THE HIGH COURT OF MEGHALAYA

WA No.43/2011
In WP(C)No.84/2003

1. Smti. Chellish Sangma,
Jendragre Village,
P.O. Rongram,
West Garo Hills District, Meghalaya.

2. Shri. Arwish Marak,
Jendragre, P.O. Rongram,
West Garo Hills District, Meghalaya. **::::** Appellants

-Vs-

1. Smti. Labina Sangma,
R/o Jendragre, P.O. Rongram,
West Garo Hills District, Meghalaya.

2. Shri. Drickson M. Sangma,
R/o Jendragre, P.O. Rongram,
West Garo Hills District, Meghalaya. **::::** Respondents

3. The Garo Hills Autonomous District Council,
Tura, represented by its Secretary
Executive Committee, Tura West Garo Hills,
Meghalaya.

4. The Chief Executive Member,
Garo Hills Autonomous District Council,
Tura, West Garo Hills, Meghalaya.

5. The Executive Member, In-charge,
Revenue, Garo Hills District Council,
West Garo Hills, Meghalaya. **::::** Proforma Respondents

BEFORE
THE HON'BLE MR JUSTICE T NANDAKUMAR SINGH
THE HON'BLE MR. JUSTICE S R SEN

For the Appellants : Mr. K Paul, Adv

For the Respondents : Mr. VK Jindal, Sr. Adv
Ms. QB Lamare, Adv
Mr. S Dey, Adv

Date of hearing : ***19.09.2014***

Date of Judgment & Order : ***26.09.2014***

JUDGMENT AND ORDER

(Justice T. Nandakumar Singh)

This writ appeal is directed against the judgment and order of the learned Single Bench (learned Single Judge) dated 26.08.2011 allowing the writ petition i.e. WP(C)No.84(SH)2003 filed by the principal respondents/writ petitioners wherein, the learned Single Judge held that who could be the Nokma of Jendragre Akhing had been decided in the year 1937 by the Deputy Commissioner, Garo Hills vide order dated 07.08.1937, which remains unchallenged and accepted for the last more than 70 years, shall not be opened on the objection raised by the present appellants i.e. respondents No.5 & 6 in the writ petition, after they slept over the matter for the last 70 years and thereby set aside the impugned order dated 28.01.1999 passed by the Executive Member, I/C Revenue, Garo Hills District Council, Tura declaring that respondents No.5 & 6 are the Nokmas of Jendragiri Akhing and also the order dated 08.01.2003 passed by the Chief Executive Member, Garo Hills District Council, Tura in GDC-Rev/Appl. No.22A/C of 1999 for rejecting the appeal and upheld the judgment and order dated 28.01.1999 passed by the Executive Member, I/C Revenue, Garo Hills District Council, Tura.

2. Heard Mr. K Paul, learned counsel for the appellants i.e. respondents No.5 & 6 in the writ petition, Mr. VK Jindal, learned senior counsel assisted by Ms. QB Lamare, learned counsel appearing for the principal respondents/writ petitioners and Mr. S Dey, learned counsel for the proforma respondents.

3. The present appellants did not file affidavit-in-opposition in the writ petition. However, learned Single Judge was lenient enough to consider the verbal submission of fact by the learned counsel appearing for the appellants. But party can only succeeds their case only on the basis of fact mentioned in the pleadings and in the absence of pleadings, whatever be the submission made by the learned counsel for the party regarding the fact, cannot be the basis for deciding the fact of the case.

4. The learned Single Judge had mentioned the graphic statements of facts of the writ petitioner i.e. principal respondents and also the verbal submission of fact by the learned counsel appearing for the appellants in the impugned judgment and order dated 26.08.2011. The operative portions of the judgment and order dated 26.08.2011 of the learned Single Judge, which deal with the fact of the case are quoted hereunder:-

> "*2. This case has a chequered history. It is hoped that this is a litigation to end all litigations between the parties over the Nokmaship of the Akhing land. Before proceeding further, I may first briefly refer to the facts of the case as pleaded by the petitioners. Sometime in the year 1995 the late Parkin Marak had moved the Executive Member-in-charge of Land Revenue ("EM" for short), Garo Hills District Council for appointing him as the Nokma of the Akhing, which was registered as GDC Rev/11 A/C of 1995-96. It was stated in the application that the late Rasan R. Marak, husband of late Tame A. Sangma, who were the last recorded Nokma had died in 1995 and as per Garo custom, the Maharis of this particular Akhing decided to appoint the said Parkin R. Marak and Mrs. Donme A. Sangma as the Nokma of the Akhing land. On the death of the said Parkin Marak, a substitution application was filed by the petitioner and three others on 17-8-1998 stating that all Chras and Chatchis of A'gitok Koksep clan of Jendragre had proposed the names of the petitioner No. 1 and the petitioner 2, who is none other than the daughter of the said Donme A. Sangma in place of the late Parkin Marak and his wife Donme A. Sangma and prayed that they be allowed to substitute the deceased petitioners. The application was immediately opposed by the respondents No. 5 and 6 on the ground of partiality of the Mauzadar's report and their non-selection by the Mahari clan. According to the petitioners, they are the legal heirs of the last recorded Nokmas of the Akhing land, namely, the late Rasan Marak and the late Tame A. Sangma and the*

direct descendants of the said recorded Nokma: they were also elected by the whole Agitok Koksep Sangma clan.

3. It is the case of the petitioners that the respondents No. 5 and 6 have no legal right to claim the Nokmaship as per Garo custom inasmuch as they are not the legal heirs of the last recorded Nokma, namely, the late Rasan Nokma and Tame A. Sangma nor were they elected by the clan people of the Akhing land i.e., A'gitok Koksep Sangma clan. According to the petitioners, Donme Sangma is the daughter of the late Tame Sangma and Rasak Marak and that Donme Sangma is the wife of late Parkin Marak and after death of Parkin Sangma, the petitioner No. 1, who is their daughter, married the petitioner No. 2. After the application was filed by the petitioners, the District Council directed the Mouzadar to conduct an enquiry and submit his report. The Mauzadar submitted his report dated 16-11-1995 and took the statements of the Maharis, Chras and Departo. It is claimed by the petitioners that in the year 1937, the Deputy Commissioner, Garo Hills by the order dated 7-1-1937 had declared the late Rasan Marak as the Nokma of the Akhing. The EM by the order dated 28-1-1999 disposed of the case by declaring the respondents No. 5 and 6 as the Nokmas. Aggrieved by this, the petitioners took the matter to appeal before the Chief Executive Member, Garo Hills District Council ("CEM" for short), which was registered as GDC Revenue Akhing Appeal Case No. 22/99. After hearing the parties, the CEM by the impugned order dismissed the appeal and upheld the judgment of the EM. This is how this writ petition has been filed before this Court for appropriate relief. No affidavit-in-opposition is filed by the respondents. However, Ms. A. Paul, the learned counsel for the private respondents, relying on the lower court records, extensively argued the case in the course of hearing and defended the impugned order and judgment of the CEM and EM and prayed for dismissal of the writ petition with costs.

4. From the record, it is obvious that the late Khiljing Marak was the husband of the late Nema Sangma. After the death of Nema Sangma, Smt. Thame Sangma, who was the eldest sister of Nema Sangma, became the substituted wife of Khiljing Marak. After the death of Khiljing Marak, Smt. Thame Sangma married Rasan R. Marak. According to the respondents, after the death of Thame Sangma, Smt. Memji/Sangma was given in marriage to Rasan R. Marak. There is no dispute that Donme Sangma was the daughter of Tame Sangma. The finding of the EM is that the respondent No. 5 is the grand daughter of the late Nema Sangma and that the petitioner No. 1 is a descendant of the last recorded Nokma, namely, Thame Sangma. The EM also recorded the findings that the late Thame Sangma's right of Nokmaship also expired with her death since a successor wife has only a life interest and not a heritable interest, which could be passed on to her daughter; that no semblance of any right could accrue to the petitioner herein (Smt. Labina Sangma). According to the EM, late Khiljing Marak and late Nema Sangma had three daughters, namely, Khanji Sangma, Noam Sangma and Kalse Sangma and the respondent No. 5 is the daughter of late Noam Sangma

and even Donme Sangma, the original petitioner for Nokmaship admitted this fact. The EM took the view that since the respondent No. 5 is the original daughter of Nema Sangma and reversionary heir to the Akhing, in order to uphold the Garo customary law, the Akhing should now revert to the rightful reversionary heir i.e. the respondent No. 5 and her husband, the respondent No. 6. The CEM upheld these findings recorded by the EM, the correctness whereof are under challenge in this writ petition."

5. The appellants who did not file affidavit-in-opposition in the writ petition stated in the present memo of appeal that the last recorded Nokmas of Jendragre Akhing in West Garo Hills were Shri. Khiljing Marak and Smti. Nema Sangma. After the death of Smti. Nema Sangma, as per Garo customary law, Smti. Thame Sangma was given as substitute wife to Shri. Khiljing Marak and the name of Smti. Thame Sangma was entered in the Genealogical tree. Thereafter, Shri. Khiljing Marak died and Smti. Thame Sangma (substitute wife) married one Shri. Rasan R. Marak.

Smti. Thame Sangma died and thereafter, Shri. Rasan R. Marak (who was given as husband to Smti. Thame Sangma) married one Smti. Menji Marak. Shri. Rasan R. Marak and Smti. Menji Marak had a daughter i.e. Donme Sangma, who married one Shri. Parkin Marak. After the death of Shri. Rasan R. Marak and Smti. Menji Marak, Shri. Parkin Marak applied before the Executive Member, I/C Revenue, Garo Hills Autonomous District Council for appointing him as Nokma of Jendragre Akhing.

Shri. Rasan R. Marak the husband of Thame Sangma had approached the Deputy Commissioner, Garo Hills (W Shaw) for recording as "Nokma" of Jendragre Akhing as Name Mechik died long ago and also her husband Khiljing Marak died in the year 1936. It is also stated that Rasan R. Marak and Khiljing Marak are the member of the clan of Rangsa Megongchi and also Noan Mechik, Rimje Mechik, Saljan Marak, Ranang Marak, Thagong Marak, Roke Marak, Changnan Marak, Thonang Sangma, Jinan Sangma, Rakhi Sangma and Dingsang Sangma, were present as Chatchis

and Chras and they had no objection to the entry of the name of Shri Rasan R. Marak as “Nokma”. Accordingly, the Deputy Commissioner, Garo Hills (W Shaw) passed the order dated 07.08.1937 which is quoted in the impugned judgment and order of the learned Single Judge dated 26.08.2011. For easy reference, the order of the Deputy Commissioner, Garo Hills (W Shaw) is quoted hereunder:-

> “*7.8.37*
>
> *Name Marak died a long time ago. Then Khiljing married Thama Mechik. Then Thame Mechik’s husband Khiljing Nokma died after Wangala in 1936. Now Rasan Marak has been given a husband.*
>
> *Rasan Marak and Khiljing are of the clan Rangsa Megongchi.*
>
> *Noan Mechik, Rimje Mechik, Saljan Marak, Ranang Marak, Thagong Marak, Roke Marak, Changnan Marak, Thonang Sangma, Jinan Sangma, Rakhi Sangma and Dingsang Sangma all were present as Chatchis and Chras of they have no objection.*
>
> *Enter Rasan Marak as Nokma and inform DFO.”*
>
> *Sd/- W. Shaw*”

6. It is the case of the appellants that after the death of Nema Sangma Mechik original Nokma of Jendragre Akhing and her husband Khiljing Marak, Jendragre Akhing should be reverted back to the daughter. Nema Sangma Mechik and Khiljing Marak had three daughters namely Khanji Sangma, Noan Sangma and Kalse Sangma. The appellant No.1 is the granddaughter of Nema Sangma Mechik and the appellant No.2 is the husband of the appellant No.1. The appellants and others filed objection/complaint dated 11.07.1996 against the petition filed by Parkin Marak and his wife Donme A. Sangma for recording as “Nokma” of Jendragre Akhing. In their objection/complaint, it is stated that according to the Garo customary law, the Maharis have to elect the one who is to become

the “Nokma”. In their objection, the appellants and others did not state that the undisputed owner of Jendragre Akhing i.e. Nema Sangma Machik, did not appoint any “Nokna” for Jendragre Akhing and as no “Nokna” was appointed during the lifetime of Nema Sangma Machik and her husband Khiljing Marak, the Maharis have to appoint the “Nokma”. The objection/complaint dated 11.07.1996 filed by the appellants and others against the petition filed by Parkin Marak and his wife Donme A. Sangma before the Executive Member, I/C Land and Revenue, Garo Hills Autonomous District Council, Tura reads as follows:-

“***TYPED COPY OF THE CERTIFIED COPY***

To,

The Executive Member,
I/C Land and Revenue,
Garo Hills Autonomous District Council,
Tura, West Garo Hills, Meghalaya.

Dated, Jendragre, the 11th July, 1996.

Sub: complaint against the petition filed by Shri. Parkin Marak and his wife Donme A. Sangma for the appointment of Nokma of Jendragre by the maharis (clan).

Sir,

Most respectfully sheweth, we the undersigned A’gitok maharis (clan) nokmachik (female) chra and dopante (sons) of Jendragre with reference to the subject mentioned above, request your kind favour. As mentioned above that Shri. Parkin R. Marak and his wife Smti. Donme A. Sangma of Jendragre has applied for appointment of Nokma during 1995 in the Council. But the maharis (clan) and the villagers have rejected it therefore this case has been under pending. And today we the two parties have been summoned in your court for hearing and therefore today we request you not to appoint their name in Nokmaship of Jendragre Akhing showing few reasons.

1. Shri. Parkin R. Marak and his wife Smti. Donme Sangma are not the elected members of A’gitok mahari nor of the villagers.

According to the Garo custom when the nokma of village dies, the one whom the late Nokma named for nokmakrom has the right authority to become nokma, and he is the one for whom the maharis assemble together for decision to appoint Nokma. If anybody is named or written by nokma to be successor, then the maharis (clans) nokmechiks (female) chra-depante (sons) and pagachis (married man and woman)

assemble together to see who is the one in the line of heir, who can be reliable for the maharis (clans) villagers and the government. This kind of person is elected and the one who is selected is brought to the District Council to the list of A'king nokma. Of course the Nokma of Jendragre Late Rasan R. Marak and his wife Tami A'Sangma has already died, inspite of this they have not named nor wrote the name of anyone to inherit the a'kinggore. Therefore, to look for the one to be nokma or to work to appoint the Naokma or new nokma is under the hands of the maharis(clans) of A'gitok of Jendragre and till now the maharis has not assemble together to name anyone.

2. The enquiry and report of mauzadar is inadequate and false:

a) On receiving the petition filed by Shri Parkin Marak and his wife Donme Sangma. Shri Alipson R. Marak was sent for spot enquiry by the council. On hearing the news of Mauzadar's arrival regarding the appointment of Nokma of Jendragre A'king, it was found when enquired from the council that Shri Parkin R. Marak and his wife Smti. Donme Sangma has filed petition secretly for appointment of Nokma. The same day i.e. on 27th October 1995 one of the chra and depante Shri Rogendra A. Sangma submitted complaint that there is no need of enquiry and in their name Nokma cannot be appointed.

Even then ignoring that complaint Shri Alipson Marak Mauzadar on the next day, that is on 28th October 1995 went to Jendragre. On that day one of the Chra and depante Shri. Wilbath A. Sangma and Shri Jenarson Sangma strongly intercepted and said that Shri Parkin Marak and Smti. Donme A. Sangma cannot be appointed Nokma of Jendragre A'king. But Shri Alipson R. Marak Mauzadar on that day took the signature for the member present and took the signature of 51 people and gave report that all of them are willing to appoint Shri Parkin R. Marak and Donme A. Sangma to be Nokma. The report is not true and on that day it was not well informed and sufficient maharis and the villagers were not present.

b) Mauzadar Shri Alipson R.Marak is Shri Parkin R. Marak's brother in our view Shri Alipson R.Marak himself being a mauzadar secretly instigated Shri Parkin Marak and his wife Donme A. Sangma to claim for nokmaship offering full support. Therefore we find Mauzadar - Shri Alipson R.Marak was being partial and gave false report and tried to mislead the honourable Court.

c) Shri Parkin R. Marak and his wife Smti. Donme A. Sangma is not reliable person to maharis and the villages.

We the A'gitok mahari of Jendragre village, nokme'chick chra-depante and pa-gachis (married man and women) and the villagers cannot trust Shri Parkin Marak and his wife Smti. Donme A. Sangma we have seen the past deeds , they have the object n view or intention to sell the property of the A'king, trees and bamboos.

Therefore, basing on the reasons mentioned above, we the A'gitok mahari of Jendrangre nokma'chik (female) chra-depante (sons) and pa-gachis (married man and women) strongly request the honourable judge not to appoint Shri Parkin Marak and his wife Smti. Donme A. Sangma and regarding Garo customary law <u>we request you the judge to entrust the maharis to elect the one who was to become the nokma</u>.

To seek justice and truthful favour in hope we writes:-

Sl.No.	*Sd/-*
1.	*Wiljeng A. Sangma*
2.	*Arwish Marak*
3.	*Wilbath A. Sangma*
4.	*Rojeng Marak*
5.	*Pinenson Ch. Marak*
6.	*Donbalish A. Sangma*
7.	*Rogendra Sangma*
8.	*Bandi Marak*
9.	*Jinason Sanga*
10.	*Chellis A. Sangma*
11.	*Jandik A. Sangma*
12.	*Changban B. Marak*
13.	*Jajak A. Sangma*
14.	*Nongjah Sangma*
15.	*Rani Sangma*
16.	*Bathsing Marak*
17.	*Jollen Sangma*
18.	*Krinalson Sangma*
19.	*Gilment Sangma*
20.	*Rakan Sangma*
21.	*Monjak A.Sangma*
22.	*Jadak A. Sangma*
23.	*Illegible L.T.I*
24.	*Illegible Sd/-*"

7. Learned counsel for the respondents without proper pleadings asserted that according to the Garo customs, inheritance of the property is according to matrilineal system. Shri. VK Jindal, learned senior counsel appearing for the principal respondents i.e. writ petitioners contended that though matrilineal system is followed by Garos, the ultimo-geniture (i.e. devolution through the youngest issue) does not prevail among the Garos. In the Khasi Hills, the youngest daughter inherits the property of the mother by virtue of her being the youngest, but in the Garo Hills, it depends on the will of the parents as to who among the daughters should inherit such property.

No one can predict who would be the next heir, till the parents make their choice of the fortunate favourite. The chosen daughter is “Nokna”, who will inherit the property. In case the mother has no female issue and also mother having female issues, did not appoint the Nokna among her daughters, then the Mahari must provide a new wife to the widower and she could select the Nokna in consultation with the father from among the daughters of the deceased mother living in the house with the consent of Chras of the deceased mother. But the submission of Mr. K Paul, learned counsel for the appellants that like the Khasis, who follow the matrilineal succession, succession will go to the youngest issue/youngest daughter in case of Garos also. Mr. K Paul, learned counsel for the appellants had drawn the attention of this Court by referring to Section 15 of the Book called “Principles of Garo Law by Jangsang Sangma (former Judge of the Gauhati High Court). Section 15 of the said Book called Principles of Garo Law, reads as follows:-

> “*15. NOKNA AND SUCCESSOR WIFE. – Where a woman dies and is survived by her nokna, the property vests in her and not in successor wife even though she may be provided by the relatives of the deceased wife. The successor wife may have a life estate to the property, but she cannot dispossess the nokna of the deceased wife. If the successor wife had property of her own at the time of coming as the widower’s wife, then such property would continue to be hers and her daughter inherits and not the daughter of the first wife. If the successor wife had no daughter on her death, then if she be of first wife’s clan, her property also would vest in first wife’s daughter but if she be of different clan, it would revert to her female relative appointed by members of that clan*.”

8. On reading of Section 15 of the said Book called Principles of Garo Law written by Jangsang Sangma, it appears that the Garos follow the matrilineal, and when a woman dies and is survived by her “Nokna” the property vests in her daughter. Now the question is who is the “Nokna”? Who is the “Nokna” is mentioned in “the Study of the Land System of Meghalaya” prepared by the Law Research Institute, Eastern Region, Gauhati High

Court, Guwahati and “Nokna” is the daughter chosen by the parents who would inherits the property. The relevant portions of the Study of Land System of Meghalaya prepared by the Law Research Institute, Eastern Region, Gauhati High Court, Guwahati are quoted hereunder:-

Comparison with Khasi Custom

It is clear from the above that, though like the Khasis, the Garos also go by the matrilineal system, the ultimo-geniture (i.e. devolution through the youngest issue) does not prevail among the Garos. In the Khasi Hills, Ka Khaddu (the youngest daughter) inherits the property of the deceased by virtue of her being the youngest, but in the Garo Hills, it depends on the will of the parents as to who among the daughters should inherit such property. No one can predict who would be the next heir, till the parents make their choice of the fortunate favourite. There is a special Garo term to describe the chosen daughter, - ‘Nokna’. The best daughter, the most obsequious daughter, is chosen by the parents to be the Nokna of the family. There is no special qualifications for being a Nokna and it is the privilege of the parent to select anyone. They select the Nokna by consultation between themselves, but in case of any difference of opinion, it is the opinion of the mother that prevails, because the Garo system is matriarchal. The mother is the owner of the family property, and it is on her that the last word rests with regard to the selection of the person who would be the future heir to that property.

Discretion of the parents to determine the next heir.

The Garo customs, unlike those of most other tribes, leave a lot of discretion with the parents in the matter of inheritance. In all other systems, the course of devolution of property is specific;- either it goes to the eldest (as among the Apa Tanis), or it goes to the youngest (as among the Khasis), or it is divided among all the issues (as among the Nishis and the Mishmis).

This power of the parents (in ultimate analysis, the power of the mother) to choose the heir is unique feature of the Garo system among all the customary laws of inheritance. It looks like the power of a testator to dispose of his property by will in favour of any person he chooses. But really the power of the parents is not so wide as that of the testator. Because, firstly, the choice of the future heir is limited to the female issues of the owner of the property. Secondly, in general, the practice is to choose the youngest daughter as the Nokna, since the Nokna is required to stay, along with her husband, in

the house of the mother who, in her old age, receives more attention from the youngest daughter. It is for this reason that in the villages visited by our team, in more than 70% of the plots, the youngest daughter was found to be the "Nokna".

The position when the mother has no female issue.

If the mother has no female issue, she may adopt a girl as Nokna from her maternal line, so that the land does not pass on to a member of a different family-group. (Mahari)

If the mother dies without a female issue and before a Nokma has been adopted, even then the father has no right to select the Nokna. On the other hand, the Mahari must provide a new wife to him from the deceased wife's family – group, so that she may have an opportunity to be get a female child or to adopt one.

If the mother had female issues but died before she could select the Nokna, then the Mahari must provide a new wife to the widower as mentioned above, and she could select the Nokna in consultation with the father from among the daughters of the deceased mother living in the house. But if the daughters have meanwhile been married away and live separately, then they have no right to Noknaship, and the step-mother may select the Nokna from the deceased mother's family- group with the consent of the 'Chras' of the deceased mother.

If the father also dies after the death of his wife and before a Nokna was selected or adopted, then the Chras of the deceased wife select a Nokna for that family."

***PLEADINGS*:-**

9. It is now well settled law that a party has to plead its case and produce sufficient evidence to substantiate the averments made in the writ petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. There is a clear distinction between a pleading under the Code of Civil Procedure and a writ petitioner or counter affidavit. While in a pleading i.e. plaint or written statement, the facts and not the evidence are required to be pleaded. But in a writ petition or in a counter affidavit not only the facts but also evidence in proof of such facts have to be pleaded and annexed to it. The Apex Court held in the ***State of Madhya***

Pradesh v. Narmada Bachao Andolan & anr: (2011) 7 SCC 639, (para 9 of the SCC) that:

> *"9. In **Bharat Singh v. State of Haryana: (1988) 4 SCC 534: AIR 1988 SC 2181**, this Court has observed as under (SCC p.543, para 13)*
>
> > *"13. …….. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter affidavit, as the case may be, the court will not entertain the point. …. there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter affidavit. While in a pleading, that is, a plaint or written statement, the facts and not [the] evidence are required to be pleaded. In a writ petition or in the counter affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."* *(emphasis added)*
>
> *A similar view has been reiterated by this Court in **Larsen & Toubro Ltd. v. State of Gujarat: (1998) 4 SCC 387: AIR 1998 SC 1608, Atul Castings Ltd. v. Bawa Gurvachan Singh: (2001) 5 SCC 133: AIR 2001 SC 1684 and Rajasthan Pradesh Vaidya Samiti v. Union of India: (2010) 12 SCC 609: AIR 2010 SC 2221**."*

10. The appellants did not file affidavit-in-opposition in the writ petition. The consequence of not filing the affidavit-in-opposition controverting the case of the writ petitioner in the writ petition would be that the respondents had admitted the allegations and assertions of the writ petitioner in the writ petition. Regarding this fairly settled law, it would be sufficed to refer to the two decisions of the Apex Court in ***(i) Bir Singh Chauhan v. State of Haryana & Anr: (1997) 6 SCC 282;*** and ***(ii) State of Assam v. Union of India & Ors: (2010) 10 SCC 408***. Para 4 of the *SCC* in ***Bir Singh Chauhan's*** case *(Supra)* reads as follows:-

> "4. *We wanted to examine the record to ascertain whether there is any substantial case against the appellant. The respondents have neither filed counter nor produced the record. Under these circumstances, we are constrained to accept the case of the appellant that he is entitled to be considered for promotion under the Rules. We direct the Government to consider his case for promotion on the basis of his service record within four months from the receipt of this order. While doing so, the Government will exclude the material relating to his inspection report*."

Para 18 of the *SCC* in ***State of Assam*** case ***(Supra)*** reads as follows:-

> "*18. The Union of India has filed its counter-affidavit. It has denied various assertions made by the appellants, but insofar as the aforesaid assertion of the appellants is concerned, it is not stated by them that they had arrayed the State of Assam as a party to the proceedings nor do they assert that the learned counsel for the State was heard in the matter. In our view, the respondents must deal specifically with each allegation of fact of which, it does not admit to be true. The allegation of fact, if not denied/controverted in the counter-affidavit, normally it shall be taken to be admitted by the respondents*."

11. It is fairly well settled law that a custom must be proved to be ancient, certain and reasonable and had been acted upon in practice for such a long period with such invariability and proved by general evidence as to its existence by members of the tribe. Only when these conditions are fulfilled, the custom may be taken as a customary law. When a custom has been judicially recognized by the Court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872. Materials custom must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the Court become so notorious that the Courts take judicial notice of it.

12. The question is if the writ proceeding is a proper forum for deciding the custom inasmuch as, the custom is required to be proved by adducing both oral and documentary evidence. The answer would be that the

writ proceeding is not a proper forum for deciding the custom in the present context. The general principles which should be kept in view in dealing with questions of customary law had been summarized by the Apex Court in ***Gokal Chand v. Pravin Kumari: AIR 1952 SC 231***. Para 14 of the AIR in ***Gokal Chand's*** case **(***Supra***)** reads as follows:-

> "*14. ……... (2) Inspite of the above fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove that existence of the custom set up by him. See '****Daya Ram v. Sohel Singh' 110 P.R. 1906 p. 390 at 410; 'Abdul Hussein Khan v. Bibi Sona Dero', 45 Ind App 10 (PC)****.*
>
> *(3) A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. See* ***'MT. Subhani v. Nawab' AIR 1941 PC 21 at 32****.*
>
> *(4) A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Riwaj-i-am or Manual of Customary Law. See* ***'Ahmed Khan v. MT. Channi Bibi', AIR 1952 PC 267 at 271****.*
>
> *(5) No statutory presumption attaches to the contents of a Riwaj-i-am or similar compilation, but being a public record prepared by a public officer in the discharge of his duties under Government rules, the statements to be found therein in support of custom are admissible to prove facts recited therein and will generally be regarded as a strong piece of evidence of the custom. The entries in the Riwaj-i-am may however be proved to be incorrect, and the quantum of evidence required for the purpose of rebutting them will vary with the circumstances of each case. The presumption of correctness attaching to a Riwaj-i-am may be rebutted, if it is shown that it affects adversely the rights of females or any other class of persons who had no opportunity of appearing before the revenue authorities. See* ***'Beg v. Allah Ditta', AIR1916 PC 129 at 131, 'Saleh Mohammad v. Zawar Hussain', AIR 1994 PC 18; 'MT. Subhani v. Nawab', AIR 1941 PC at 25****.*

*(6) When the question of custom applicable to an agri- culturist is raised, it is open to a party who denies the application of custom to show that the person who claims to be governed by it has completely and permanently drifted away from agriculture and agricultural associations and settled for good in urban life and adopted trade, service, etc., as his principal occupation and means and source of livelihood, and does not follow other customs applicable to agriculturists. See '**Muhammad Hayat Khan v. Sandhe Khan', 55 P.R. 1908 p. 270 at 274, 'Muzaffar Muhammad v. Imam Din', 9 Lah 120 at p.125***."

13. The Apex Court in ***Laxmibai (Dead) through LRS & Anr. v. Bhagwantbuva (Dead) through LRS & Ors: (2013) 4 SCC 97*** reiterated that a custom must be proved to be ancient, certain and reasonable and the evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting and when a custom has been judicially recognized by the Court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Indian Evidence Act, 1872. Material customs must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the Court become so notorious, that the Courts take judicial notice of it. Paras 14, 15, 16 & 17 of the SCC in ***Laxmibai (Dead) through LRS's*** case ***(Supra)*** read as follows:-

*14. A custom must be proved to be ancient, certain and reasonable. The evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method. Nothing that the Courts can take judicial notice of needs to be proved. When a custom has been judicially recognised by the Court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872. Material customs must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the Court become so notorious, that the Courts take judicial notice of it. (See also: **Effuah Amissah v. Effuah Krabah, (1936) 44 LW 73: AIR 1936 PC 147, T. Saraswati Ammal v. Jagadambal. , AIR 1953 SC 201; Ujagar Singh v. Jeo, AIR 1959 SC 1041 and Siromani v. Hemkumar, AIR 1968 SC 1299**).*

*15. 10. In **Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya: (1871-72) 14 MIA 570** it was held:*

> *"It is essential that special usage, which modifies the ordinary law of succession is ancient and invariable; and it is further essential that such special usage is established to be so, by way of clear and unambiguous evidence. It is only by means of such evidence, that courts can be assured of their existence, and it is also essential that they possess the conditions of antiquity and certainty on the basis of which alone, their legal title to recognition depends."*

*16. In **Salekh Chand: (2008) 13 SCC 119** this Court held as under: (SCC pp.130-131, paras 23 & 26-27)*

> *"23. Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them…….*
>
> ** * **
>
> *26. ……. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.*
>
> *27. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy ……"*
>
> *(emphasis supplied)*

*17. In **Bhimashya & Ors. v. Janabi:, (2006) 13 SCC 627,** this Court held: (SCC pp.635-36 paras 25 & 28-29)*

> *"25. A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm……it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.*
>
> ** * **
>
> *28. Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life; fashion is arbitrary and capricious, it decides in matters of trifling import; manners are*

rational, they are the expressions of moral feelings. Customs have more force in a simple state of society.

29. Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by limitation or prescription; the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom."

(See also: ***Ram Kanya Bai v. Jagdish; (2011) 7 SCC 452: (2011) 3 SCC (Civ) 736: AIR 2011 SC 3258****).*

14. In the present writ proceedings, keeping in view of our above observations regarding the Garo customary law, we have accepted the submissions of the learned counsel appearing for the parties that Garos follow matrilineal system of inheritance of the property and when the woman dies and survived by her "Nokna", the property vests in "Nokna", who is not compulsorily the youngest issue/youngest daughter and the "Nokna" is the favourite daughter amongst the daughters chosen by the parents during their lifetime to inherit the property. In the present case, there is no material evidence or assertion of the parties that Nema Sangma Mechik and her husband Khiljing Marak had chosen one of their daughters among the three daughters as "Nokna". In such case, "Nokna" may be the one selected by Chras of the deceased wife and maharis. In the present case, it is clear from the order of the Deputy Commissioner, Garo Hills (W Shaw) dated 07.08.1937 that Maharis and Chras had no objection to the entry of Rashan R. Marak as Nokma. Normally, the names of the husband and wife are entered as Nokma of the Akhing in the record and such decision of the Deputy Commissioner, Garo Hills had not been challenged and not controverted for more than 70 years and have been followed. Learned Single Judge rightly in his impugned judgment and order dated 26.08.2011, had decided not to open the matter which had been decided by the Deputy

Commissioner, Garo Hills as early as 07.08.1937. The Apex Court in a catena of cases held that the matter which had been finally settled and decided and followed for a considerable number of years should not be opened. Regarding this point, we may refer to the ratio laid down by the Apex Court in ***(i) N. Suresh Nathan & Anr v. Union of India & Ors: 1992 Supp (1) SCC 584;*** and ***(ii) M.B. Joshi & Ors v. Satish Kumar Pandey & Ors: 1993 Supp (2) SCC 419***. Para 4 of *SCC* in ***N. Suresh Nathan's*** case ***(****Supra****)*** held that "if the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined". The ratio laid down in ***N. Suresh Nathan's*** case ***(****Supra****)*** is also followed in ***M.B. Joshi*** case ***(****Supra****)***.

15. From the fact discussed above, it is very clear that the appellants had been sleeping over their right, if any, for the Nokmaship of Jendragre Akhing for a number of decades. The Apex Court in a catena of cases held that the delay and laches is one of the factor for refusal to entertain the petition/objection raised by the party, who slept over their right for a number of years and then one day wake up from the deep slumber like Rip Van Winkle and asserted their claims. It would be sufficed to refer regarding this fairly settled law to the decisions of the Apex Court in ***(i) Shankara Cooperative Housing Society Limited v. M. Prabhakar & Ors: (2011) 5 SCC 607; (ii) State of Uttaranchal & Anr v. Shiv Charan Singh Bhandari & Ors: (2013) 12 SCC 179;*** and ***(iii) Bharat Sanchar Nigam Limited v. Ghanshyam Dass (2) & Ors: (2011) 4 SCC 374***.

16. For the reasons discussed above, we are in complete agreement with the decision of the learned Single Judge in the impugned

judgment and order dated 26.08.2011. Writ appeal is devoid of merit and accordingly dismissed.

JUDGE **JUDGE**
(*Justice S.R. Sen*) **(*Justice T Nandakumar Singh***

Lam