AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.270 of 2003

1. Daduram, S/o Daulatram, aged 47 years

2. Amrit Ram (Dead) through LRs

   (a) Chulmati, aged 48 years, W/o late Shri Amrit Ram

   (b) Gajanan, aged 27 years, S/o late Shri Amrit Ram

   (c) Sarita, aged 24 years, D/o late Shri Amrit Ram

   (d) Sangeeta, aged 20 years, D/o late Shri Amrit Ram

   All above are R/o Village Taroda, Tahsil & District Raigarh (C.G.)

3. Kanhaiya, S/o Kartikram, aged 47 years

4. Tularam, S/o Kartikram, aged 44 years

5. Mst. Naanhi Bai, D/o Mardan, aged 72 years

   All by Caste Saura (Tribe)

   Nos.1, 3 and 4 R/o Village Taroda, Tahsil & District Raigarh (C.G.)

   No.5 R/o Village Bhedvan, Tah. Sarangarh, District Raigarh (C.G.)

(Defendants)
---- Appellants

Versus

1. (a) Bhuri Bai (Died & Deleted)

   (b) Tirith Kumar, S/o Anandram, aged 20 years, R/o Darri, Tah. Dabhra, District Janjgir-Champa (C.G.)

   (c) Mongra Bai, D/o Anandram (W/o Ghasiya Sidar), aged 35 years, R/o Surtipas-Saalhe, Tahsil Dabhra, District Janjgir-Champa.

   (d) Kevra Bai, D/o Anandram (W/o Nandan Sidar), aged 31 years, R/o Kharkena, Tahsil Dabhra, District Janjgir-Champa.

2. Barat Ram (Dead) through LRs

   (i.) Smt. Amrutin Bai, aged about 61 years, W/o late Shri Barat Ram.

(ii.) Narendra Sidar, aged about 40 years, S/o late Shri Barat Ram

1 and 2 are residents of village Darri, Tahsil Dabhra, District Janjgir-Champa (C.G.)

(iii.) Mangmati Sidar, aged about 44 years, W/o Dainar Sidar, Radhapur, Tahsil Pusour, District Raigarh (C.G.)

(iv.) Mothara Sidar, aged about 38 years, W/o Nanki Sidar, Amlibhaina, Tahsil Pusour, District Raigarh (C.G.)

3. Shyam Lal, S/o Puniram, aged 42 years, R/o Village Darri, Tahsil Dabhra, District Janjgir-Champa

(Plaintiffs)

4. Padum Lal, S/o Daulatram, aged 42 years

5. Laxmi Narayan, S/o Daulatram, aged 39 years

No.4 and 5 R/o Village Shankarpali, Tahsil Dabhra, District Janjgir-Champa.

6. State of Chhattisgarh, through the Collector, Janjgir-Champa.

---- Respondents

For Appellants: Mr. Somnath Verma and Mr. Anil Mourya, Advocates.
For Respondents No.1(b) to (d), 2(i.) to (iv.) and 3: -
Mr. Vivek Bhakta, Advocate.
For Respondent No.6 / State: -
Mr. R.K. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

06/02/2019

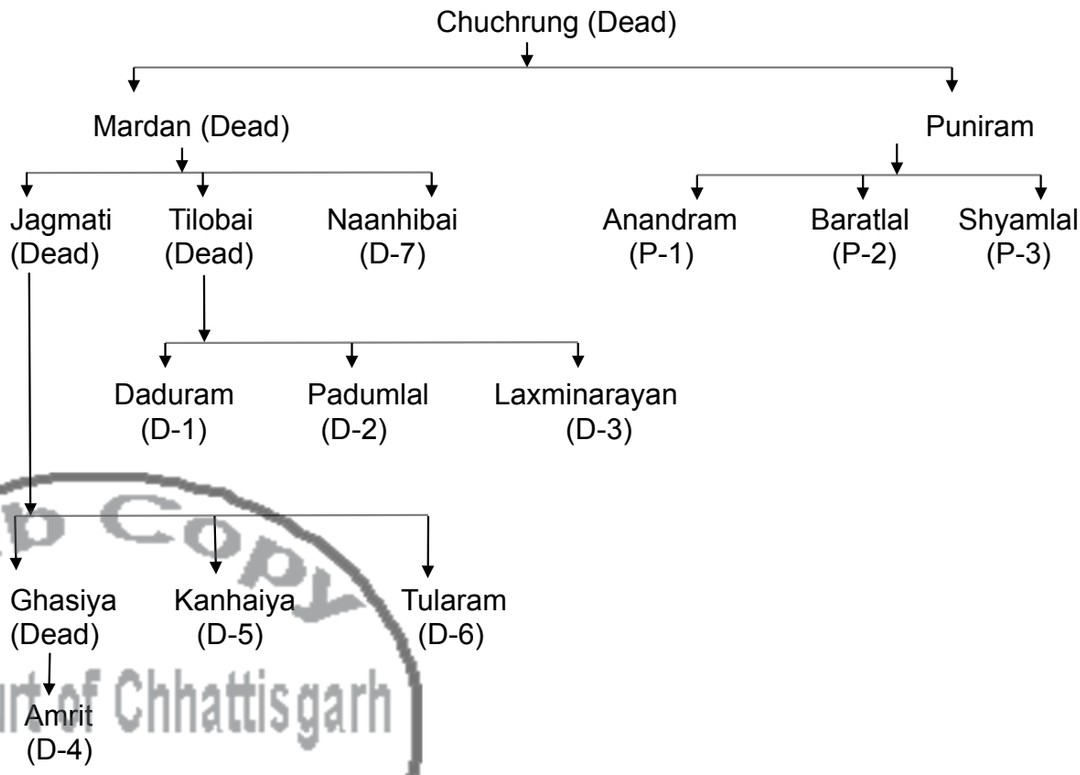
1. The following two substantial questions of law were framed for determination at the time of admission of this appeal as under: -

> "1. Whether the finding of both the Courts below in respect of making the Hindu Succession Act applicable upon the parties to the suit was proper or not?
>
> 2. Whether the daughters of deceased Mardan have inherited and perfected the right over the property of their father on account of the fact that he had died prior to 1955?"

(Parties hereinafter will be referred as per their status shown

and ranking given in the suit before the trial Court.)

2. The following genealogical tree would demonstrate the relationship among the parties: -



3. The suit property mentioned in Schedule A measuring 13.95 acres situate at Village Darri, Tahsil Dabhra, District Bilaspur (presently District Janjgir-Champa) was originally held by Chuchrung in his exclusive ownership. After death of Chuchrung, his two sons Mardan and Puniram inherited the said property. Mardan and his wife died of cholera in the year 1951 leaving behind three daughters Jagmati, Tilobai and Nanhibai, who is defendant No.7. Defendants No.1 to 3 are sons of Tilobai, whereas defendant No.4 is grand-son of Jagmati being her son's son and defendants No.5 & 6 are sons of Jagmati. Puniram died in the year 1960 leaving behind his three sons who are the plaintiffs. The plaintiffs being heirs of Puniram brought an action for declaration of title and

permanent injunction against the defendants on 31-8-1995 pleading inter alia that the parties are Sawara by caste which is notified Scheduled Tribe under the Constitution (Scheduled Tribes) Order, 1950 and they faith and follow the principles of Hindu law and thus, they became Hindus. The defendants being the daughter / daughters' sons of Mardan have no right of inheritance because, Mardan died in the year 1951 before coming into force of the Hindu Succession Act, 1956 (for short, 'the Act of 1956') on 17-6-1956, therefore, the share of Mardan had reversed to his brother Puniram because, prior to 1956, female heirs had no right of succession and the defendants have no right to inherit the property of their father Mardan which the defendants denied stating that they are governed by their own custom while admitting that the suit property was held by Chuchrung and inherited by Mardan and Puniram jointly.

4. After appreciating oral and documentary evidence on record, the trial Court held that the parties though are aboriginal tribe, but they follow the principles of Hindu law and since Mardan and his wife both died in 1950-51 prior to coming into force of the Act of 1956, therefore, Mardan's daughters had not acquired any title or cannot inherit the share of Mardan and as such, his brother Puniram had inherited the property and the plaintiffs are in possession, and decreed the suit in toto in favour of the plaintiffs.

5. The first appellate Court agreed with the reasonings recorded by the trial Court and dismissed the appeal preferred by the defendants leading to filing of second appeal in which substantial questions of law have been framed which have been set-out in the

opening paragraph of this judgment.

6. Mr. Somnath Verma, learned counsel for the appellants/defendants, would submit that both the Courts below are absolutely unjustified in holding that the parties have become Hindus and they are following the principles of Hindu law, as the parties are aboriginal by tribe and by virtue of the provisions contained in Section 2(2) of the Act of 1956, the provisions of the Act are not applicable to them and the plaintiffs have failed to prove that they have given up their customary succession and have become Hindus out-and-out or sufficiently Hinduised and in the matter of succession, they are governed by any particular School of Hindu Law. He would further submit that since the Hindu law would not apply, therefore, the defendants will be governed by the provisions of the Central Provinces Laws Act, 1875 and therefore they would be entitled for share of their father Mardan and as such, the appeal deserves to be allowed by setting aside the judgments & decrees of the two Courts below.

7. Mr. Vivek Bhakta, learned counsel appearing for the plaintiffs/ respondents No.1 to 3 herein, would support the impugned judgment & decree and submit that the parties have become Hindus and therefore both the Courts are absolutely justified in granting decree in favour of respondents No.1 to 3 herein/plaintiffs.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.

9. Section 2(2) of the Act of 1956 provides as under: -

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

10. List of Scheduled Tribes is contained in the Constitution (Scheduled Tribes) Order, 1950 amended with effect from 1-11-2000 by virtue of Section 20 of the Madhya Pradesh Reorganisation Act, 2000, which provides that on and from the appointed day, the Constitution (Scheduled Tribes) Order, 1950, shall stand amended as directed in the Fourth Schedule. Sawara to which the parties herein belong is in Entry 41 in relation to Chhattisgarh in the above order. As such, Sawara is a Scheduled Tribe within the meaning of the Constitution of India notified by the Constitution (Scheduled Tribes) Order, 1950 by the President of India and it is a Scheduled Tribe within the meaning of Article 366(25) of the Constitution. Thus, the provisions of the Act of 1956 do not pro-tanto apply to the members of Scheduled Tribe as per Section 2(2) of the Act of 1956, because of *non obstante* clause in Section 2(2) of the Act of 1956, as the customary law of the Scheduled Tribe has been preserved by the legislature.

11. The Supreme Court in the matter of **Madhu Kishwar and others v. State of Bihar and others**[1], after noticing sub-section (2) of Section 2 of the Act of 1956, held as under:-

> "4. … Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom,

1 (1996) 5 SCC 125

as is well recognized, varies from people to people and region to region."

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

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

14. This Court in the matter of **Smt. Butaki Bai and others v. Sukhbati and others**[2] after review of the entire legal position in this regard has held in paragraph 25 as under: -

"25. On the basis of forgoing analysis, the following proposition would emerge:—

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

(ii) to establish further that they have become "Hindus out and out" or "sufficiently Hindus" so as to be governed by in matter of succession and inheritance by any school of Hindu law, and thereafter to prove

2 2014(3) C.G.L.J. 590

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

15. Further, it has been held by this Court in **Smt. Butaki Bai** (supra) in paragraphs 26 and 32 of the report as under: -

> "26. Having ascertained the legal position, turning back to the facts of the instant case, it would appear that according to the plaintiffs, they belong to Halba tribes of Bastar and in matter of succession, they are governed by their own tribal customs prevalent, among them, which is similar to Mitakshara School of Hindu Law and custom as prevalent is very old, continuous and has a force of law in Halba tribes. The plaintiff in the plaint did not particularize the prevalent tribal custom except stating that those custom are similar to that of Mitakshara school of Hindu law and thereafter, proceeded to claim that she is entitled for 1/10th share in the suit land and suit house.
>
> 32. Thus, in view of the foregoing discussion, this Court is of the considered opinion that the plaintiff has failed to establish that members of the Halba scheduled tribe, have given up her customary succession and have become "Hindus out and out" or "sufficiently Hinduised" and in the matter of succession, they are governed by any particular school of Hindu law, consequently, the legislative bar enacted under sub-section (2) of Section 2 of Act of 1956 will apply in full force and provision of the Hindu Succession Act 1956 will not apply to parties to suit i.e. Halba Scheduled Tribes in absence of notification by Central Government applying the provision of Act of 1956 to them."

16. Reverting to the facts of the present case in light of the aforesaid discussion, the trial Court on the basis of the statements of plaintiff No.1 Anandram (PW-1), Ugrasen (PW-2) and Karmaha (PW-3) has come to the conclusion that the parties have become Hindus as they follow the traditions and principles of the Hindu law. The plaintiffs neither in the plaint nor in their evidence particularised the prevalent tribal custom except pleading some ceremonies of marriage in their caste. It has neither been pleaded nor proved that they have abandoned their law of origin (customary law) and they

have given up their customary succession and did not state anything so as to be governed by in the matter of succession and inheritance by any school of Hindu law, and that they have adhered to any particular school of Hindu law. Mere pleading as vague as it can be would not amount to pleading and establishing that they have given up their customary succession and to establish further that they have become Hindus out-and-out or sufficiently Hinduised and in the matter of succession they are governed by any particular school of Hindu law.

17. Both the parties have failed to prove any custom governing succession in their caste. The Central Provinces Laws Act, 1875 has been enacted to regulate the inheritance, special property of females, betrothal, marriage, dower, adoption and other system and customs. Sections 5 and 6 of the said Act reads as follows: -

> "5. Rule of decision in cases of certain classes.- In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be the Muhammadan Law in cases where the parties are Muhammadans, and the
>
> Hindu Law in cases where the parties are Hindus, except in so far as such law has been by the legislative enactment altered or abolished, or is opposed to the provisions of this Act:
>
> Provided that when among any class or body of persons or among the members of any family any custom prevails which is inconsistent with the law applicable between such persons under this section, and which if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to.
>
> 6. Rules in cases not expressly provided for.- In cases

not provided for by section 5, or by any law for the time being in force, the Courts shall act according to justice, equity and good conscience."

18. Their Lordships of the Supreme Court have also in the matter of **M.V. Elisabeth and others v. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa**[3] held that where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience. It was observed as under: -

> "86. The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience."

19. Now, the question is what is meaning and significance of the expression "justice, equity and good conscience". The Formula "Justice, Equity and Good Conscience"—The origin of the formula lie in the Romeo canonical sources, way back in the 16th Century. Late the formula was applied in Italy, Germany and France. It appealed the English legal system which modified and incorporated it in their own system. The preamble to the Act of Succession enacted in 1536 used the expressions "Equity, reason and good conscience". The East India Company carried the principle to India. In 1688, the Judges appointed in Bombay under the Company's

3 1993 Supp (2) SCC 433

Law were "to behave themselves according to good conscience". The Royal Charters of 1683, 1687, 1726 and 1753 also used the expressions "Equity and Good Conscience" and "Justice and Right". The Regulation of 1781 enjoined that in all cases for which no directions were given the respective Judge "do act according to justice, equity and good conscience". The principles were to be applied where positive law or custom did not assist the Court to dispense judicial Justice. Indeed, the term "Justice" eludes a precise definition. It means the constant and perpetual disposition to render to every man his due. The Courts are to administer "commutative justice" and "distributive justice" as well. The expression "commutative justice" means that virtue whose object is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, so that no one may be gainer by another's loss. The expressions "distributive justice" means that virtue whose object is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal things nor unequal persons things equal. "Equity' is a system of law or rules more consonant than the ordinary law which opinions current for the time being as to a just regulation of the mutual rights and duties of men living in a civilized society, vide Halsbury's Laws of England, 3rd Edn,, Vol. 14, p. 464. "Equity' according to Blackstone means "that portion of remedial justice which was formerly exclusively administered by a

court of Equity as contra-distinguished from that portion which was formerly exclusively administered by a court of common law" - vide Blackstone's Commentaries, 429-437. The meaning of the expressions "Justice, equity and good conscience" was summed up by Lord Hobhouse in *Waghela Rajsanji v. Shekh Masludin* (1887) 13 Ind. Appl. 89(96). "Justice, equity and good conscience" could be interpreted to mean the rules of English Law and found applicable to Indian society and circumstances". (See **U. Bransly Nongaiang v. U. Drolishon Syiemiong and others**[4].)

20. In the matter of **Chuiyya s/o Jhadi and another v. Mangari Bai and another**[5], the M.P. High Court while dealing with the issue of inheritance of property of father by daughter belonging to "Oraon tribe" held as under: -

> "It is true that the provisions of Hindu Succession Act, 1956 do not apply to the members of the Scheduled Tribe as per section 2(2) of this Act. It is also true that parties are Scheduled Tribes. In the absence of son the daughter was entitled to inheritance and she used to get "limited Estate" and on her death it used to pass on to the reversioners of her father. That rule has been abrogated. Section 14 of the Hindu Succession Act, 1956 confers full heritable capacity on a female heir. There is no definite evidence that amongst the Oraons a daughter is excluded from inheriting the property of her father. There should be no disparity in the rights of man and woman in matters of succession and inheritance. This is recognized in all the systems. It is for the person setting up the plea of exclusion of daughter from inheritance to prove and establish that there is such a caste custom. A custom is a rule which has by long usage obtained the force of law. It must be ancient, certain and reasonable. The daughter is entitled to the share in the lands in dispute."

21. Similarly, in the matter of **Sukhmani and others v. Jagarnath**[6], the

4 (1986) 2 Gauhati Law Reports 487
5 2000(2) M.P.L.J. 441
6 2000 RN 301

M.P. High Court applying the principles of equity, justice and good conscience, finding no provision of law governing right to succession among Gond-caste held as under: -

> "10. The trial Court had rightly held that the daughters are entitled to a share in the property of father in the Gond community and they along with Sonamati and the respondent succeeded to the property of Jatu. After the death of Sonamati half share of Sonamati was also transmitted to the appellants as there was no prohibition in law to succeed the property of their step-mother. In fact, sections 5 and 6 of the Central Provinces Law read together would show that in absence of any law governing the right to succession, the principles of equity, justice and good conscience shall apply.
>
> 11. For all these reasons, this Court comes to the conclusion that the appellants and the respondent are entitled to 1/6th share each in the suit property."

22. This Court also in the matter of **Mst. Sarwango and others v. Mst. Urchamahin and others**[7], applying Section 6 of the Central Provinces Laws Act, 1875, held that in absence of any law of inheritance or custom prevailing in Gond-caste, Courts are required to decide right according to justice, equity and good conscience and allotted ½ share to daughters on the property left by their father. It was observed as under: -

> "10. In the present case, both the parties have failed to prove any law of inheritance or custom prevailing in their Gond caste i.e. member of Scheduled Caste whom Hindu Law or other law governing inheritance is not applicable. In absence of any law of inheritance or custom prevailing in their caste governing the inheritance the Courts are required to decide the rights according to justice, equity and good conscience in term of Section 6 of the Act. Plaintiffs Sawango and Jaituniya are daughters of Jhangal, nearest relative rather the respondents, who were daughter-in-law of brother of Jhangal and legitimate or illegitimate son of Balam Singh, son of Dakhal.

7 AIR 2013 Chhattisgarh 98

> 11. In these circumstances, plaintiffs Sawango and Jaituniya would be the persons' best entitlement to inherit the property left by their father. The Courts below ought to have decreed the suit for partition to the extent of share of Jhangal, but the Court below i.e. the lower appellate Court has allowed the appeal and dismissed the suit in absence of any law or custom for inheritance for a member of Schedule Tribe. The Courts below are required to decide their rights of inheritance in accordance with the provisions of Section 6 of the Act applicable to the State of Chhattisgarh and undivided State of Madhya Pradesh."

23. In view of the aforesaid legal analysis, I am of the considered opinion that both the Courts below have committed legal error in granting the suit of the plaintiffs in toto. It is held that the plaintiffs have failed to establish that they being the members of Sawara Scheduled Tribe have given up their customary succession and have become "Hindus out-and-out" or "sufficiently Hinduised" and in the matter of succession they are governed by any particular School of Hindu Law. Consequently, the legislative bar contained in Section 2(2) of the Act of 1956 would apply in full force and hence, the provisions of the Act of 1956 would not apply to the parties to suit i.e. Sawara Scheduled Tribes in absence of notification by the Central Government applying the provisions of the Act of 1956 to them and in absence of any law of inheritance or custom prevailing in Sawara Scheduled Tribes, the provisions of Section 6 of the Central Provinces Laws Act, 1875 would apply as held above and the courts are required to decide right according to justice, equity and good conscience applying the said principles and following the principles of law laid down in this behalf in the above-stated judgments – **Sukhmani** (supra) and **Mst. Sarwango** (supra). Thus, it is held that daughters of Mardan/his LRs would also be

entitled to half share in the total property, as the suit property has not been partitioned and the plaintiffs would only be entitled to half share on partition as mentioned in Schedule A of the plaint. Consequently, the second appeal is allowed in part and the plaintiffs suit is partly decreed that the plaintiffs are entitled only for half share in the property mentioned in Schedule A of the plaint and the defendants i.e. daughters/LRs of Mardan would be entitled for half share of the property shown in Schedule A of the plaint. The substantial questions of law are answered accordingly. No order as to cost(s).

24. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.270 of 2003

Daduram and others

Versus

Tirith Kumar and others

Head Note

In absence of any law of inheritance prevailing in Gond-caste governing inheritance, courts are required to decide right according to justice, equity and good conscience in terms of Section 6 of the Central Provinces Laws Act, 1875.

गोंड़ जाति के विरासत को शासित करने वाले किसी उत्तराधिकार विधि के प्रचलन में न होने पर, न्यायालय को चाहिये कि वह विरासत संबंधी अधिकार का निर्णय, सेन्ट्रल प्राविन्सेस विधि अधिनियम, 1875 की धारा 6 के अनुसार न्याय, साम्य और शुद्ध अंतःकरण से करें।