

(2009) 08 CHH CK 0056
In the Chhattisgarh High Court

Nand Lal Khare and Vishnoo Khare	Vs	APPELLANT
Rajendra Kumar Khare and Others		RESPONDENT

Date of Decision : 03-08-2009

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 8
Hindu Marriage Act, 1955 — Section 11, 12, 16, 2, 5

Citation : (2009) 3 CGLJ 381 : (2009) 4 MPJR 67

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

Bench : Division Bench

Judgement

T.P. Sharma, J.

This second appeal is directed against the judgment & decree dated 17-7-2002 passed by the 5th Additional District Judge, Bilaspur in Civil Appeal No. 13-A/2001 reversing the judgment & decree of dismissal of suit and decreeing the suit for partition by the judgment & decree dated 6-10-98 passed by the 2nd Civil Judge Class-II, Bilaspur in Civil Suit No. 24- A/90, whereby learned Civil Judge Class-II has dismissed the civil suit filed on behalf of respondent No. 1/ plaintiff for partition and possession of suit land on the basis of succession.

Judgment & decree impugned is challenged on the ground that respondent No. 1 herein is son of deceased Narayan Khare, brother of the present appellants, but he is not legitimate or illegitimate son entitled for succession of share left by deceased Narayan Khare and the lower appellate Court has committed illegality by decreeing the suit.

Brief facts giving rise to filing of the present appeal are that the property in dispute was owned by one Shivaji Rao & his wife, after the death of Shivaji Rao & his wife, the property devolved upon their sons namely, the present appellants Nand Lal, Vishnu and deceased Narayan Khare. Deceased Narayan Khare solemnized marriage with a Muslim woman who changed her name as Mst. Sharda Khare, respondent No. 2 herein. After the death of Narayan Khare, dispute arose about succession of property left by Narayan Khare and finally, suit

for partition was filed by respondent No. 1 herein against the present appellants & respondents No. 2 to 7 which was dismissed by the trial Court and subsequently, decreed by the lower appellate Court. The present appellants/defendants No. 1 & 2 have contested the suit and pleaded that respondent No. 2 Smt. Sharda Khare was not legally wedded wife of Narayan Khare, she was Muslim woman and no lawful marriage was possible between Narayan Khare & Sharda Khare. Respondents No. 1 and 3 to 7 herein are sons & daughters of respondent No. 2 Sharda Khare, but they are not entitled for any share upon the property of Narayan Khare.

On the basis of averments made by the parties, issues were framed and after affording opportunity of hearing, the suit was dismissed on the ground that respondent No. 1 herein or other respondents are not heirs of deceased Narayan Khare under the Hindu Succession Act, 1956 (for short 'the Act of 1956').

Judgment & decree of the trial Court was challenged by respondent No. 1 herein and vide judgment & decree impugned, learned Additional District Judge after holding that Rajendra Kumar Khare is successor of deceased Narayan Khare, decreed the suit for partition and entitlement of his 1/3rd share over the property.

The present second appeal is admitted on the following substantial questions of law:

- (1) Whether the suit property was the self acquired property of Shivaji Rao Khare?
- (2) Whether it is established on record that the plaintiff was the illegitimate child of Late Narayan Rao?

If so or even otherwise also, whether he was entitled to receive partition in the share to be allotted to his father?

I have heard learned Counsel for the parties and perused the impugned judgment as also the record of the Courts below.

Learned Counsel for the appellants argued that evidence adduced on behalf of the parties are sufficient to prove the fact that the suit property was self-acquired property of deceased Shivaji Rao and respondent No. 1 herein/original plaintiff Rajendra Kumar Khare is his son born out of the wedlock of deceased Narayan Khare & respondent No. 2 Smt. Sharda Khare, who was originally a Muslim lady. But according to the Act of 1956 and the Hindu Marriage Act, 1955 (for short 'the Act of 1955') lawful marriage between Hindu & Muslim was not possible and in absence of such lawful marriage, the son born out of the void marriage is not entitled for any share left by the father. Judgment & decree impugned is not sustainable under the law. Learned Counsel placed reliance in the matter of Gullipilli Sowria Raj v. Bandaru Pavani alias Gullipilli Pavani in which the Apex Court has held that marriage between a Hindu and other professing other religion is null and void.

On the other hand, learned Counsel for the respondents argued that marriage between a Hindu male and Muslim female was permissible under the law and the child born out of the wedlock of Hindu male & Muslim female may be illegitimate child but entitled for succession u/s 16 of the Act of 1955 and has right over the property left by his deceased father. Learned Counsel further submitted that the lower appellate Court has rightly decreed the suit. Learned counsel placed reliance in the matter of Nera Bai w/o Bramh Sahu and Ors. v. Pusia Bai w/o Bittu Sahu in which the High Court of M.P. has held that illegitimate child in view of Section 16 of the Act of 1955 shall be deemed to be legitimate for all practical purposes and will get share in father's property in accordance with Section 8 of the Act of 1956.

In order to appreciate the contentions of the parties, I have examined the material required to decide the substantial issue formulated for just decision of the case.

It is not disputed that the property was originally owned by Shivaji Rao who died leaving his three sons namely, Narayan Khare (since deceased) - father of respondent No. 1, Nandlal Khare & Vishnu Khare (the present appellants). Sharda Bai was originally a Muslim woman living with deceased Narayan Khare. Respondent No. 1 herein is born out of the physical relations between Narayan Khare & Sharda Khare. After the death of Shivaji Rao, the property left by him, which was his self-acquired property, devolved upon his three sons namely, Nandlal Khare, Vishnu Khare & Narayan Khare (since deceased). The only question for decision of this case is whether respondent No. 1 Rajendra Kumar Khare, who is legitimate or illegitimate son of Narayan Khare, is entitled for succession under the Act of 1956.

Evidence adduced on behalf of the parties are sufficient to show that the alleged Smt. Sharda Khare was originally a Muslim lady living with Narayan Khare and respondent No. 1 herein was born as a result of physical relations between Narayan Khare & Smt. Sharda Khare.

Concurrent findings of the Court below reveal that learned Civil Judge has arrived at a finding relating to marriage that the marriage between Narayan Khare & Sharda Khare was not lawful and does not confer the status of legally wedded husband & wife. Rajendra Kumar Khare is not entitled for any share in the property left by Shivaji Rao. Learned appellate Court has not recorded any finding relating to legitimacy or illegitimacy of respondent No. 1 Rajendra Kumar Khare and has decreed the suit.

In the matter of Gullipilli (supra), the Apex Court has held that marriage between a Hindu and other professing other religion is null and void. In that case, the marriage was between a Hindu male and Christian female. Para 21 of the said judgment reads thus,

21. Section 5 of the Act thereafter also makes it clear that a marriage may be solemnized between any two Hindus if the conditions contained in the said

Section were fulfilled. The usage of the expression `may' in the opening line of the Section, in our view, does not make the provision of Section 5 optional. On the other hand, it in positive terms, indicates that a marriage can be solemnized between two Hindus if the conditions indicated were fulfilled. In other words, in the event the conditions remain unfulfilled, a marriage between two Hindus could not be solemnized. The expression `may' used in the opening words of Section 5 is not directory, as has been sought to be argued, but mandatory and non-fulfillment thereof would not permit a marriage under the Act between two Hindus. Section 7 of the 1955 Act is to be read along with Section 5 in that a Hindu marriage, as understood u/s 5, could be solemnized according to the ceremonies indicated therein.

In the case of Gullipilli (supra), even after marriage both the parties continued their Hinduism & Christianity that is to say woman in that case was never converted from Christianity to Hinduism.

Hindu law applies to whom is enumerated in para 6 of Chapter I of Mulla's Principles of Hindu Law (Fourteenth Edition), which reads as follows:

(i) not only to Hindus by birth, but also to Hindus by religion, i.e. converts to Hinduism;

(ii) to illegitimate children where both parents are Hindus;

(iii) to illegitimate children where the father is a Christian and the mother is a Hindu, and the children are brought up as Hindus. But the Hindu law of coparcenary, which contemplates the father as the head of the family and the sons as coparceners by birth with rights of survivorship, cannot from the very nature of the case apply to such children;

(iv) to Jains, Buddhists in India, Sikhs and Nambudri Brahmins except so far as such law is varied by custom and to Lingayat who are considered Sudras;

(v) to a Hindu by birth who, having renounced Hinduism has reverted to it after performing the religious rites of expiation and repentance. Or even without a formal ritual of reconversion when he was recognized as a Hindu by his community;

(vi) to sons of Hindu dancing girls of the Naik caste converted to Mahomedanism, where the sons are taken into the family of the Hindu grandparents and are brought up as Hindus;

(vii) to Brahmos; to Arya Samajists; and to Santhals of Chota Nagpur and also to Santhals of Manbhum except so far as it is not varied by customs; and

(viii) to Hindus who made a declaration that they were not Hindus for the purpose of the Special Marriage Act, 1872.

In the matter of Commissioner of Wealth Tax, Madras and Ors. v. Late R. Sridharan by L.Rs. the Apex Court has held that son born of parents married

under the Special Marriage Act, 1954 between Hindu male & Christian female, and Muslim woman converted herself into Hindu is a valid marriage under the Special Marriage Act, 1954 and the son born out of such wedlock will inherit the property of his Hindu father.

In the present case, marriage between Narayan Khare & Sharda Khare was not solemnized under the Special Marriage Act, 1954 (for short 'the Act of 1954') or not solemnized after conversion in accordance with Section 7 of the Act of 1955. In absence of any marriage under the Act of 1954 or in accordance with Section 7 of the Act of 1955, Narayan Khare & Sharda Khare were not legally wedded Hindu wife & husband and such alleged marriage was even in violation of Section 2(1)(c) of the Act of 1955 which reads as follows:

2. Application of Act.-

(1) This Act applies-

(a) ***** **

(b) ***** **

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

The respondents have claimed that illegitimate child of a Hindu is also entitled to inherit the property in accordance with Section 16 of the Act of 1955 which reads as follows:

16. Legitimacy of children of void and voidable marriages.-(1) Notwithstanding that a marriage is null and void u/s 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage u/s 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in Sub-section (1) of Sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity u/s 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such

rights by reason of his not being the legitimate child of his parents.

Sub-section (1) of Section 16 of the Act of 1955 is controlled by Sections 11 & 5 of the Act of 1955, which reveal that children born out of void marriages in violation of Clause (i), (iv) and (v) of Section 5 i.e. marriage in the life time of a spouse, the parties are not within the degrees of prohibited relationship and the parties are not sapindas of each other, shall be legitimate.

According to Sub-section (2) of Section 16 of the Act of 1955, children begotten or conceived under voidable marriage in accordance with Section 12 will also be the legitimate children even after passing of the decree of nullity of marriage.

Sub-section (3) of Section 16 of the Act of 1955 deals with last and residual category of marriage by engrafting a provision with a non obstante clause stipulating specifically that nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity u/s 12, "any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents".

While dealing with the question of inheritance u/s 16(3) of the Act of 1955, the Apex Court has held in the matter of *Jinia Keotin and Ors. v. Kumar Sitaram Manjhi and Ors.* that children born of void or voidable marriage are not entitled to claim inheritance in ancestral coparcenary property but entitled to claim inheritance in property of parents. Paras 4 & 5 of the said judgment read thus,

4. We have carefully considered the submissions of the learned Counsel on either side. The Hindu Marriage Act underwent important changes by virtue of the Marriage Laws (Amendment) Act, 1976, which came into force with effect from 27-5-1976. Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardizing the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children is depended very much upon the marriage between their parents being valid or void, thus turned on the act of the parents over which the innocent child had no hold or control. But, for no fault of it, the innocent baby had to suffer a permanent setback in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that

the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children is concerned, to the properties of the parents only.

So far as Section 16 of the Act is concerned, though it was enacted to legitimate children who would otherwise suffer by becoming illegitimate, at the same time it expressly provides in Sub-section (3) by engrafting a provision with a non obstante clause stipulating specifically that nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity u/s 12, "any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents". In the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisage therein by resorting to any presumptive or inferential process for reasoning, having resource to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would attempt to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants. The view taken by the courts below cannot be considered to suffer from any serious infirmity to call for our interference, in this appeal.

Admittedly, in the present case, deceased Narayan Khare was entitled for 1/3rd share over the property left by his father, along with his brothers Nand Lal Khare & Vishnu Khare, the appellants herein. After the death of Narayan Khare interest over the property will devolve upon his legitimate & illegitimate children in accordance with sub-section (3) of Section 16 of the Act of 1955, in spite of the fact that marriage between Narayan Khare & the Muslim lady was void in the light of decision in the matter of Gullipilli (supra).

For the foregoing reasons, substantial question No. 1 is decided as positive and substantial question No. 2 is also decided as positive, resultantly respondent No. 1 along with other respondents will inherit the property inherited by deceased Narayan Khare.

After appreciating the material available on record, learned lower appellate Court has allowed the appeal and decreed the suit. Learned lower appellate Court has not committed any illegality in decreeing the suit.

Consequently, I do not find any force in the second appeal, same is liable to be dismissed and it is hereby dismissed.

Parties shall bear their costs of the suit as well as the appeal.

Advocate fees as per schedule.

Decree be drawn up accordingly.