

(1974) 04 GAU CK 0004
In the Gauhati High Court
Case No : First Appeal No. 1 of 1971

Gurumayum Sanahanbi Devi and others	APPELLANT
Vs	
Gurumavum Ongbi Ibempishak Devi and others	RESPONDENT

Date of Decision : 09-04-1974

Acts Referred:

Transfer of Property Act, 1882 — Section 1, 41

Citation : AIR 1975 Guw 56

Hon'ble Judges : Baharul Islam, J

Bench : Single Bench

Advocate : B.B. Sen, for the Appellant; N. Nabakumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Baharul Islam, J.—This appeal is by the defendants and is from the judgment and decree passed by the Second Subordinate Judge, Manipur, in Title Suit No. 33 of 1963.

2. The plaintiffs are two in number plaintiff No. 1 is the mother of plaintiff No. 2. Their case is that Mani Sharma, husband of plaintiff No. 1 died on 19-9-1963 leaving behind his widow, plaintiff No. 1, and two daughters-plaintiff No. 2 by plaintiff no 1 and defendant No. 1 by is pre deceased first wife. Mam Sarma left the suit land described in the schedule of the plaint. He became insane at the age of 40 and defendant No. 1 and her husband, defendant No. 2, were appointed guardians of the person and property of Mani Sharma after the death of Mani Sharma, defendant No. 1 in collusion with her husband defendant No. 2 sold away about 14 bighas of land to defendant No. 3 on 25-9-1963 without the knowledge and consent of the plaintiff's. The plaintiffs demanded of defendant No. 1 partition of the land. As she refused it, the plaintiffs filed the present suit for partition. The plaintiffs claim that on the date of the death of Mani Sharma they and defendant No. 1 are entitled to equal shares in the suit land.

3. The defendants have filed joint written statement. They admit that Mani

Sharma died on 19-9-1963: they also admit that plaintiff No. 1 was the wife of Mani Sharma, but they ever that; she had been divorced by Mani Sharma about 40 years ago; they deny that plaintiff No. 2 is the daughter of Mani Sharma They further plead that defendant No. 8 is a bona fide purchaser of the land invaluable consideration. They claim that on the death of Mani Sharma, the defendant No. 1 was the sole heir to the land in suit. It is also averred that the sale was on account of a legal necessity to meet the expenditure of the Sharadh ceremony of Mani Sharma.

4. The learned Subordinate Judge held that the plaintiff No. 1 had not been divorced by Mani Sharma and plaintiff No. 2 was the daughter of late Mani Sharma. He also held that defendant No. 3 failed to prove that he was a bona fide purchaser of the land and that the defendants have failed to prove that the sale was for legal necessity. Hence this appeal.

5. The defendants having admitted that plaintiff No. 1 was the legal wife of late Mani Sharma it is their burden to prove that she had been divorced by her husband during his lifetime and that plaintiff No. 2 was born out of wed-lock.

6. In support of their case, the defendants have examined themselves. D. W. 1 is defendant No. 3; D. W.2 is defendant No. 2 and D. W. 3 is defendant No. 1. The evidence of defendants Nos. 1 and 2 is the only evidence to prove the alleged divorce and illegitimacy of plaintiff No. 2.

7. Defendant No. 2 (D. W. 2) deposes that the plaintiff No. 1 was divorced by Mani Sharma before he married defendant No. 1; that he married defendant No. 1 about 1952-53 and that Mani Sharma became insane about 30 years ago. Plaintiff No. 2 is about 40 years old. Therefore, if the defendants' case is true plaintiff No. 1 must have been divorced long before his marriage. He was then an outsider to the family of Mani Sharma. He has not disclosed the source of his knowledge of the alleged divorce. His evidence is of a make-believe nature and cannot be relied upon. Defendant No. 1 (D. W. 3) has not deposed that plaintiff No. 1 was divorced by her father. D. W. 1 says that her mother died eleven days after her birth and she was taken away and brought up by Mani Sharma's sister at her husband's house. This evidence of D. W. 1 has not been challenged. Plaintiff No. 1 was married after the death of defendant No. 1st mother. Defendant No. 1 was not living in the house of her father. She however, deposes in her evidence. "He (her father) left no widow at the time of his death." Great emphasis has been laid on this sentence by the learned counsel who submits that the only inference from that sentence is that plaintiff No. 1 had been divorced. In my opinion, that inference cannot be drawn as this is not the only possible inference; another possible inference is that plaintiff No. 1 second wife of Mani Sharma had been dead. Learned counsel has not attempted to explain as to what prevented defendant No. 1 from saying that plaintiff No. 1 had been divorced by her father. There is no other evidence in support of the defendants' contention that plaintiff No. 1 had been divorced by Mani Sharma during his lifetime. The defendants have hopelessly failed to prove that plaintiff No. 1 had

been divorced by Mani Sharma.

8. On the contrary, although it was not necessary, the plaintiff has adduced cogent evidence to show that plaintiff No. 1 continued to be the wife of Mani Sharma till his death. P. W. 1, Pishak Sharma and P. W. 2 Gouragopal Sharma are first cousins of Mani Sharma, and Pishak Sharma is the oldest living male member in the family. The evidence of P. W. 1 is that Mani Sharma became insane about 30 years ago and that his insanity continued till his death. Before his insanity, he married the mother of defendant No. 1. Within 11 days of the birth of defendant No. 1 his wife died. Then he married plaintiff No. 1 and that plaintiff No. 2 was born "not out of wed-lock." P. W. 2 corroborates P. W. 1 on the birth of plaintiff No. 2 in the wed-lock of plaintiff No. 1 and Mani Sharma. He categorically says that, "Ibempishak Devi was never divorced by Mani Sharma." Great reliance has been taken by the appellant on the following sentence in the evidence-in cross-examination of P. W. 2: "It is correct that Ketuki was divorced about, 40 years ago by Mani Sharma." Apparently, this is a mistake. Ketuki is admittedly the daughter of the wife of Mani Sharma; it is nobody's case that Ketuki had ever been married to Mani Sharma, even if she was not his daughter. Therefore, the question of divorce of Ketuki by Mani Sharma does not arise. There is no reason to disbelieve P. Ws. 1 and 2 who are the first cousins of Mani Sharma. Nothing has been brought out in the cross-examination as to why they would support the case of a divorce of Mani Sharma in preference to their niece, defendant No. 1. In addition to the above, there is another circumstance supporting the case of the plaintiffs that plaintiff No. 1 is the widow of Mani Sharma. With regard to the performance of the shraddha ceremony by defendant No. 1 and plaintiff No. 1, a dispute arose, and that dispute went to the local Brahma Sabha. in the shape of a case (Misc. Case No, 13 of 1963) at the instance of the plaintiffs; and thereafter to the Administrator of the Palace of the Maharaja in the shape of an appeal as per Parwara No. 9 (P) of 1963. P W 3, clerk in the office of the Brahma Sabha since 1934, proves Ext. A/1 which is a certified copy of the order of the Brahma Sabha in the aforesaid case No. 13 of 1963 dated 25-9-1963. The order, inter alia, lays down: "Hence the atma (soul) of the deceased will be in peace if the parties jointly perform the karma (shraddha ceremony) at the residence of the deceased. If it is not agreeable to both the parties there will be no restriction to both the parties in their performing the karma separately according to their own will. "Both the parties" means plaintiff No. 1 and defendant No. 1. Ext. A/2 is the certified copy of the appellate order that has been proved by P. W. 4. The order, inter alia, provides, "regarding place for performing the shraddha ceremony, it is ordered that the performance be done at the ancestral residence of late Mani Sharma as late Mani Sharma has his own house and also as his last wife Gurumavum. Ongbi Ibempishak Devi (Plaintiff No. 1) urges to perform the said ceremony at the ancestral residence of her husband. So it will be better on the part of Aribam Sanahanbi Devi (defendant No. 1). daughter of late Mani Sharma. if she also participates in the said ceremony which is going to be performed by her mother at the ancestral

residence of late Mani Sharma. "These two documents, Exts. A/1 and A/2, show that plaintiff No. 1 is the widow of Mani Sharma. The evidence of P. Ws. 1 and 2 and Exts. A/1 and A/2 conclusively prove that plaintiff No. 1 had not been divorced by, but was the widow of Mani Sharma, It must, therefore, be held that plaintiff No. 2 was born in the wed-lock of Mani Sharma and plaintiff No. 1.

9. The only question that remains for consideration is whether defendant No. 3 is the bona fide purchaser of the "land transferred. His material evidence is that he does not know if Mani Sharma left any other heirs besides defendant No. 1 at the time of his death. He further, admits that he did not make any enquiry as to whether Mani Sharma had other legal heirs when he made the purchase. He further admits that at the time of his purchase, the land was still standing in the name of Mani Sharma.

9-A. Section 41 of the Transfer of Property Act protects a bona fide purchaser from ostensible owner of property. It provides.

Where, with the consent, express or "implied, of the persons interested in immovable property, a person is the ostensible Owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: Provided that the transferee, after taking reasonable care to ascertain that the transferor had Power to make the transfer has acted in good faith.

Before the purchase is protected u/s 41 of the Act, the following conditions among others, are to be fulfilled, viz. (1) that the transferor is the ostensible owner of the land in question and (2) that the transferee acted in good faith taking reasonable care to ascertain that the transferor had power to transfer. These two conditions have not been fulfilled. The transferor, viz., defendant No. 1 was not the ostensible owner as the land was still standing in the name of the late Mani Sharma. It was, therefore, the duty of defendant No. 3 to ascertain as to who were the heirs left by Mani Sharma. Admittedly, he did not make any enquiry in her regard. The above conditions not having been fulfilled, defendant No. 3 cannot be protected u/s 41 of the Transfer of Property Act.

10. The plaintiffs and defendant No. 1 as heirs in Class I of the Schedule of the Hindu Succession Act, 1956 under Rules 1 and 2 of Section 1 of the said Act (sic), they are entitled to equal shares. The learned Court below rightly decreed the suit. Its judgment and decree are upheld. The appeal fails and is dismissed with costs.