

(2011) 09 GAU CK 0082

In the Gauhati High Court

Case No : Regular Second Appeal No.165 of 2005

Arat Marak

APPELLANT

Vs

On The Death of Sole Balbila @ Mailani Sangma

RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Citation : (2012) 2 GLR 789 : (2012) 2 GLT 323

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : Mr. B. Banerjee and Mr. A. Roshid for the appellant., Mr. K.R Sarma and Mr. H. Das for the respondent., Advocates appearing for Parties

Judgement

1. The legality and validity of the judgment and decree dated 28.6.2005 passed in Title Appeal No. 15 of 2005 by the learned Civil Judge (Sr. Div.), Goalpara, reversing the judgment and decree dated 10.3.2005 passed in Title Suit No. 75 of 2003 by the learned Civil Judge (Jr. Div.) Goalpara is under challenge in the instant Regular Second Appeal.

2. Heard Mr. B. Banerjee, learned counsel appearing for the appellant. Also heard Mr. H. Das, learned counsel for the respondents.

3. This Court while admitting the Regular Second Appeal, formulated the following substantial questions of law :

(a) Whether the learned court of appeal below is justified in holding that there was valid marriage between the defendant and the deceased Moniram under Garo Customary Law though the defendant had admittedly deserted the deceased and married another person without the decision of Mohari, the special custodian of marriage laws under Garo custom?

(b) Whether the learned court of appeal below is justified in holding that the defendant and the deceased lived together as husband and wife but failed to consider the question of remarriage with another person and eventually she has

lost all her right to property and she is not entitled to get any thing under the law of inheritance of Garo Customary Law and, therefore, all property would automatically passes into the hands of Nokna or of the new wife whom the mahari eventually provides for the abandoned husband and as such whether the impugned judgment suffers from perversity?

4. In order to answer the substantial questions of law as formulated, the court has to go through the pleadings of the parties, the evidence on record and the relief sought for :

The appellant herein as plaintiff brought a suit being Title Suit No. 75 of 2003 seeking the following reliefs :

RESPONDENT BALBILA

"(a) For a declaration that the defendant is not a lawful wife of late Moniram Marak;

(b) For a declaration that the defendant is not entitled to any property left by late Moniram Marak;

(c) For a declaration that Succession certificate obtained by the defendant in Misc. (success) Case No. 26/2000 is fraudulent, void and inoperative in law;

(d) For a declaration that the plaintiff is sole heiress of late Moniram Marak and entitled to all properties movables and immovables left by said late Moniram Marak;

(e) For a permanent injunction to restrain the defendant from claiming herself as the wife of late Moniram Marak and also from claiming any right to any property left by late Moniram Marak.

5. The relief as sought for is based on the averments made in the plaint contending that Maniram Marak was an employee of Assam State Electricity Board, Goalpara Division, who died on 9.5.1999 while on service and he died as unmarried leaving the plaintiff as full sister as his only heiress and under Garo customary law, the plaintiff being the only surviving sister is entitled to inherit all the properties of late Moniram Marak. It has further been averred that the defendant lived with the deceased for few years as his mistress without any formal marriage but deserted late Moniram Marak in the year 1983 and went to Meghalaya by adopting a new name, "Mailani Sangma", married one Mr. Pinalson Momin of village Hatibasha under PS and PO Mendipathar, East Garo Hills district and residing there since 1983. But after the death of Moniram Marak, the defendant with mala fide intention came back in order to grasp the entire property and in fact obtained a Succession Certificate to the estate of late Moniram Marak being Misc. (Succ.) Case No. 26/2002 on 4.6.2003 without arraying the plaintiff as party respondent in the case and, hence, the suit seeking the relief as indicated above.

6. On receipt of the summon the defendant appeared and contested the suit by

filing her written statement contending that the suit is not maintainable, the suit is bad for nonjoinder of heirs of the deceased Maniram Marak and raised other objections as available under the law. The real facts she has averred that Maniram Marak married the defendant according to Sangsari process of Garo customary law about 29 years ago and out of their wedlock a daughter was born and the daughter Bresilla Marak was married to one Mr. Dhona Sangma, a resident of Hatibasa, Mendipathar, District East Garo Hills. The defendant has further averred that there was a long enmity between the plaintiff and the defendant since her marriage. However Bresilla Marak, the daughter of the plaintiff has posed herself as Balbila Marak, wife of late Maniram Marak obtained a Succession certificate being No. 22/2000 fraudulently from the learned District Court Goalpara for collecting the debts, etc., of late Maniram Marak but knowing the fact, the defendant filed a petition for revocation of the Succession Certificate so granted being Misc. Case No. S.C. (R) 26/2002 which was revoked and a Succession Certificate was issued being Misc. S.C. 75/2002 and accordingly the employer ASEB paid Rs. 50,000 (Rupees fifty thousand only as a part payment but again on 30.7.2003 the said Bresilla Marak posing herself as Balbila Marak sent a notice to the Executive Engineer, ASEB for withholding the remaining amount and, hence, the suit, which is frivolous and prayed for dismissal of the suit.

7. Upon the pleadings of the parties, the learned trial court has framed as many as five issues which reads as follows :

- (1) Whether there is cause of action in the suit?
- (2) Whether the suit is maintainable in the present form?
- (3) Whether the suit is bad for nonjoinder of necessary parties?
- (4) Whether the suit is barred by the law of limitation?
- (5) To what relief(s) parties are entitled to as per law and equity?

8. During the trial the plaintiff has examined as many as 5 (five) witnesses whereas the defendant has examined 4 (four) witnesses in support of their respective case. The learned trial court after going through the evidence on record and after hearing the parties has decreed the suit holding that there was no valid marriage between the defendant and late Maniram Marak.

9. Being aggrieved with the judgment and decree passed in Title Suit, the defendant took up the matter on the file of the learned Civil Judge (Sr. Div.) Goalpara. The learned First Appellate Court after going through the record and the evidence thereon has held that if a man and woman live together for long years as husband and wife than a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable. In the instant case, the presumption has not been rebutted and, hence, it can be held that here occurred a valid marriage in between them and, thus, reversed the judgment and decree of the learned trial court and allowed the appeal relying on

a decision of the Apex Court reported in AIR 1996 SC 1290 and, hence, the present appeal.

10. Mr. Banerjee, learned counsel appearing for the appellant, would contend that the facts pleaded and established would go to show that the learned Appellate Court has committed an error of law while relying on the decision of the Apex Court reported in Ranganath Parmeshwar Panditrao Mali and Another v. Eknath Gajanan Kulkarni and Another, AIR 1996 SC 1290, whereas in subsequent decision reported in Saritoben Somabhai Bhatiya v. State of Gujarat and Ors., (2005) 3 SCC 636, the Apex Court has held that the expression "wife" as per section 125 of the Criminal Procedure Code, 1973 ("the Code") refers to only legally married wife. The Apex Court has further held that provisions of section 125 of the Code are applicable and enforceable whatever be the personal laws of the parties. But section 125 of the Code requires the claimant taking benefit under subsection 1(a) thereof to establish that she is the wife of the person concerned and the said issue cannot be decided only by reference to the law applicable to the parties and, hence, the personal law is relevant for deciding the validity of the marriage and, therefore, cannot be altogether excluded from consideration and, hence, require interference considering the evidence on record.

11. In order to substantiate the argument advanced, Mr. Banerjee has drawn the attention of the court the evidence of the parties chronologically, whereas PW1 has deposed that the defendant Balbila had lived for about 3/4 years with Maniram as mistress without any valid marriage and there was no issue. When Maniram was severely attacked by TB, she deserted him and fled away with one Sanjib Marak in December, 1983 and she never came back. She later on changed her name, "Balbila" and adopted a new name "Mailani" and married Pinalson Momim of Mendipathar. PW2 has deposed that Balbila and Maniram Marak lived together for about 3/4 years without undergoing any lawful marriage. But she left the house of Maniram Marak in 1983 when he was attacked by TB. She never came back to Maniram Marak. She neither came when Maniram Marak died on 9.5.1999 nor she attended the last rites of late Maniram. Balbila thereafter married Pinalson of Mendipathar. PW3 has deposed that Balbila deserted Maniram after 3/4 years and fled away with Sanjib Marak in the month of December 1983 and never came back. PW4 has deposed that Balbila lived with Maniram for few years but when Maniram was attacked by TB, she deserted him and never came back to him. She also did not attend the last rites of Maniram. She married Pinalson Momin. Sister of Maniram, Smt. Arat Marak and other relatives performed the last rites of Maniram after his death. PW5 has deposed that Maniram lived with Balbila for few years, but when he was suffering from TB, she deserted him and his sister Arat Marak looked after him till his death and performed the last rites.

In crossexamination PW1 stated that Jelson Marak is the motherinlaw of Late Maniram. Bresilla is not the daughter of late Maniram. Both the defendant and

Maniram resided together only for 4 years. Bresilla is the daughter of Balbila through other persons. She had further stated that Balbila stayed with Ranjit, who expired thereafter, after living together for 10 years without any marriage. In cross, the PW2 stated that Maniram and Balbila lived together for 15/16 years without any lawful marriage. Bresilla was the adopted daughter. Balbila lived without marriage. PW3 in cross has stated that they lived together for about 13/14 years without marriage. PW4 in crossexamination has stated that they lived together for 10/12 years as per Sangsari custom without marriage and if children are born out of marriage, they are treated as legal heirs as per the Sangsari custom. However, Maniram had no children. When Maniram died in the year 1999, Balbila had already settled at Hatibasa with one Filmoni in the year 1988 and out of the said wedlock with Filmoni, Balbila had three children though he was not sure if Balbila had married Filmoni. In cross PW5 has stated that the late Maniram and Balbila was residing as husband and wife as per Garo custom.

12. Mr. Banerjee learned counsel appearing for the appellant has also drawn the attention of the court to the evidence of defendants in order to substantiate that there was no valid marriage between the defendant Balbila and late Maniram Marak. The relevant portion of 4 DW's and the crossexamination of all DW's have been referred to while arguing the case. The evidence on record would go to show that DW1 (the defendant herein) has deposed that the marriage between her and Maniram Marak was performed as per Sansari Garo custom before 29 years back. The defendant and late Maniram had no issue and they took a girl Bresilla in adoption before 25/26 years and subsequently given marriage to Dhanaram Sangma. There was an enmity between the plaintiff and her family. The daughter of the plaintiff Smt. Bresoni Marak by showing her name as Balbila Marak applied for Succession Certificate on 4.1.2001 and accordingly Succession Certificate was issued in her favour. After, knowing the fact the defendant applied for revocation of succession certificate which was granted and being a legal heir she applied for Succession Certificate being Misc. S/C 75/2002 and accordingly Succession Certificate was issued and the ASEP paid Rs. 50,000 to her. She has denied to have married to one Pinalson Marak and stated that she is the only legal heir of late Maniram Marak. She has further deposed that relation between her and plaintiff was not good. In crossexamination she has admitted that Alvila Marak was married to late Maniram Marak who has deserted him after 2 years and stated that the marriage between her and late Maniram was solemnized according to Sangsari Garo custom. DW 2 in her evidence has stated that she has seen the marriage between the defendant and late Maniram Marak and they lived as husband and wife for about 25 years and she is the legal heir of late Maniram Marak and entitled to the properties of late Maniram Marak. In crossexamination she has admitted that Alvila was married to late Maniram Marak and stayed with him for 3/4 years. Thereafter Alvila deserted late Maniram Marak. She has further stated in crossexamination that out of the marriage, one child was born to Balbila and late Maniram Marak and she attended at the time of delivery of the girl Bresilla

and stayed there during the night as she was "Dhai" and denied the suggestions put to her. DW 3 is the employee of ASEB who worked with late Maniram Marak who deposed that the marriage between late Maniram Marak and Balbila was performed according to Sangsari Garo custom and he was present at the time of marriage and they lived together as wife and husband till the death of late Maniram Marak. He has further deposed that after two (2) years of their marriage they adopted a girl and she was known as Bresilla Marak who was married to Dhaniram Sangma and at present is living with her husband at Hatibasha at Meghalaya. When Maniram Marak was suffering from TB, Smt. Balbila Marak was taking care of late Maniram Marak. The other suggestion of marriage with other person has been denied and she states that Balbila is entitled to inherit the properties left by the deceased late Maniram Marak. In crossexamination, he deposed that Maniram was married to Alvila and she stayed with him. Maniram and Alvila was married as per Christian custom and lived together for about 7/8 years and thereafter Alvila left Maniram, she left behind Balbila as per Sangsari Garo custom though Christian person cannot marry another without divorce. But according to Sangsari Garo custom, one can keep more than one wife and other suggestions put to him have been denied. The defence has further examined DW4 to prove the marriage between late Maniram Marak and Balbila who has deposed that at the time of the marriage between them she was present and the marriage was performed according to Sangsari Garo custom. But after the death of Maniram Marak the plaintiff has driven out the defendant who is now living with her daughter. She has further deposed that after or before the death of Maniram Marak, the defendant has never married any person and no child was born as alleged. The defendant being the legally married wife, she is entitled to the properties left by the deceased late Maniram Marak. In crossexamination she has denied all the suggestions put to her. She has stated that relation between the plaintiff and defendant Baibila was not good.

13. Mr. Banerjee has further referred the principles of Garo Customary law prevalent amongst the Garos. He has drawn the attention of certain words under the Garo customary law which is relevant for the decision of the instant case. The word "chra" means "male relatives". The word "Machong" means "motherhood". The word "mahari" means "male members" consisting of the maternal uncle, sons, daughters, husbands and the other members of same "machong". The word "Nokna" or "aKim" is usually "nokkrons" father's nephew (sister's son). The word "Nokkrom" means in case of an ancestral property "the heiress", who may be the youngest, daughter or the daughter chosen by the parents and approved by the maternal uncles, is the legal owner. The word "Nokma" means "head of a village". The word "Sangsarek" means the "traditional indigenous religion".

14. With reference to the context as mentioned above, Mr. Banerjee would submit that the marriage rule among the Sangsarek (nonChristian) Garos, polygamy is permissible. Polyandry is not known. A man can have more than one

wife even up to seven wives. In case of all marriages consent of the first wife and her "chra" are necessary. If the marriage is without their consent, he forfeits the right to his authority over the property of the first wife. However, during post harvest agricultural activities in a well to do Sangsarek family, the first wife herself approaches her "chra"s to arrange for another wife from "machong" for her husband. In the instant case the evidence on record would show that when Alvila deserted Maniram Marak the first wife, did not approach her "chra"s to arrange for another wife from machong of her husband and consequently thereupon the marriage between the defendant Balbila and late Maniram Marak has no sanctity under Garo Customary law, more so, when the defendant as per her own admission married Maniram without his divorce with Alvila, though the defendant has claimed that late Maniram Marak was later on converted to Christianity prior to one year of his death and, hence, the marriage, if any, cannot be termed as valid marriage which require interference under section 100 of the Code.

15. Mr. Banerjee would further contend that in case of adoption of Bresilla Marak as alleged, it is a custom of Garos that adoption is always done in consultation with the "chra" and relatives. The adopted daughter preferably belongs to the sisters of the adoptive mother or someone from the same motherhood or "ma chong"s. This is done in order to retain within the machong or motherhood which however, does not reflect on the evidence of record and, hence, the adoption of Bresilla Marak cannot be termed as valid adoption as required under the Garo Customary law and, hence, both the issues of marriage and adoption requires interference disentitling them to inherit the properties of late Maniram Marak.

16. Mr. Banerjee would submit drawing the attention of the court that on 12.10.2009 the defendant Balbila Marak died and on her death two legal representatives of late Balbila Marak were substituted whereby it can be presumed that the legal representatives so substituted to which no affidavitinopposition has been filed controverting the substitution of her legal heirs can be presumed that the defendant deserted late Maniram Marak which disentitled her to inherit the properties of late Maniram Marak and the finding arrived at by the learned lower appellate court holding that long duration of living as husband and wife under the same roof can be presumed to be legal and valid marriage relying on the decision of Ranganath Parmeshwar (supra) which cannot be relied upon in the instant case in view of decision in Savitaben (supra) and the judgment under challenge requires interference under section 100 of the Code being perverse.

17. On the contrary, Mr. H. Das, learned counsel appearing for the defendants would contend supporting the judgment delivered by the learned lower appellate court that the defendant Balbila and late Maniram Marak was married according to Sangsarek (Garo custom and lived together for near about 29 years till the death of Maniram Marak and the desertion as alleged by the appellant cannot be proved in view of the evidence of DWs and she is entitled to inherit all the

properties of late Maniram Marak. In support of his contentions he relied on the following decisions viz.,

- (i) Badri Prasad v. Deputy Director of Consolidation and Ors., AIR 1978 SC1557.
- (ii) Smt. Radhamma v. Union of India and Ors., AIR 1998 Kar. 364.
- (iii), Ranganath Parmeshwar Panditroo Mali and Anr. v. Eknath (Gajanan Kulkarni and Anr., AIR 1996 SC 1290.
- (iv) Savitaben Somabhai Bhatiya v. State of Gujarat and Others, (2005) 3 SCC 636.
- (v) M. Yogendra and Ors. v. Leelamma and Ors., (2009) 15 SCC 184.

18. Considered the argument advanced. Perused the evidence on record in detail along with the pleadings of both the parties. Admittedly late Maniram Marak was a Sangsarek (a nonChristian), whereas he married Alvila (a Christian), who deserted him without adhering to the rule of divorce under Garo Customary law. It is also an admitted fact that there was no divorce between late Maniram Marak and Alvila. On desertion by Alvila, the defendant. Balbila came to the life of late Maniram Marak and they lived together as husband and wife without complying the rule of marriage Under the Garo Customary law as would reveal from the materials on record. Similar is the question of adoption of Bresilia Marak. A sangsarek cannot marry a woman who is Christian without being divorced by his first wife and without the consent of "chra"s as indicated above, though the defendant of her own admission deposed that late Maniram Marak converted himself into Christianity without being divorced by his first wife. Therefore the inference can be drawn thereof that there was no valid marriage between them and she cannot be termed as legally married wife in accordance with Garo customary law disentitling her to the properties of late Maniram Marak.

19. Another feature of the case is that as pleaded on behalf of the defendants that Balbila never deserted late Maniram Marak whereas she died on 12.10.2009 and her legal representatives were substituted, wherefrom it becomes clear that the defendant deserted late Maniram Marak and at the time of desertion she had no issue through Maniram and the unimpeachable evidence led by the parties would clearly establish that the defendant deserted late Maniram Marak thereby disentitling her to get the properties of late Maniram Marak and the grounds urged coupled with the evidence on record would establish That the marriage between the defendant Balbila and late Maniram Marak was not valid marriage and the presumption cannot be" drawn when customary law speaks otherwise.

20. Now coming to the decisions cited by me parties, it is noticed that in the case reported in Badri Prasad (supra), the Apex Court held that a man and woman living together for 50 years, strong presumption arises in favour of wedlock and proof as to factum of marriage by examining the priest and other witnesses not necessary and the case reported in Smt. Rodhamma (supra), it has been held that long cohabitation valid marriage. So is the case reported in Kanganath

(supra), whereas, the case reported in Savitaben (supra) speaks otherwise wherein the expression "wife" means only "legally married wife" and the Apex Court has held that personal law is relevant for deciding the validity of the marriage and, therefore, cannot be altogether excluded from consideration. In the instant case parties are governed by Garo Customary law including the marriage, adoption and divorce. The pleaded facts established in the case would clearly indicate that the marriage was not performed according to Garo Customary law coupled with divorce and desertion. In M. Yogendra (supra), the Apex Court at paragraph 20 has held that for the purposes of arriving at a conclusion as to whether a valid marriage has been performed or not the court would be entitled to consider the circumstances thereof. In the case in hand the evidence on record shows that there is no valid marriage between the parties.

21. In view of the pleadings set forth by the parties and the evidence on record as well as the decisions cited, the court has no hesitation to hold that the marriage between late Maniram Marak and the defendant Balbila was not a valid marriage and the defendant deserted late Maniram Marak which disentitles her to claim the properties of late Maniram Marak.

22. In the result, the appeal succeeds. The judgment and decree passed by the learned lower appellate court is set aside and the Judgment and decree passed by the learned trial court is affirmed.

23. Send down the lower court records.