judge may not set himself in opposition to a custom which is fully accepted by the community.

But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct, it not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, whose guardians of an ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organisations of existing society. Thus, the judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that opinion is abhorrent to right thinking people. In other words, the judge would consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality."

24. As in other parts of the country, in Bihar, most of the tribes like Munda, Oraom and Ho practised shifting cultivation along with the settled cultivation as it has not been popular with the tribe to combine various modern productive technology. But, by passage of time, when the land has become scarce, they too have settled down to ploughing cultivation on fixed tenures. Due to diverse reasons which it is not necessary for the purpose of this case to elaborate, major part of the land slipped out from their holdings.

25. Notable researchers, who spent their valuable time living among the tribes, are W.G. Archer, Dy. Commissioner, Santhal Pargana during 1939-40, Prof. Christopher Von Furer-Haimendorf, a German Sociologist appointed by Nizam of Hyderabad in 1940 who spent his life with the tribals in Nizam State in Andhra Pradesh as well as Arunachal Pradesh. Portrayed life style and customs operating among the Tribals, Haimendorf says in his "Tribes in India, the struggle for Survival" that Chenchoo women, Tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they cannot inherit any substantial property. They abide by the decision of their husbands. They are equal companions with men doing as much, if not more, of the work in maintaining the common household. She and her husband, are joint possessors of the family property insofar as it is acquired by the daily labour. In Sough India, in particular Andhra Pradesh after the grant of ryotwari pattas to the tillers of the soil including the tribes, they acquire permanent right to fixed land holdings and there does not exist any discrimination in matter of intestate succession between man and women. "Issues in Tribal Development" by Prof. P. Ramaiah of Kakatiya University, Andhra Pradesh, at page 9 it is stated that "hereditary rights rule the property distribution arrangements. If a man dies, his wife and sons get equal share of the property. Widow gets her husbands' share from the property". At page 14 he has further stated, "land is a part of his spiritual as well as economic heritage."

26. Dr. L. P. Vidyarthi in his *Tribal Development Act and Its Administration*, published by Concept Publishing Co., (1986 Edn.) has stated at page 310 that the element of certainty and definiteness of customs in the tribal society is lacking because of divergent customs on the same issue adopted by different sections of the tribes. The element of antiquity is also of little aid in that behalf. In Tribal Society, custom is generally a product of dominating mind, nurtured in the belief of super-natural forces and taboos than a source of spontaneous growth. It is mostly based upon the totem and taboos evolved in a particular family having the force of the family law. The custom in the tribal society is much influenced by the instinct of possessive authority and not on the basis of sociological origin but it has been carried, generation after generation, as being the family law. No scientific explanations are available, but if the custom is examined in detail it is found deep rooted in the element of totem and taboos. That is the reason that majority of the customs prevailing in the tribal society could not attain the status of law and there is no legal validity except in the cases of inheritance and some family laws like adoption and marriage. If the working and life of the tribal societies is minutely observed, it will be found that from morning till night, with the birth of a baby till death, agricultural operations are the sole occupation for livelihood; all are tagged, linked and based upon certain conduct and behaviour reflecting, nearly custom and it may be said that entire tribal society is based upon the rigid rules of custom and any society still untouched by the influence of urbanisation exists in the phenomenon of religion mixed with magic custom.

27. Archer in his "Tribal Law and Justice-- The Santhal View of Woman" has stated in 1939-40 that the unmarried daughter has ordinarily no right at all in the land. She cannot ask for partition and if her brothers separate, some land may be kept by her father or brother for financing her marriage and maintaining her, but that is to fulfil their duties towards her and does not confer upon her any rights. At the partition, she is given no share. She has a right to maintenance. If her father or brothers or father's agnates are against discharging their duties, she can claim enough land for keeping her till marriage. She can acquire the land of her own which is her absolute property. If her father dies leaving no other heirs or agnates, she will get his land until she is married. If she is married, her sisters will share equally with her. If she has no sisters, the property goes to the village community. With regard to married daughters, he stated, that two to three bighas of land would be given as "Stridhan" at the time of marriage, In respect of that property, right of the father, brother or agnates are extinguished. The property given is her absolute property. Her children inherit her property. In their absence, it passes on to the father, brother, mother or her male agnates. With regard to the right of married woman, at page 156, he has stated that at partition the wife and children get one share and the husband gets one share. He has given instances of one Safal Hansdeak of Tharia. With regard to the right of the widow, she is like a Hindu widow having right to maintenance. If her husband died while he was joint holder with his brothers she will continue to live in the family and the situation will not differ materially from what it was in her husband's lifetime. Her right to maintenance will continue and if her husband's family neglects her without cause, she can demand sufficient land to keep herself. If there is a complete family partition the widow and her children will get the share which would have gone to her husband had he been alive. She gets life estate like Hindu widow's estate. "The Mundras and their Courts" by Sarad Chandra Roy, 14 th Ed. at p. 244 to 451 (1915). The origins of Chotanagpur by Sarad Chandra Roy at p. 369 to 370 (1915 Ed.) dealt with inheritance on the same lines. So they need no reiteration.

28. In *Doman Sahu v. Buka*, AIR 1931 Patna 198, though Mundas and Mundari women of Ranchi District are akin to other tribals, since they regard themselves as Hindus, it was held that Hindu law of succession would apply to them. In *Ganesh Mahto v. Shib Charan*, AIR 1931 Patna 305, Kurmi Mahtons of Chota Nagpur adopted Hindu religion. The Division Bench held that it must be presumed that ordinarily they are governed by Hindu law in matters of inheritance any succession

except insofar as parties prove and custom obtaining among them which is at variance with it. It was held that Mitakshara Hindu law of succession was applicable to them. They did not prove any special custom alleged by them. In "Law Enforcement in Tribal Areas" by S. K. Ghosh, Director, Law Institute, Calcutta, published by Ashish Publishing House at page 89 it is stated that though the Hindu Succession Act 1956, Hindu marriage Act 1954, Hindu Adoptions and Maintenance Act 1956 did not apply," because of their contacts with other advanced societies some changes have taken place among tribes in the observance of marriage, divorce, etc. In the event of any litigation, the tribal courts are unable to reach a definite conclusion as these customary codes as they are unwritten code. Therefore, it was recommended that a proper study of customary codes of the tribals should be made and the same may be codified properly." "Some State Governments have already taken action to codify the personal laws of important tribal groups. These laws can be gradually dispensed with or repealed when the tribals are fully assimilated with the main body of our national community." At pages 90-91 he explained the customs, among the Bhils living in Madhya Pradesh and Rajasthan who constitute largest tribal group in the country, of a marriage by elopement or capture or by arrangement. They are very truthful people and they do not hesitate to speak against the culprits, though they may happen to be kith and kin.

29. The Garos, the Khasis and the Jaintias are the main inhabitants of Meghalaya State. They observe monogamy. The daughter (Nokma Dongipa Mechik) descendant from the ancestor is chosen for marriage for common ancestors. The husband goes and lives with the wife which in Hindu law known as Illatom son-in-law. The custom is that the senior-most household of the area maintains a line of inheritance from the mother to the chosen daughter and the husband of the inheritress mother, popularly known as Nokma is accepted as the constitutional head of the A' Khing. The lands are held in common ownership of the machong, the usufruct rights are granted to all the residents of the A' Khing. Mikirs, a populous tribe in Meghalaya is patrilineal. The sons inherit property and it is divided among them. In the absence of male heirs, the nearest agnate inherits that land. The daughters have been excluded. In the absence of sons and brothers, the widow retains the property provided she marries one of her husband's clan. The Gonds in Andhra Pradesh, Madhya Pradesh, Bihar and Orissa observe monogamy. At page 139, he has stated that the custom is heritable and transferable and right of inheritance is patrilineal. The male heirs would succeed and the females are completely excluded. The sons take equal; shares, but among the Apa Tanis and the Nactes, the system of primogeniture prevails, i.e. the eldest son only inherits the father's landed property which has been softened among Apa Tanis. In Manipur, the custom among Thandon kukis is that the property is of the Chief of the village. The practice is of shifting cultivation and the Chief distributes the plots among the groups. The system of inheritance among the Naga group is that at the death of the last owner, the succession is by patrilineal and the rules of primogeniture prevails among them. The practice is that during his life-time the father gives some land to the younger brother as well.

30. In a report on Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa by Dr. Bhupinder Singh and Dr. Neeti Mahanti of Jigyansu Tribal Resarch Centre, sponsored by the Ministry of welfare, Government of India and submitted on May 19, 1993, it is stated at page 1 in last paragraph of his preface that to reduce tribal customary laws into formal, technical, straight-jacket frame is likely to rob it of its vitality and strength. It will expose the innocent, gullible tribals to the machinations of touts, middle-men etc. The customs which differ, in whatever magnitude, from one community to other would help exploitation of the tribals by application of the traditional law. Its relevance, freshness and vitality to a considerable extent, would get weakened. Whims and fancies in dispensation of justice would be avoided. They concluded that "we must proceed deliberately and wirely." In Chapter III-at page 8 it is stated thus :

"Customary law refers to rules that are transmitted from generation to generation through social inheritance. In a close-knit simple tribal society, the people themselves want to live according to customs backed by social sanctions; to save them from objection and social ridicule of the society."

At page 9, it is stated that "the major areas of interest for a tribal community is inheritance of land, forest rights and social customs like marriage, divorce, desertion, child support, death, birth etc." Santhals, one of the largest tribes of India spread over West Bengal, Orissa, Bihar and parts of Assam and Tripura, It is observed at page 30 on the "Chapter Succession to Property" that the succession is in favour of the son, in his absence to the daughter, in their absence to the relative. Even among Santhals, it is not strictly patrilineal. If they have no son, succession is open to the daughter and if they have neither son nor daughter then to the relative of the family. Some people among them preferred succession among son and daughter equally . On husband's demise, the widow gets a share in the property, as life-estate. In their conclusion at page 37, they have stated that the Santhals and Saora tribals practice patrilineal as a mode of succession. At pages 38-43, after detailed discussion it is stated that though there is considerable "on-going acculturation process", the tribes have not completely discarded the customs. At page 45, it was mentioned that though Santhal society is predominantly patrilineal, they do not strictly adhere to it. The inheritance in favour of the daughter has been softened but Soara society is conservative and less exposed to winds of change. They preferred sons to daughters only if there is no son in the family and other relatives of the family. However, the widow inherits the estate of her husband. The working group of the 7th Five Year Plan on the tribal development recommended codification of customary laws prevalent among the tribals in its report at pages 323-24 of the Planning Commission documents. Dr. B. L. Maharde, a bureaucrat of Rajasthan Civil Services, in his "History and Culture of Girjans" in the State of Rajasthan, narrated the practices of tribals at page 84 stating that the property after the death of the father is equally divided among the sons by the village elders of Panchayat and in case of dispute, by the private Panchayat. The youngest son, since he lives with his father, is entitled to have an extra share. The grandson of his pre-deceased son is entitled to an equal share. Daughters are not entitled to inherit their father's property, but they can share the animal wealth. The son-in-law is entitled to equal share. The widow has right to property which she loses on her remarriage. We do not get any material as regards succession among the tribals in Madhya Pradesh, Maharashtra and Gujarat and in view of the general trend we assume that in those States also patrilineal succession would be in vogue.

31. 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 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.

32. Section 2(2) of the Hindu Succession Act, similar to Hindu Marriage Act, Hindu Adoptions and Maintenance Act, excludes applicability of customs to the Scheduled Tribes as defined by clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the official Gazette otherwise directs. Explanation 11 to Article 25 does not include them as Hindus. The Chotanagpur Tenancy Act and the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1994, the Bihar Scheduled Areas Regulation, 1969 intend to protect the lands of the tribals and their restoration to them. Sections 7 and 8 of the Act regulates the right of Khuntketti Raiyats. By operation of customary inheritance, the son and lineal descendants inherit the lands held by the tribes for the purpose of cultivation by himself or male members of his family. Section 76 read with S. 6. gives effect to custom, usage or customary right provided thereunder not inconsistent with or not necessarily modified or abolished by the provisions of the Act. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. As stated earlier, it must keep pace with march of time with the heart beats of the society and with the needs and aspirations of the people. As seen, even among the tribals in Bihar, the customs have now undergone advancement. They prefer both son and daughter alike though not uniformly. Succession is patrilineal; Santhals practically adapted the Mitakshara Hindu law of succession. The Hindu Succession Act modified the pre-existing law and intestate succession gives right of succession to Hindu female. Section 14 (1) has enlarged limited estate known to Sastric law into absolute right of property held by a Hindu female. In the Law of Intestate and Testamentary Succession, (1991 Ed.) at page 21, Prof. Diwan has stated that S. 2(2) does not mean that Scheduled Tribes which were, prior to the codified Hindu law, governed by Hindu law will not, now, be governed by the Hindu law. If before codification, any Scheduled Tribe was governed by Hindu law, it will continue to be governed by it. However, it would be uncodified Hindu law that would apply to them. It is settled law that the procedural or substantive law which offered the fundamental right are void. Sections 7 and 8 of the Act exclude woman tribals from inheritance to the Khuntkutti raiyati rights solely on the basis of sex and confine succession and inheritance among male descendants only. In *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 : (AIR 1978 SC 597), this Court held that reasonableness is an essential element of equality; non-arbitrariness pervades Article 14. The Court must consider the direct and inevitable effect of the action in adjudging whether the State action offends the fundamental right of the individual. This Court sustained the validity of Passport Act by reading down the statutory provisions. Justice, equity and good conscience are integral part of equality under Art. 14 of the Constitution which is the genus and Article 15 is its specie. In *Harbans Singh v. Guran Ditta Singh* (1991) 1 SCR 614, this Court held that though the Transfer of property Act did not per se apply to the State of Punjab at the relevant time, the general principles contained therein being consistent with justice, equity and good conscience would apply.

33. Under the General Clauses Act, male includes female. In *Jitmohan Singh Munda v. Ramratan Singh*, 1958 Bihar LJR 373, interpreting Mundari Khunt Kattidari widow's right to remain in possession of Mundari Khunt Kattidari tenancy, after the death of her husband, the Bihar High Court held that the widow would have life estate in tenancy rights as they have adopted Hindu law of succession. There is no reference whatsoever to the exclusion of the widow of the particular Mundari. Therefore, in respect of Khunt Kattidari tenancy, the widow would be entitled to

possession and S. 8. is not inconsistent with that position. In *Jani Bai v. State of Rajasthan*, AIR 1989 Raj 115, interpreting Rajasthan Colonisation Act, 1954, the Division Bench held that male descendants would include female descendants and the adult son and the daughter should be treated alike both being equally eligible for allotment under the rules under that Act. By operation of S. 13 (1) of General Clauses Act, males includes females, of course, subject to Statutory scheme which by now is subject to the Constitution. In Sections 7 and 8 of the Act if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son. Scheduled Tribes are as much citizens as others and are entitled to equality. Sections 7 and 8 are accordingly read down and so on that premise are valid.

34. The question then is: whether the interpretation is consistent with sub-s. (2) of Section 4 of the Hindu Succession Act, 1956? Entry 7 of List III of Seventh Schedule to the Government of India Act, 1935 provided "Wills, intestacy and succession save as regards agricultural land." Entry 5 of the Concurrent List in the Seventh Schedule of the Constitution omitted the words "save as regards agricultural lands" and provided merely "intestacy and succession; joint family and partition". In *Basavant Gouda v. Smt. Channabasawwa*, AIR 1971 Mysore 151, a Division Bench of Mysore High Court in paragraph 11 had held that Entry 5 of the Concurrent List of the Seventh Schedule would apply to succession of agricultural lands under Hindu Succession Act. It followed the judgment of *Amar Singh v. Baldev Singh*, AIR 1960 Punjab 66 (FB) in its support. The same view was taken by a Division Bench of the Orissa High Court, in a judgment rendered by B. Jagannadha Das, J., as he then was, in *Laxmi Debi v. S. K. Panda*, AIR 1957 Orissa 1.

35. In *Gopi Chand v. Bhagwati Devi*, AIR 1964 Punjab 272, a Division Bench of Punjab High Court had held that sub-s. (2) of Sec. 4 of Hindu Succession Act does not apply to the Delhi Land Reforms Act conferring permanent tenancy rights of Bhumidar or Asami, laid down in Sec. 50 of that Act. If it is otherwise, it would be inconsistent with Sec 4 (1) of the Hindu Succession Act and would be void. In *Phulmani Dibya v. State of Orissa*, AIR 1974 Orissa 135, a Full Bench has held that exclusion of woman from succession to any Brahmottar grant discriminates against woman under Art. 15 on ground of sex and that, therefore, became void offending Art. 15 (1). In *Tokha v. Smt. Samman*, AIR 1972 Punj and Har 406, a Single Judge of that Court held that the occupancy rights held by a limited owner (widow) before the Hindu Succession Act had come into force, enlarged as absolute property under the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act and thereby she became an absolute owner and was entitled to gift over that land as an absolute owner which was upheld.

36. In *Mayne's Hindu Law and Usage* (13th Ed.), revised by Justice A. Kuppaswami, commenting on sub-section (2) of Sec. 4 of Hindu Succession Act, in paragraph 17 at page 960, it is observed that the legislature can always provide that the devolution of tenancy rights shall be dependent upon personal law, i.e., Hindu Succession Act. The legislature can also lay down that in certain circumstances there would be one kind of succession and in different circumstances the holding shall devolve on different persons. Devolution in the case of a Bhumidari under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, is not affected by Sec. 14 of the Hindu Succession Act as tenures created by the Uttar Pradesh did not create proprietary interest but only tenancy right. In *Bajaya v. Gopikabai* (1978) 2 SCC 542 : (AIR 1978 SC 793), a Bench of three Judges of this Court held that Bhumiswami and Bhumidari rights are two classes of tenure-holders of lands paying land revenue to the State and are governed by the provisions of the Hindu Succession Act. The tenancy rights having been separately dealt with by the Madhya Pradesh Land Revenue Code, the devolution of the rights of an ordinary tenancy and an occupancy tenant are in

accordance with the personal law of the deceased tenant.

37. Sub-section(2) of Section 4 of the Hindu Succession Act, to remove any doubts, has declared that the Act shall not be deemed to affect the provisions of any law in force providing for (i) preventions of fragmentation of agricultural holdings; (ii) for the fixation of ceiling; and (iii) for the devolution of tenancy rights in respect of such holdings. It is the policy of the legislature that with a view to distribute the surplus land ceiling on agricultural land has been prescribed so that the surplus land would be distributed to the landless persons etc. Therefore, the operation of such law was excluded from the purview of the Hindu Succession Act. This Court in *Smt. Sooraj v. S.D.O. Rehli*, Civil Appeal No. 1180/84 decided on November 22, 1994 (reported in 1995 AIR SCW 677), has upheld the ceiling law and held that married daughters are not entitled to intestate succession of the father nor a separate holding since the definition of "family" did not include married daughter. The devolution of the tenancy rights are governed by Entry 18 to the List II of the Seventh Schedule. Therefore, the Hindu Succession Act to that extent stands excluded. As regards the prevention of fragmentation of agricultural land, it is already held that if at the instance of sons the agricultural lands are divisible and each son is entitled to hold and enjoy his share separately, daughters also would be entitled to a separate share at a partition and enjoyment therein. The fragmentation in that behalf, therefore, should not stand an impediment to the daughter's claiming an intestate succession and to claim a share in the agricultural lands. The Hindu Succession Act regulates succession of agricultural land and the word 'property' in Ss. 6 to 8, 14 and 15 and other sections in that Act would include agricultural land. Thus considered, the operation of sub-s. (1) of Section 4 will have an overriding effect for Hindu female claiming parity with Hindu male for succession to the agricultural lands held by the father, mother, etc. and sub-s. (2) does not stand an impediment for such a right of devolution.

38. The reason assigned by the State level committee is that permitting succession to the female would fragment the holding and in the case of inter-caste marriage or marriage outside the tribe, the non-tribals or outsiders would enter into their community to take away their lands. There is no prohibition for a son to claim partition and to take his share of the property at the partition. If fragmentation at his instance is permissible under law, why the daughter/widow is denied inheritance and succession on par with son? In Kerala State, the Hindu Succession Act, 1956 was modified in relation to its application to the State of Kerala, by amendment of Devasthanam Properties (Admission of Temporary Management and Control and Hindu Succession) (Amendment) Act, 1958 and of the (Kullaiamma Thumporan Korilakam Society Partition) Act, 1961. Kerala Hindu Joint Family Abolition Act, 1975 brought about change bringing female into the fold for succession per capita. Equally, the Hindu Succession (A.P. Amendment) Act 13 of 1986, the Andhra Pradesh Legislature took lead and amended S. 6 of the Parent Hindu Succession Act and S. 29A conferred on the unmarried daughter the status of coparcener by birth and has given her right to claim partition and equal along share with the sons. In the event of sale by the daughter of the property obtained at the partition S. 29C gives right to male heirs to purchase the property on payment of the consideration. In the event of disagreement on the consideration, the Court having the jurisdiction is given power to determine such consideration. In the event of non-payment by male heirs, the right has been given to the female heir to sell the property to outsiders. Karnataka and Maharashtra legislatures have followed the suit and suitably amended the Hindu Succession Act, 1956.

39. Throughout the country, the respective State laws prohibit sale of all lands in tribal areas to non-tribals, restoration thereof to the tribals in case of violation of law and permission of the competent authority alienation is a must and mandatory and non-compliance renders the sale void. The Acts

referred to hereinbefore prevailing in Bihar State expressly prohibit the sale of the lands by the tribals to the non-tribals and also direct restoration or recompensation by equivalent lands to the tribals. Therefore, if the female heirs intend to alienate their lands to non-tribals, the Acts would operate as a check on their action. In the event of any need for alienation, by a tribal female, it would be only subject to the operation of these laws and the first offer should be given to the brothers or agnates. In the event of their refusal or unwillingness, sale would be made to other tribals. In the event of a disagreement on consideration, the civil Court of original jurisdiction should determine the same which would be binding in the partition. In the event of their unwillingness to purchase the same, subject to the permission of the competent officer, female tribal may sell the land to tribals or non-tribals. Therefore, the apprehension expressed by the State-level committee is unfounded.

40. 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.

41. 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 lenial descendent 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 lenial descendant is not willing to purchase either by mutual agreement or as per the price settled by the civil Court, the female tribal women shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act.

42. The writ petitions are accordingly allowed and rule nisi is made absolute. The interim direction given for the protection of the petitioners Nos. 2 and 3 in the first writ petition would continue until they voluntarily seek its withdrawal or modification in writing made to the District Superintendent of Police and an order in that behalf is passed and communicated to them.

43. In the circumstances, parties are directed to bear their own costs.

44. In these two petitions under Article 32 of the Constitution, challenge is made to certain

provisions of the Chota Nagpur Tenancy Act, 1908, (hereinafter referred to as "the Act) which go to provide in favour of the male, succession to property in the male line , on the premise that the provisions are discriminatory and unfair against women and therefore, ultra vires the equality clause in the Constitution. A two-member Bench hearing these matters at one point of time on soliciting was conveyed the information that the State of Bihar had set up a Committee to consider the feasibility of appropriate amendments to the legislation and to examine the matter in detail. It was later brought to its notice that the Committee ultimately had come to the opinion that the people of the area, who were really concerned with the question of succession, were not interested in having the law changed, and that if the law be changed or so interpreted, letting estates go into the hands of female heirs, there would be great agitation and unrest in the area among the scheduled tribe people who have custom-based living. The two-member Bench then ordered as follows:

Scheduled tribe people are as much citizens as others and they are entitled to the benefit of guarantees of the Constitution. It may be that the law can provide reasonable regulation in the matter of succession to property with a view to maintaining cohesiveness in regard to Scheduled Tribes and their properties. But exclusion from inheritance would not be appropriate. Since this aspect of the matter has not been examined by the State of Bihar and the feasibility of permitting inheritance and simultaneously regulating such inheritance for the purpose of ensuring that the property does not go out of the family by way of transfer or otherwise we are of the view that in the peculiar facts of the case the State of Bihar should re-examine the matter. In these circumstances, instead of disposing of the two writ petitions by a final order, we adjourn the hearing thereof for three months and direct the State Bihar to immediately take into consideration our order and undertake the exercise indicated and report to the Court by way of an affidavit and along with that a copy of the report may be furnished by the Committee to be set up by the State of Bihar."

45. In pursuance thereof, the State Bihar has furnished an affidavit to the effect that a meeting of the Bihar Tribal Consultative Council was held on 31-7-1992, on presided over by the Chief Minister and attended to by M. Ps. and M. L. As. of the tribal areas, besides various other Ministers and officers of the State; who on deliberations have expressed the view that they were not in favour of effecting any change in the provisions of the Act, as the land of the tribal may be alienated, which will not be in the interest of the tribal community at present. The matter was not closed, however, because the Council recommended that the proposal may widely be publicised in the tribal community and their various sub-castes may be prompted to give their opinion if they would like any change in the existing law. It is in this backdrop that these petitions were placed before this three-member Bench for disposal.

46. 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.

47. 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 Hindu, 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 S. 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled tribe within meaning of clause (25) of Art. 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 S. 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 S. 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.

48. In face of these divisions and visible barricades put up by the sensitive tribal people valuing their own custom, 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, a political 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 policy 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 and each case must be examined when full facts are placed before the Court.

49. With regard to the statutory provisions of the Act, he has proposed the reading down of Sections 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 thicket, it is far better that the Court's kept out of it. It is not far to imagine that there would follow a bee-line for similar claims 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. Non-uniformities would not in all events violate Art. 14. Judge made amendments to provisions, 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 by our learned brother is, regretfully not acceptable to us.

50. The Chota Nagpur Tenancy Act was enacted in 1908 . It's preamble suggests that it was a law to amend and consolidate certain enactments relating to the law of landlord and tenant and the settlement of rent in Chota Nagpur. It extends to North Chota Nagpur and South Chota Nagpur divisions, except areas which have been constituted as municipalities under the Bihar and Orissa Municipality Act, Chapter II, thereof providing classes of tenants containing Sections 4 to 8 is reproduced hereafter :

CHAPTER II

Section 4:

"CLASSES OF TENANTS -- There shall be, for the purposes of this Act, the following classes of tenants, namely :--

(1) tenure-holder, including under tenure-holders,

(2) raiyats, namely :--

(a) occupancy-raiyats, that is to say, raiyats having a right of occupancy in the land held by them,

(b) non-occupancy raiyats, that is to say, raiyats not having such a right of occupancy, and

(c) raiyats having khunt katti rights.

(3) under raiyats, that is to say, tenants holding, whether immediately or immediately under raiyats, and

(4) Mundar Khunt-kattidars."

Section 5:

"MEANING OF 'TENURE-HOLDER' -- Tenure-holder means primarily a person who has acquired from the proprietor, or from another tenure-holder, a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes --

(a) the successors-in-interest of persons who have acquired such a right , and

(b) the holders of tenures entered in any register prepared and confirmed under the Chota Nagpur Tenures Act, 1869.

but does not include a Mundari Khunt-kattidar.

Section 6:

"MEANING OF RAIYAT --(1) 'Raiyat' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners ; and includes the successors-in-interest of persons who have acquired such a right, but does not include a Mundari khunt-kattidar.

Explanation -- Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(2) A person shall not be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari khunt-kattidar.

(3) In determining whether a tenant is a tenure-holder or a raiyat, the Court shall have regard to--

(a) local custom, and

(b) the purpose for which the right of tenancy was originally acquired.

Section. 7:

"(1) MEANING OF 'RAIYAT HAVING KHUNT-KHATTI RIGHTS' -- 'Raiyat having khunt katti rights' means a raiyat in occupation of, or having any subsisting title to, land reclaimed from jungle by the original founders of the village or their descendants in the male line, when such raiyat is a member of the family which founded the village or a descendant in the male line of any member of such family :

Provided that no raiyat shall be deemed to have khunt katti rights in any land unless he and all his predecessors-in-title have held such land or obtained a title thereto by virtue of inheritance from the original founders of the village.

(2) Nothing in this Act shall prejudicially affect the rights of any person who have lawfully acquired a title to khunt kattidari tenancy before the commencement of this Act.

Section 8:

"MEANING OF MUNDARI KHUNT-KATTIDAR --' Mundari khunt-kattidar' means a Mundari who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members

of his family, and includes --

(a) the heirs male in the line of any such Mundari when they are in possession of such land or have any subsisting title thereto ; and

(b) as regards any portions of such land which have remained continuously in the possession of any such Mundari and his descendants in the male line, such descendants.

At this place, Section 76 along with its illustrations would also need reproduction :

"76. SAVING OF CUSTOM -- Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions.

ILLUSTRATIONS

I. A custom or usage whereby a raiyat obtains a right of occupancy as soon as he is admitted to occupation of the tenancy, whether he is a settled raiyat of the village or not, is inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act. This custom or usage, accordingly, wherever it exists, will not be affected by this Act.

II A custom or usage by which under raiyat can obtain rights similar to those of an occupancy raiyat is, similarly, not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act, and will not be affected by this Act.

III. A custom or usage whereby a raiyat is entitled to make improvements on his tenancy and to receive compensation therefore on ejection is not inconsistent with, and is not expressly or by necessary implication modified or abolished by the provisions of this Act. That custom or usage accordingly, where it exists, will not be affected by this Act.

IV. A custom or usage whereby korkar is held --

(a) during preparation for cultivation, rent-free, or

(b) after preparation, at a rate of rent less than the rate payable for ordinary raiyati land in the same village, tenure of estate, is not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act. That custom or usage accordingly, wherever it exists, will not be affected by this Act."

51. A bare outline of these provisions goes to show that these have been enacted to identify classes of tenants. These provisions have no connection with the ownership of land. Section 3 (XXVI) defines 'tenant' to mean a person who holds land under another and is, or but for a special contract would be, liable to pay rent for that land to that other person. Sub-section (1) of Section 4 is plainly tied up with S.5. Sub-sections (2) (a) & (b) of S. 4 is tied up with S. 6 and sequally with S. 76, Local customs, as the illustrations under S. 76 show, are for the purpose of streamlining the tenancy rights and landlord-tenant relationship. Sub-section (2) (c) of Section 4 in the same pattern is tied up

with S. 7 . Lastly sub-section (4) of Section 4 is tied up with S.8 relating to " Mundari Khunt-kattidhar". All these tenants as classified, do not own the tenanted lands, but hold land under others. Their tenancy rights are identified and regulated through these provisions. The personal laws of the tenants nowhere figure in the set up.

52. The solitary decided case available under S. 8 of the Act and where personal law of the Mundari was allowed to intrude is *Jitmohan Singh Munda v. Ramratan Singh*, 1958 Bihar LJR 373. There the learned Judges of the High Court comprising the Bench seem to have differed on the applicability of Section 8 but not on its scope. The case there established was that the Mundari Khunt Kattidar deceased was of Hindu religion and on that basis it was held that his widow could retain possession of the tenancy rights of her deceased husband during her life time. The right of the male collateral to take possession was deferred by the intervening widow's life estate. This case could, in a sense, be taken as *stare decisis*, when none else is in the field, in order to take the cue that personal law of a female descendant of a Mundari Khunt Kattidar could steal the show and Section 8 would have to be read accordingly. But this case is decided on misreading of Section 8. The earlier part of it providing the meaning of Mundari Khunt Kattidar has been overlooked. It has been assumed, on the basis of the latter part that the expression has an inclusive definition and thus would not exclude the Mundari's widow governed by Hindu law. The High Court at page 375 of its report observed as follows :--

"The contention based on Section 8 also terminologically cannot be accepted. In the first place, in defining Khunt Kattidar interest as quoted above, the word used is 'includes' whereafter occur clauses (a) and (b) containing reference to the male line of a Mundari. The word 'includes' cannot be taken to be exhaustive."

53. *Jitmohan Singh's* case cannot thus be a guiding precedent. It is at best a decision on its own facts. There is no scope thus in reading down the provisions of Section 8 and even that of Section 7 so as to include female descendants alongside the male descendants in the context of Sections 7 and 8. It is only in the larger perspective of the Constitution can the answer to the problem be found.

54. Life is a precious gift of nature to a being. Right to life as a fundamental right stands enshrined in the Constitution. The right to livelihood is born of it. In *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 this Court defined it in this manner in para 32 of the report :

"..... The Sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important fact of that right is the right to livelihood because, no person can live without the means of living, that is the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the

massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live ' Only a handful can afford the luxury of living to eat. That they can do, namely, eat , only if they have the means of livelihood. That is the context in which it was said by Douglas J. in Baksey, (1954) 347 MD 442 that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in Munn v. Illinois, (1877) 94 US 113, means something more than mere animal existence and the inhibition against the deprivation of life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh v. State of U.P., (1964) 1 SCR 332: (AIR 1963 SC 1295)

And then in para 33:

"Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of underserved want. Article 37 provides that the Directive Principles, though not enforceable by a Court, are nevertheless fundamental in the governance of the country. The Principles contained in Arts. 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right, to life conferred by Article 21."

55. Agriculture is not a singular vocation. it is, more often than not, a joint venture, mainly, of the tiller's family members. Some of them have to work hard and the others harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil. Traditionally and historically, the agricultural family is identified by the male head and this is what Sections 7 and 8 recognise. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, grand-daughter, and others joint with him have, under Sections 7 and 8, to make way to a male relative within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognised, a right the female enjoyed in common with the last male holder of the tenancy. it is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. it is on the exhaustion of, or abandonment of land by, such female descendants can the males in the line of descent take over the holding exclusively. In other

words, the exclusive right of male succession conceived of in Sections 7 and 8 has to remain suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue. It is in this way only that the constitutional right to livelihood of a female can interject in the provisions to be read as a burden to the statutory right of male succession, entitling her to the status of the intervening limited dependents/descendents under Sections 7 and 8. In this manner alone, and upto this extent can female dependents/descendents be given some succour so that they do not become vagrant and destitutes. To this extent, it must be so held. We would rather, on the other hand, refrain from striking down the provisions as such on to touchstone of Article 14 as this would bring about a chaos in the existing state of law. The intervening right of female dependents/ descendents under Sections 7 and 8 of the Act are carved out to this extent, by suspending the exclusive right of the male succession till the female dependents/ descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose.

56. For the afore-going reasons, disposal of these writ petitions is ordered with the above relief to the female dependents/descendents. At the same time direction is issued 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. it is also directed to examine the question of recommending to the Central Government whether the latter would consider it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the Indian Succession Act at this point of time in so far as the applicability of these provisions of the scheduled Tribes in the State of Bihar is concerned. These writ petitions would on these directions stand disposed of making absolute the interim directions in favour of the writ petitioners for their protection. No costs. Order accordingly.