
(2009) 09 CHH CK 0036
In the Chhattisgarh High Court
Case No : Second Appeal No. 767 of 1994

Bola alias Shyam Bai

APPELLANT

Vs

Dularam and Another

RESPONDENT

Date of Decision : 02-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 103(B)
Criminal Procedure Code, 1973 (CrPC) — Section 145
Evidence Act, 1872 — Section 114, 18(2)

Citation : (2010) 1 CGLJ 83

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

Bench : Division Bench

Advocate : K.A. Ansari and R.L. Bajpai, for the Appellant; Shree Kumar Agrawal R.K. Tiwari and Sanjeev Kumar Agrawal, Panel Lawyer for State, for the Respondent

Final Decision : Dismissed

Judgement

T.P. Sharma, J.—This second appeal is directed against the judgment and decree dated 12.9.1994 passed by the 6th Additional District Judge, Bilaspur, in Civil Appeal No. 22A/93 reversing the judgment and decree dated 1.8.83 passed by the 4th Civil Judge Class-II, Bilaspur, in Civil Suit No. 125 A/77 whereby learned 4th Civil Judge Class-II has dismissed the suit for declaration of title and possession filed on behalf of Respondent No. 1 on the basis of sale deed executed by deceased Mohd. Hanif alleged husband of deceased Baisakhiya Bai who was original owner of the suit land, learned lower appellate Court has allowed the appeal and reversed the judgment and decree of the 4th Civil Judge Class-II, Bilaspur and declared Respondent No. 1 as a owner of the suit land and entitled for possession of the suit property.

2. Brief facts lading to filing of this appeal, as claimed by Respondent No. 1 original owner of the disputed property situated at Village Bodri was Baisakhiya Bai who was unmarried. She went Calcutta for her livelihood where she

converted herself into Islam and married with Mohd. Hanif in accordance with the provisions of Mahomedan Law and changed her name as Hamidan Bi. Deceased Defendant Jahani was real brother of Baisakhiya Bai. Baisakhiya Bai @ Hamidan Bi died on 25.7.73. After her death, property was succeeded by her husband Mohd Hanif who sold the property to present Respondent No. 1 Dularam vide registered sale deed dated 26.12.1973 and thereafter Respondent No. 1 came into possession of the suit land. In the year 1975, at the time of cutting of crops, proceeding u/s 145 of the Code of Criminal Procedure, 1973 (in short "the Code") was initiated and receiver was appointed. Finally, Sub Divisional Magistrate, Bilaspur has declared the possession of the present Appellant and her husband Jahani which was affirmed by the revisional Court. After decision of the revisional Court, present Respondent No. 1 has filed the suit against the present Appellant, husband of the Appellant and alleged husband of Baisakhiya Bai @ Hamidan Bi namely i.e. Mohd. Hanif. The present Appellant and her husband have contested the suit and pleaded that Baisakhiya Bai was Hindu woman and had never converted into Islam. Deceased Jahani was her real brother. Marriage between Hindu woman and Muslim man was not legally possible under Mahomedan Law. The property was owned by Baisakhiya Bai. Her name was not Hamidan Bi. After death of Baisakhiya Bai, her property devolved upon her only surviving heir brother Jahani who became owner of the property and was in peaceful possession. He has mutated his name. Proceeding u/s 145 of the Code was initiated and finally possession of Jahani was declared. Any sale or transfer of the land by Mohd. Hanif without any interest is void ab initio. The alleged husband of Baisakhiya Bai @ Hamidan Bi i.e. Mohd. Hanif has also filed separate written statement in which he has pleaded that he has never married with Baisakhiya Bai. She has not converted into Islam, her name was not Hamidan Bi. She was residing with her brother Jahani at Bodri. She was residing in her house. Mohd Hanif was her tenant. After death of Baisakhiya Bai, her last rituals had been performed by her brother Jahani. He has not purchased any land in the name of Baisakhiya Bai. He has not executed sale deed in favour of present Respondent No. 1 Dularam, but at the instance of Dharamdas, brother of Respondent No. 1 with a view to secure the loan borrowed by Mohd.Hanif, Dharmu @ Dharamdas has obtained signature over some documents of Mohd. Hanif Mohd. Hanif has paid the loan but Dharamdas has not returned the documents.

3. On the basis of averments made by the parties, learned 4th Civil Judge Class-II has framed the issues and after affording an opportunity of hearing to the parties, finally dismissed the suit on the ground that Baisakhiya Bai has not converted herself into Islam, Mohd. Hanif was not husband of Baisakhiya Bai and was not competent to execute the sale deed in favour of Respondent No. 1.

4. Judgment and decree was challenged before the lower appellate Court and lower appellate Court has reversed the judgment and decree on the ground that Mohd.Hanif was husband of Baisakhiya Bai @ Hamidan Bi and there was lawful marriage between Baisakhiya Bai @ Hamidan Bi and Mohd. Hanif. After death of

Baisakhiya Bai, property was succeeded by her husband, he was competent to sale the property to Respondent No. 1.

5. For decision of this second appeal, the following substantial questions of law were formulated vide order dated 16.11.98:

1. Whether the lower appellate Court was right in holding that there was no performance of marriage ceremony between Hanif and Basakha in absence of any evidence on record to the contrary?

2. Whether the lower appellate Court was right in drawing the presumption u/s 114 of the Evidence Act that long cohabitation between Mohd. Hanif and Baisakhiya Bai proved that they were married despite the contrary finding recorded by it regarding the marriage ceremony?

3. Whether this Court is entitled to re-examine the evidence u/s 103(B) of the CPC read with Section 100 thereof?

6. I have heard learned Counsel for the parties and perused the judgment and decree impugned and records of the Courts below.

7. Learned Counsel for the Appellant vehemently argued that Baisakhiya Bai (original owner of the land) was Hindu and Mohd. Hanif was Muslim, therefore, no lawful marriage was possible between Hindu woman and Muslim man, but any such marriage may be termed as an irregular marriage which is known as fasid maniage under Mahomedan Law and result of fasid maniage if such fasid marriage is consummated, then the issue from the maniage would be legitimate child, but an irregular marriage though consummated, does not create mutual rights of inheritance between husband and wife, therefore, if it is presumed that Baisakhiya Bai had married with Mohd. Hanif, Mohd. Hanif will not succeed the property left by Baisakhiya Bai. After death of Baisakhiya Bai, her property will be devolved only upon her sole surviving heir brother Jahani who came into possession of the property. He was in possession at the time of initiation of proceeding u/s 145 of the Code and the Sub Divisional Magistrate, Bilaspur has declared his possession. The trial Court has elaborately discussed the evidence and rightly arrived at a finding that there is no lawful marriage and Mohd. Hanif has not succeeded any property left by Baisakhiya Bai, but lower appellate Court has erroneously arrived at a finding that Baisakhiya Bai has converted herself into Islam and she had married with Mohd. Hanif and property left by deceased Baisakhiya Bai devolved upon her sole surviving heir i.e. Mohd. Hanif who has sold the property to Respondent No. 1 Dularam.

8. Learned Counsel placed reliance in the matter of Mohd. Ikram Hussain Vs. State of U.P. and Others, in which while dealing with the issuance of writ of Habeas Corpus for production of Muslim wife filed by the husband, the Apex Court has held that the Court is required to satisfy itself that whether in case of conversion from one sect to another sect, such conversion has taken place and whether alleged woman is lawful wife of the alleged Muslim man. Learned

Counsel further placed reliance in the matter of *Dolgobinda Paricha Vs. Nimai Charan Misra and Others*, in which the Apex Court has held that to prove the factum of relationship on the basis of evidence, the essential requirements of the section are; (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship, on other words, the person must fulfil the condition laid down in the latter part. Learned Counsel also placed reliance in the matter of *Anis Iqbal and Anr. v. State and Ors.* 1996 (2) Civil LJ 131 in which the High Court of Rajasthan has held that without prior conversion of the wife into Islam, any marriage of Hindu wife with Muslim man is not held to be a valid marriage.

9. On the other hand, learned Counsel for Respondent No. 1 supported the judgment and decree impugned and argued that the trial Court has erroneously dismissed the suit of Respondent No. 1, but after taking into consideration the material available on record, learned lower appellate Court has rightly decreed the suit. The evidence adduced on behalf of Respondent No. 1 is sufficient for proving the fact that Baisakhiya Bai has converted herself into Islam and has married with Mohd. Hanif and marriage between Mohd. Hanif and Baisakhiya Bai who subsequently changed her name as Hamidan Bi was lawful marriage and after death of Baisakhiya Bai @ Hamidan Bi, her property devolved upon sole surviving heir i.e. Mohd. Hanif who has sold property to present Respondent No. 1. Learned Counsel further argued that Mohd. Hanif had also filed his written statement and has examined himself before the trial Court and has pleaded and alleged that he has never transferred the land to present Respondent No. 1. Baisakhiya Bai was Hindu woman and never converted into Islam. She was not his wife. At the instance of brother of present Respondent No. 1 with a view to secure the loan borrowed by Mohd. Hanif, Dharamdas, brother of Respondent No. 1, has taken thumb impression over some documents. He has paid the loan, but Dharamdas has not returned the documents to Mohd. Hanif. Learned Counsel also argued that after selling of the property, Mohd. Hanif was not having any interest over the property, therefore, any admission pleaded or deposed by a person having no interest over the property attaches no evidentiary value. Learned Counsel next contended that property was succeeded by Mohd. Hanif who has sold the property to Respondent No. 1 and Respondent No. 1 was in possession of the property, but learned Sub Divisional Magistrate, Bilaspur has wrongly declared the possession of deceased Jahani and the present Appellant.

10. Learned Counsel placed reliance in the matter of *Tulsah and Ors. v. Durghatiya and Ors.* AIR 2008 SCW 1148 in which the Apex Court has held that continuous living of one man with woman after death of husband of woman will give the presumption of not only marriage but valid marriage, and not in a state of concubinage.

11. In order to appreciate the contentions of the parties and to decide the substantial questions of law formulated for decision of this appeal, I have examined documentary and oral evidence and pleadings of the parties. The main dispute in this appeal is that question of conversion of deceased Baisakhiya Bai into Islam and her relation with Mohd. Hanif as Muslim husband and wife. Dularam (PW-1) Respondent No. 1/original Plaintiff has deposed that Baisakhiya Bai was unmarried. She went Calcutta for her livelihood. When she returned from Calcutta, she came with Mohd. Hanif. Baisakhiya Bai used to reside with Mohd. Hanif at Bodri as his wife. Mohd. Hanif has also purchased the land in the name of Baisakhiya Bai. After death of Baisakhiya Bai, Mohd. Hanif has sold the disputed land which was recorded in the name of Baisakhiya Bai to him vide sale deed dated 26.12.1973 (Ex.P/1). Execution of sale deed by Mohd. Hanif was contested by original Respondent Jahani, husband of the present Appellant. Respondent No. 1 has also deposed that he took possession over the land. He cultivated crop in the year 1974, but in the year 1975 husband of the Appellant stalled quarrel and finally his land was attached and also deposed that Mohd. Hanif has also filed an application for mutation of name of the Plaintiff. One ration card was also prepared by the Bodri panchayat in the name of Mohd. Hanif and Baisakhiya Bai. He has filed copy of record of right and panchshala khasra as Exs.P/3 and P/4. He has denied the suggestion that Mohd. Hanif has borrowed loan from his brother Dharamdas and instead of taking receipt of the said loan, he has taken signature over the sale deed.

12. Living together as husband and wife of Baisakhiya Bai and Mohd. Hanif has also been corroborated by Sunder Das (PW-2) and Cheddi Khan (PW-4) and factum of living together of Mohd. Hanif and Baisakhiya Bai has not been denied by the Defendant witnesses Kadam Bai, Parmanand, deceased Defendant Jahani, brother of Baisakhiya Bai, Gajraj and present Appellant Bola Bai. Deceased Mohd. Hanif was also party before the trial Court who has denied the marriage and relation with Baisakhiya Bai and has specifically deposed that he has borrowed loan from brother of the Plaintiff and instead of taking receipt of the loan, Dharamdas has obtained thumb impression over some documents. He has deposed that he has not sold the property of Baisakhiya Bai. He was not competent to sale the property of Baisakhiya Bai. He has denied the suggestion that Baisakhiya Bai has converted into Islam and he had married with Baisakhiya Bai in accordance with the provisions of Mahomedan Law and Baisakhiya Bai has changed her name as Hamidan Bi. Plaintiff and Defendant witnesses have contradicted the version of each other relating to long living of Baisakhiya Bai and Mohd. Hanif as husband and wife.

13. Best witness was available to the parties was Mohd. Hanif alleged husband of Baisakhiya Bai who has deposed that Baisakhiya Bai was not Ms wife. He has not married with Baisakhiya Bai. She has not converted into Islam. He has deposed in para-8 of his cross-examination that without written document of marriage, marriage between man and woman under Mohomedan Law is not possible. He has admitted in para-10 of his cross-examination that name of his wife was

Hamidan Bi. He has admitted in para-11 of his cross-examination that Baisakhiya Bai was also residing at Calcutta. He has also deposed that he was tenant of Jahani. He has admitted his signature over sale deed (Ex.P/1) but has explained that Dharamdas has taken his thumb impression impressing him that same is document of loan transaction. He has also deposed in para-13 of his cross-examination that he has specifically told to Dharamdas that he is not literate. He has filed his written statement in which he has signed as Mohd. Hanif. He has admitted his signature over sale deed at 7 places. He has also admitted his signature upon the document (Ex.P/2). Both the documents reveal that the land was originally held of his wife Baisakhiya Bai and after her death, he has sold the land as sole successor and also signed over application for mutation. Ex. P/3 copy of record of right of 1976 reveals the name of Baisakhiya Bai @ Hamidan Bi, wife of Mohd. Hanif as owner. Copy of panchshala khasra of 1973-74 and 1974-75 (Ex.P/4) also reveals the name of Baisakhiya Bai and Respondent No. 1 as purchaser. Copy of kotwari register (Ex.P/5) reveals that Baisakhiya Bai @ Hamidan Bi died on 25.7.73. Her death was intimated by Mohd. Hanif to kotwar. Sunder Das (PW-2) has deposed that death of Baisakhiya Bai @ Hamidan Bi was intimated to him by Mohd. Hanif and on the basis of such information he made entry. He has also stated that Mohd. Hanif had put his signature over the register relating to entry (Ex.P/5). In detail cross-examination, he has admitted that death of Baisakhiya Bai was intimated by Mohd. Hanif who also told that Baisakhiya Bai was his wife. The material witness Mohd. Hanif has not admitted relationship with Baisakhiya Bai and her conversion from Hinduism to Muslimism and even execution of the alleged sale deed (Ex.P/1). Mohd. Hanif has filed his written statement in which he has specifically pleaded in para-7 of his written statement that Dharamdas has taken his signature over one paper, but Ex. P/1 is not a plain paper. Ex. P/1 is the document written over the stamp paper and it bears signature of Mohd. Hanif at 7 places, including the signature before the Registrar at the time of registration of the documents.

14. Mohd. Hanif has deposed in para-4 in his evidence that Dharmu has taken his thumb impression other some documents after explanation with the document is only related to loan transaction, but any document bearing thumb impression of Mohd. Hanif has not been produced by any of the parties. Alleged sale deed bears his signatures at 7 places which has been admitted by this witness. He is a witness who has executed the alleged sale deed and after execution of the sale deed, he has lost his interest over the property, therefore, any admission even in terms of the explanation of the facts is not admissible in terms of Sub-section (2) of Section 18 of the Evidence Act which reads as follows:

S.18. xxxx xxxx xxxx xxxx

xxxx xxxx xxxx xxxx

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

15. Even otherwise his statement is not trustworthy and credence and has deposed only to help the present Appellant and her husband. In the absence of material evidence of Mohd. Hanif, documentary evidence (Ex.P/1) alleged sale deed executed on 26.12.73 reveals that Mohd. Hanif was husband of deceased Baisakhiya Bai. Record of right of 1976 also reveals the name of Baisakhiya Bai @ Hamidan Bi, wife of Mohd. Hanif, panchshala khasra (Ex.P/4) bears the name of Baisakhiya Bai as purchaser of the property in the year 1973 -74 and in the year 1974-75. The name of Respondent No. 1 is recorded as purchaser of the suit land. Ex. P/5 entry in the kotwari register of 26.7.73. Statement of Kotwar Sunder Das (PW-2) reveals that Mohd. Hanif has informed the death of Baisakhiya Bai @ Hamidan Bi. MohdHanif has informed the kotwar that Baisakhiya Bai @ Hamidan Bi was his wife who died on 25.7.73. The documents Exs.P/2 and P/4 show that Baisakhiya Bai was wife of Mohd. Hanif. Dularam has deposed that Baisakhiya Bai was residing with Mohd.Hanif as his wife. Cheddi Khan (PW-4) has deposed mat Mohd. Hanif and Baisakhiya Bai were residing under the same roof as husband and wife and another wife of Mohd.Hanif was residing separately in Achanakpur with his son. He has admitted in para-8 of his cross-examination that Baisakhiya Bai herself has told him that she is wife of Mohd. Hanif and has performed Chudi marriage. The present Appellant has examined Jahani, husband of the present Appellant and herself who have deposed that Baisakhiya Bai was never married to MohdHanif. They have deposed that they have performed last rituals of Baisakhiya Bai according to their custom. Jahani has admitted in para-9 of his cross-examination that he had put his thumb impression over the documents, but at that time he was not known that the document was sale deed.

16. Without any knowledge, thumb impression or signature over the documents is not normally possible. If Jahani was not having any knowledge of the documents, then it was not expected that he will put his thumb impression over any document and that too before the Registrar at the Registrar office where normally the documents of alienation and other documents are registered. Jahani has specifically admitted that at the time of last rituals of Baisakhiya Bai, their relatives of the village had not come. Present Appellant Bola Bai has admitted in her cross-examination that Baisakhiya Bai was residing at Bhatapara and Mohd. Hanif was also residing in one room in the same premises as a tenant. She has deposed that husband of Baisakhiya Bai was died earlier. Defendant witness Gajraj has admitted in para-4 of his evidence that after the death of Baisakhiya Bai, Mohd.Hanif has entered into possession of the house of Baisakhiya Bai and Mohd.Hanif has also sold the property. He has admitted in para-7 of his cross-examination that caste members of Jahani had not attended last rituals of Baisakhiya Bai.

17. Evidence adduced on behalf of both the parties reveal that Mohd.Hanif was residing with Baisakhiya Bai and after death of Baisakhiya Bai, he has entered into possession of the suit house and has sold the property. Jahani was attesting witness of sale deed. The factum of execution of sale deed and attestation by

Jahani is supported by documents. Oral and documentary evidence shows that Mohd. Hanif and Baisakhiya Bai were living together as husband and wife since longtime.

18. As regards the conversion of Baisakhiya Bai into Islam is concerned, conversion is permissible under the Mahomedan Law. Section 259 of the Mahomedan Law provides marriage between different religions which reads as under:

259. Difference of religion.--(1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a Kitabia, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular.

Section 259 of the Mahomedan Law provides that any marriage of Muslim male with an idolatress or a fire-worshipper is not void, but merely irregular marriage. Likewise Section 267 of the Mahomedan Law provides the effect of irregular (fasid) marriage. According to Section 267 of the Mahomedan Law, an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife. Section 268 of the Mahomedan Law provides that marriage will be presumed, in the absence of direct proof, from (a) prolonged and continual cohabitation as husband and wife.

19. In the matter of Anish (supra), the High Court of Rajasthan has held that in the absence of proof of conversion into Islam, the marriage was not held to be a valid marriage. Only by putting an additional muslim name as alias. In the matter of Mohd." (supra), the Apex Court has held that for the issuance of Habeas Corpus at least party was required to establish that there was marriage between the parties. In the matter of Dolgobinda (supra), the Apex Court has held that opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question.

20. For drawing any inference of marriage between Hinduism and Muslimism, there must be some evidence to show the conversion and long cohabitation as husband and wife likewise opinion must be well founded.

21. In the present case, long cohabitation as husband and wife is not disputed. Previously Baisakhiya Bai was Hindu. There is no direct evidence to prove the conversion of Baisakhiya Bai into Islam.

22. In the matter of Tulsa (supra), the Apex Court has held that continues living of man and woman after death of husband or wife is sufficient for presumption as to marriage. The Apex Court has also held that if man and woman are proved to live together as husband and wife, the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years.

23. If we see the conduct of the parties that the present Appellant and her

husband have not admitted the fact that Mohd. Hanif and deceased Baisakhiya Bai living together for long time which has been otherwise established by the other witnesses. Mohd. Hanif has also denied the relationship and even execution of the document by putting his signature, but when document was shown to him, he has admitted 7 signatures over the documents including signature before the Registrar shows that he has tried to conceal the truth, but otherwise established by other witnesses. If Mohd. Hanif was not owner of the property, then there was no occasion to execute sale deed or any deed of the property owned by Baisakhiya Bai. Thumb impression of Jahani upon the aforesaid sale deed shows that purchaser has taken extra precaution with the view to avoid future dispute at the instance of Jahani. Jahani has admitted thumb impression but has deposed that without knowing the document and the fact that he has put his thumb impression shows Jahani has also concealed the material fact and truth.

24. Taking into consideration the statements of Respondent No. 1 and his witnesses and especially the statement of Mohd. Hanif, the only statement of the Plaintiff and his witnesses and documentary evidence are remained for consideration which clearly shows that Baisakhiya Bai @ Hamidan Bi was wife of Mohd. Hanif and they were living together as husband and wife since long time is sufficient for drawing presumption of valid marriage between them.

25. For the foregoing reasons, on the basis of presumption of alleged marriage, substantial question of law No. 1 is decided as negative, substantial question of law No. 2 is decided as positive and substantial question of law No. 3 is decided as negative.

26. As a result of decision of the aforesaid substantial questions of law, the finding of the lower appellate Court does not suffer from any illegality and as a result of finding of the substantial questions of law, the appeal is liable to be dismissed and it is hereby dismissed.

27. Parties shall bear their own costs.

28. Advocate fee as per schedule.

29. Decree be drawn up accordingly.