

(2011) 09 CHH CK 0043
In the Chhattisgarh High Court
Case No : Second Appeal No. 356 of 2002

Bhukhan and Others

APPELLANT

Vs

Kaushalya Bai and others

RESPONDENT

Date of Decision : 17-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Marriage Act, 1955 — Section 11, 18, 5, 7
Hindu Succession Act, 1956 — Section 23

Citation : (2011) 2 CGBCLJ 302

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Advocate : Arun Kumar Agrawal, for the Appellant; Sanjay Patel, Advocate for Respondent No. 1, Akhil Agrawal, Advocate for Respondent No. 2/State and None for Respondent Nos. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

T.P. Sharma, J.—By this second appeal u/s 100 of the Civil Procedure Code, 1908 (in short "the Code") appellants have challenged the legality and propriety of judgment and decree of dismissal of appeal dated 9/8/2002 passed by Additional District Judge, Bemetara District Durg (C.G.) in Civil Appeal No. 43-A/2002 affirming the judgment and decreeing the suit for declaration of share of 1/6th of respondent No. 1 over the suit property dated 23/7/1984 passed by Civil Judge Class-2, Bemetara, District Durg in Civil Suit No. 152-A/1984. Present second appeal has been admitted for consideration on the following substantial questions of law:-

A. Whether the finding that Kaushalya Bai is the legally wedded wife recorded by the trial Court is perverse?

B. If yes, whether both the Courts below have erred in decreeing the suit in favour of the plaintiff?

2. As per pleading of the parties, present appellant No. 1 Bhukhan, father of appellants No. 2a to 2e & respondents No. 3 & 4 namely Kushal, one Barnu, appellant No. 4 Janak Bai, & deceased appellant Sankalheen were brothers & sisters and sons & daughters of Prem Singh, original defendant No. 3 Phoolbai was wife of Prem Singh, they were governed Hindu Law and were holding joint property situated at Village Kewanchhhi, Tahsil Bemetara total area 21.02 Acres recorded in different names shown in Schedule-A in plaint and house shown in Schedule-B & C of the plaint. As per claim of respondent No. 1 Kaushalya, she was married to Barnu and she is legally wedded wife of deceased Barnu. After 10 months of death of Barnu, she was filed suit for declaration of 1/4th share over the suit property and partition. Present appellants/defendants had denied the married & lawful marriage of respondent No. 1 with Barnu and pleaded that respondent No. 1 is not a wife, widow & legally wedded wife of Barnu. They have specially pleaded that no marriage of Barnu was solemnized with respondent No. 1 in accordance with Hindu Marriage Act, 1955. They have specifically denied the share and claim of respondent No. 1, they have also pleaded that some of the property was self acquired property of different share holder, respondent No. 1 is not a male member therefore, she is precluded for claiming partition of the house jointly held by other persons in accordance with Section 23 of the Hindu Succession Act, 1956 (in short "the Act of 1956"). They have also claimed that loan of 20,000/- is outstanding against joint family property therefore, he is also liable for payment of such debts. On the basis of her minority, maintainability of suit was also challenged after preliminary examination suit was found maintainable.

3. After providing an opportunity of hearing in evidence, trial Court has decreed the suit to the extent of 1/6th share which was affirmed by the lower appellate Court.

4. Mr. Arun Kumar Agrawal, Advocate for the appellants, Mr. Sanjay Patel, Advocate for the respondent No. 1 & Mr. Akhil Agrawal, P.L. for the respondent No. 2/State are heard.

5. Judgment & decree of both the Courts below and records of both the Courts below are perused.

6. Learned counsel for the appellants vehemently argued that in order to prove the case, respondent No. 1 was under obligation to prove the fact that she was legally wedded wife of Barnu and marriage has been solemnized as per Sections 5 & 7 of the Hindu Marriage Act, 1955 (in short "the Act of 1955"), admittedly, as per evidence of respondent No. 1, she was minor at the time of her alleged marriage therefore, marriage of minor with another minor was not valid under Sub-section 3 of Section 5 of the Act of 1955.

7. Learned counsel for the appellants further argued that appellant's witness Bhukhan Singh & Bhagwani have specially deposed that Barnu was not married to any bride and he was suffering from tuberculosis, no rituals were performed

relating to marriage these facts have not been challenged in cross-examination and are unchallenged therefore, adverse inference would be drawn against respondent No. 1 relating to aforesaid facts.

8. Learned counsel for the appellants also argued that as per evidence of PW3 Chhotu, father of respondent No. 1 was present in the Court and was called for evidence but reasons best known to the respondent No. 1 she has not examined her father Kejau in her support.

9. Learned counsel for the appellants placed reliance in the matter of K.K. Jain and another v. Smt. Masroor Anwar w/o. Anwar Hussain and others in which High Court of Madhya Pradesh has held that witness not cross-examined on any material point deposed to by him in examination-in-chief necessary inference is that adversary does not mean to challenge that version given by the witness.

10. Learned counsel for the appellants further placed reliance in the matter of Mahabirsingh v. Chandravati in which High Court of Madhya Pradesh has held that plaintiff must succeed on the strength of his own title and not on weakness of defense.

11. Learned counsel for the appellants also placed reliance in the matter of Satyapal Purswami v. Radha in which High Court of Madhya Pradesh has held that witness summoned and present left by the party summoning the witness presumption may be drawn had the witness been examined the witness would have deposed against the person calling the witness.

12. On the other hand, learned counsel for the respondent No. 1 opposed the second appeal and argued that respondent No. 1 was under obligation to prove lawful marriage with Barnu, she has succeeded in discharging her burden. By adducing evidence of herself, uncle of Barnu namely PW6 Ganpatram, PW1 Anup has defendants have failed to discharge the burden or even discharge the onus. Even otherwise present appellants have not disputed the factum of marriage, they have disputed its validity on the ground of non-performance of rituals, detail written statement of appellants clearly reveal that they have challenged the allegation made in plaint on the ground that there was no lawful marriage between Barnu & respondent No. 1. She had not made party to sisters of Barnu, her claim relating to partition of house was not maintainable in accordance with Section 23 of the Act of 1956. She has also not pleaded about the debt of Rs. 20,000/- of joint family property and her liability.

13. As per contention and submission of the appellants, at the time of alleged marriage respondent No. 1 & Barnu were minor. As per preliminary evidence, one document vide Ex. P-1, date of birth of present respondent No. 1 is 12/7/1960 and at the time of filing of civil suit with allegation, her husband died 10 months prior to filing such suit, she was aged about 18 years in the year 1978. As per her evidence and of other witnesses, at the time of her marriage her age was probably 12-13 years and was minor.

14. As per Sub-section 3 of Section 5 of the Act of 1955 for marriage between Hindus bridegroom must be age of 18 year and the bride must be age of 15 years. As per law applicable before Amendment Act No. 2 of 1978 came into force on 1/10/1978.

15. The opening word of Section 5 reveals that a marriage may be solemnized between any two Hindus, if following conditions are fulfilled, namely:-

(i). neither party has a spouse living at the time of the marriage;

(ii). at the time of the marriage, neither party -

a. is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

b. though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

c. has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of [twenty-one-years] and the bride, the age of {eighteen years} at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

16. Section 11 of the Act of 1955 provides the provisions of Void marriage which reads as follows:-

11. Void marriages - Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in claused (i), (iv) and (v) of section 5.

17. As per Section 11 of the Act of 1955, marriage between parties below the age of 18 & 15 years are not void marriage. As per Section 18 of the Act of 1955, marriage in contravention of Clause-3 of Sub-section 5 of the Act of 1955 is punishable, Hindu Marriage Act, 1955 does not makes the marriage between parties who were not the age of 18 & 15 years at the time of marriage void only provide punishment for such contravention therefore, I do not find any substance in the contention of learned counsel for the appellants that alleged marriage was void.

18. As regard the proof of marriage is concerned, by filing plaint, respondent No. has specifically pleaded that she was widow of Barnu, she has specifically pleaded in Para-6 that she was residing with Barnu as a wife and was enjoying

the property in dispute. By filing written statement, appellants have substantially challenged allegation made in plaint relating to the fact that respondent No. 1 was widow of Barnu on the ground of lawful need of marriage. They have specially challenged the claim for partition of house u/s 23 of the Act of 1956, pleading of the appellants substantially reveal that they have not challenged the marriage of respondent No. 1 with Barnu but have challenged its legality because as per their claim, same has not been solemnized in accordance with provision of Hindu Law.

19. Respondent No. 1 has examined himself as witness and has categorically deposed that her marriage was solemnized with Barnu, after Gauna she was residing with Barnu, she gave birth one daughter who died subsequently. In her detail cross-examination she has deposed her age and has denied the suggestion that she was never married with Barnu, she has also denied the suggestion that married with Barnu, she has also denied the suggestion that marriage was Chudi marriage. She has categorically deposed that rituals were performed and after Gauna she went to the house of Barnu, she admitted that the birth of her daughter was entered in to Kotwari Panji but she has not filed any copy of document. She has examined PW1 Anup, uncle of appellants in her support, PW2 Kejau, PW3 Chhotu, PW5 Guharam & PW6 Ganpatram. Present appellant has examined DW1 Bhukhan Singh & DW2 Bhagwani who has deposed that Barnu has never married to any bride who was tuberculosis patient, they have deposed rituals necessary for marriage. DW1 Bhukhan Singh i.e. present appellant No. 1 has specially admitted in Para-8 of his cross-examination that he has examined Bhulau in preliminary inquiry proceeding relating to age of respondent No. 1. Appellant's witness Bhulau has very specially deposed that Gauna of Kaushalya was performed at the age of 12-13 years then she went to her matrimonial house, she gave birth to one female child who died after 8-10 days, this evidence is on record which shows that respondent No. 1 was married at the age of 12-13 years, she went to her matrimonial house after Gauna, she gave birth one female child but even this fact has been disputed by present appellants in their detail cross-examination.

20. Definitely; specific question has not asked to DW2 Bhagwani by the respondent No. 1 relating to rituals and marriage of Barnu. DW2 Bhagwani is not a member of plaintiffs and respondents family, he himself has not deposed in his evidence that how he knows the negative facts that Barnu has not married, he has admitted the fact that he is brother-in-law present appellant No. 1 Bhukhan Singh. Present respondent No. 1 has examined herself who was party to marriage and her age was between 12-13 years, at the time of her marriage she was able to understand, her evidence corroborated by 5 other witnesses. By examining herself & 5 witnesses, she had successfully discharged her heavy onus to prove her marriage with Barnu thereafter onus shifted upon the appellants but they have failed to discharge onus inter alia evidence of their witness Bhulau recorded at the time of preliminary inquiry corroborates the evidence of respondent No. 1 relating to her marriage, Gauna, birth of female child & death

of such child.

21. As held in case of Mahabirsingh (Supra), plaintiff is required to proof his case on the strength of his own title and not on weakness of defense. In the present case, respondent No. 1 has successfully discharged her burden and has proved her case. As held in case of K.K. Jain (Supra), non cross-examination of the witnesses on material point gives adverse inference. DW2 Bhagwani himself has not deposed the factum of marriage and rituals on the basis of his knowledge therefore, it was not necessary for respondent to cross-examine him in absence of any material point. As held in case of Satyapal Purswami (Supra), respondent No. 1 has called her father for evidence and she has not examined him adverse inference can be drawn but aforesaid adverse inference would not be sufficient to suffice, the evidence of respondent No. 1 was party to the marriage.

22. Finding of both the Courts below relating to lawful marriage of respondent No. 1 with Barnu is not perverse. By decreeing the suit in favour of the respondent No. 1/plaintiff and dismissing the appeal, both the Courts below have not committed any illegality. Consequently, substantial questions of Law No. A & B is decided as negative. On the basis of finding on substantial questions of law formulated for decision of this second appeal, I do not find any substance in the second appeal, same is deserves to be dismissed. Considering the defense taken by defendants/resent appellants second appeal is dismissed with cost of Rs. 5,000/-. Appellants shall pay cost of Rs. 5.000/- to respondent No. 1.

23. Appellants shall bear their own cost of suit and appeals and also cost of suit and appeals of respondent No. 1.

24. Advocate fees if certified as per schedule or to the extent of certificate which ever less. Decree be drawn up accordingly.