

(1975) 02 OHC CK 0017
In the Orissa High Court
Case No : Second Appeal No. 379 of 1971

Fakir ' Fakir Charan Naik

APPELLANT

Vs

Nakhi Dei and Others

RESPONDENT

Date of Decision : 14-02-1975

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 18

Citation : (1975) 41 CLT 324

Hon'ble Judges : N.K. Das, J

Bench : Single Bench

Advocate : S.C. Sahoo, for the Appellant; R.S. Parida, for the Respondent

Final Decision : Allowed

Judgement

N.K. Das, J.—This appeal is directed by Defendant No. 1 against the reversal judgment of the Additional District Judge, Cut tack in a suit for recovery of arrear maintenance as well as for future maintenance along with a prayer for making future maintenance a charge on the lands described in the schedule of the plaint. Admitted position is that Defendant No. 1 is the son of Defendant No. 2 and Petitioner is the married wife of Defendant No. 1.

2. Plaintiff's case is that she married Defendant No. 1 in 1958. Defendants 1 and 2 were not well dispose of towards the Petitioner. In 1967, Petitioner suffered from dysentery, but they did not make arrangement for her treatment. After recovery, Petitioner was taken to her father's house but when her father wanted to send her back to the house of Defendants 1 and 2, they turned a deaf ear to the request of her father. Subsequently, Defendant No. 1 has married Defendant No. 3 on 17-4-1968. Accordingly, Petitioner claims arrear maintenance as well as future maintenance on the ground of ill-treatment to the Petitioner and on the ground of second marriage of Defendant No. 1 with Defendant No. 3. Plaintiff has claimed arrear maintenance from July, 1967 to April, 1968 at the rate of Rs. 70/- per month along with future maintenance.

3. Defendant No. 3 was all along ex parte. Defendants 1 and 2 contested the suit. In their written statement they denied the fact of marriage of Defendant No. 1 with Defendant No. 3 as well as the allegation of ill-treatment. It is contended by these Defendants that the Petitioner does not want to live in their house and the intention of the father of the Petitioner is that Defendant No. 1 should live at Petitioner's father's house.

4. The trial Court dismissed the suit on the ground that the allegation of ill-treatment has not been established and also the allegation of second marriage is not true. It has further been held that the Petitioner has failed to establish that the Defendant No. 1 kept Defendant No. 3 as a concubine in his house.

5. Plaintiff appealed against this decision and the appellate Court has upheld the finding of the trial Court that the allegation of ill-treatment has not been established but has come to the conclusion that Defendant No. 1 has married Defendant No. 3 for the second time. He has thus allowed arrear maintenance from 18-4.1968 at the rate of Rs. 17.50 paise per month till the date of the judgment and future maintenance at the rate of Rs. 35/-per month along with Rs. 5/- per month for separate residence.

6. In the Second Appeal it is contended that according to Section 18 of the Hindu Adoption and "Maintenance Act the wife is entitled to separate residence and maintenance from the husband if the husband has any other wife having or if he keeps a concubine in the same house in which his wife is living or habitually residing with a concubine elsewhere. It is argued that both the conditions have not been established by the Petitioner and, as such, she is not entitled to any relief and the finding of the appellate Court setting aside the findings of the trial Court is not justified In as much as the decision of the trial Court is not unsound, perverse or not based on materials on record, nor does it suffer from inconsistency or inaccuracy.

7. As regards the allegation of ill-treatment to Petitioner, both the Courts have concurrently come to the conclusion that Petitioner has signally failed to establish ill-treatment by Defendant No. 1. Plaintiff herself has not complained of any ill-treatment by Defendant No. 1 to her in her statement in Court. She has only stated that her mother-in-law quarreled with her. Though another allegation was made that she suffered from dysentery and no treatment was arranged for her in the house of Defendant No. 1, yet, the evidence to that effect is also not satisfactory. To that extent the concurrent findings are final.

8. As regards second marriage of Defendant No. 1 with Defendant No. 1, the trial Court after discussing the evidence of witnesses came to the conclusion that the story of second marriage has not been proved. The trial Court discussed the evidence as well as the infirmities and inconsistencies in the evidence of the witnesses for both sides in coming to the above conclusion. The appellate Court, on the other hand, has found that the allegation of second marriage has been established by the Petitioner. The reasonings given by the learned appellate

Judge appear to be based on surmises and not on proper materials on record. The person who is stated to have acted as priest in the marriage by the witnesses for the Petitioner has been examined as d.w. 2 who denies such marriage. The person who is said to have acted as astrologer has not been examined and another person has been examined who is said to have acted as the astrologer. He also not able to give any detail of the family of Defendant No. 3 even though he admits that papers of the detail of the family are maintained. P.w. 2 who is said to have attended the marriage function has frankly admitted that he was not able to say who acted as the Kanya Karta in the marriage. I may also add here that none of the relations or the caste people of Defendant No. 1 or of the Petitioner have been examined to prove the marriage. It may also be mentioned that neither in the plaint nor in the evidence, the identity of Defendant No. 3 from her father's side was disclosed. The service of such notice of Defendant No. 3. was also made by affixture. The onus of proof of second marriage is on the Petitioner. Plaintiff has signally failed to establish the second marriage of Defendant No. 1. The appellate Court has not taken into consideration these salient features and he has brushed aside the findings of the trial Court only on surmises. He has consulted one almanac published by the Kohinoor Press and found there is a lagna of marriage on that day even though the evidence of p.w. 3 shows that there was no lagna on that day. He accepted the evidence of p.w. 2 on the ground that his denial of acting as priest in the marriage cannot take away the effect of statement of p.w. 2. This finding is undoubtedly erroneous. The appellate Court should have come to its conclusion on reasonable grounds based on materials on record. On the other hand, the appellate Court has assessed the evidence on extraneous grounds not borne out by the record. It is now well settled that the appellate Court will not interfere with the finding of the trial Court unless it is unsound, perverse or based on grounds which are unsatisfactory by reason of material inconsistencies or inaccuracies. The appellate Court should not lightly interfere with it merely because it takes a different view of the evidence Baburao Bagaji Karemore and Others Vs. Govind and Others, .

9. In discharging the onus in the present case, Petitioner was to establish the identity of Defendant No. 3 from her father's side and the actual proof of marriage with all the legal formalities. None of the relatives of the Petitioner or Defendant No. 1 have been examined. But the Petitioner has failed to prove these aspects of the case. I have gone through the evidence of the witnesses examined on behalf of the Petitioner and I come to the conclusion that the findings of the trial Court are justified. The appellate Court has based its finding only on inferences and has not taken into consideration the salient feature to be established by the Petitioner relating to establishing the marriage. In view of this position, the decision of the appellate Court on this point cannot be said to be according to law.

10 If the marriage is not established, the question that arises is, if Defendant no 3 was kept as a concubine by Defendant No. 1 in his house or he was living with

Defendant No. 3 somewhere else. There is no assertion of to this fact in the pleading nor there is any evidence to the effect if Defendant No. 1 has kept Defendant No. 3 in his house or is living with her at some other place. In absence of any such allegation or proof, it must be held that the Petitioner has failed to establish this aspect of the case.

In view of the aforesaid finding I come to the conclusion that the Petitioner has failed to establish the case of ill-treatment or second marriage or that the fact that the Defendant No. 1 is living in his house with Defendant No. 3 as a concubine or he is living elsewhere with Defendant No. 3. Therefore, the Petitioner is not entitled to the right of maintenance and separate residence.

11. As it has been held that the Petitioner is not entitled to maintenance, the question of finding as to quantum of maintenance does not arise nor the same was pressed in the second appeal. Accordingly, the decision of the first appellate Court is set aside and that of the trial Court is restored.

12. In the result, therefore, the appeal succeeds and is allowed. In view of the relationship of the patties, each party to bear its own costs throughout.