
(1986) 01 BOM CK 0044
In the Bombay High Court
Case No : First Appeal No. 131 of 1976

Ningu Vithu Bamane and Others	Vs	APPELLANT
Sadashiv Ningu Bamane and Others		RESPONDENT

Date of Decision : 30-01-1986

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103, 104, 114

Citation : AIR 1987 Bom 27 : (1986) 2 BomCR 146 : (1986) MhLj 186

Hon'ble Judges : H.N. Kantharia, J

Bench : Single Bench

Advocate : N.N. Paranjpe, for N.D. Homebalkar, for the Appellant; D.S. Sawant, for the Respondent

Judgement

1. The appellants here are the original defendants 1 to 4 they shall be hereinafter referred to as defendants 1, 2, 3 and 4, They challenge the judgment and decree passed by the learned Joint Civil Judge Senior Division Kolhapur on 31 st July 1975 in Special CivilSuit No. 174 of 1973 decreeing the plaintiffs suit for partition separate possession of their shares in the suit properties along with past and future mesne profits.
2. this appeal is mainly directed against the first three respondents who were the orignal plaintiff (herinafter referred to as "plaintiffs 1, 2, and 3")
3. Defendant 1 Ningu Vithu Bamane is the husbane of Plaintiff 3 Gaugubai ningu Bamane Plaintiffs s1 and 2 are their sons.
4. According to the plaintiffs defendant 4, Jana Ningu Bamane is the kept mistress of defendant 1. Defendant 2 and 3 are theor sons.
5. Respondents 4 to 10 who were defedants 5 to 11 were made formal parties as they are cosharers in the immoveable preperities involved inthesuit these defendants did not contest the suit and were proceeded against ex pare. They are not even participants inthis appeal.

6. the suit properties are admittedly properly described in the plaint and no dispute is raised before me about the description of the ancestral moveable and immovable properties in the hands of defendant 1.

7. According to the plaintiffs defendant 1 made a registered partition deed in the year 1960 under which he proceeded to partition the suit properties and given certain shares to defendants 2 to 4 but the said partition deed was illegal and void ab initio and, therefore, was not binding on them. It is their contention that defendant 4 was the kept mistress of defendant 1 and defendants 2 and 3 were the sons born to her as a result of her illicit relations with defendant 1. Therefore, defendant 2 to 4 have absolutely no right, title or interest in the suit properties further, contended the plaintiffs, they then contended that the all suit properties moveable and Immovable are the ancestral properties in the hands of defendant 1 and therefore, these properties are liable for partition and each one of them has 1/4 share along with defendant 1. They therefore, claimed partition and separate possession of their 3/4 th joint share in all the suit properties. They demanded partition because there used to be quarrels in the family at the instance of defendant 4 and defendant 1 illtreated them and as such it was not possible for them to stay in the house. The plaintiffs also averred that defendant 1 drove them out of the house thus keeping them away from the enjoyment of the suit properties. While claiming partition they also claimed past and future mesne profits from defendant 1. Plaintiff 3, in the alternative claimed maintenance at the rate of Rs. 100/- per month as also maintenance of the last three days and prayed that a charge be created on the properties coming to the share of defendant 1 for her maintenance.

8. As stated above, the suit was resisted by defendants 1 to 4 only. Their written statement is at Exh. In their defence they challenged pecuniary jurisdiction of the civil court of entrenchment and try the suit. They contended that the partition effected in the year 1960 was legal and valid and binding on the plaintiffs and, therefore, the suit for fresh partition was not maintainable according to them the plaintiffs were not illtreated and were not driven out of the house and they the same house along with the defendants till recent past but plaintiff 1 got employment at Kolhapur and, therefore plaintiff 3 along with plaintiff 2 went to Kolhapur to look after plaintiff 1. Thus according to these defendants the plaintiffs had voluntarily left the house and that too in the recent past and as such are not entitled to past mesne profits. These defendants denied that defendant 4 was the kept mistress of defendant 1. According to them, she was the legally wedded wife of defendant 1 inasmuch as there was a Pat marriage between defendant 1 and defendant 4 in the year 1948. Thus, defendants 2 and 3 are the legitimate sons of defendants 1 and 4 they contended. Hence it is the case of these defendants that they are entitled to get share in the suit properties along with the plaintiffs. They, therefore, disputed the 3/4 claim of the plaintiffs in the suit properties. They also resisted the alternative claim of plaintiff 3 for maintenance.

9. On such pleadings of the parties the learned trial Judge framed as many as 20 issues. On the evidence adduced before him the learned trial Judge came to the conclusion that he had pecuniary jurisdiction to entertain any of the suits. He, however, held that defendants 1 to 4 did not prove that defendant 4 was the legally wedded wife of defendant 1 and that defendant 2 and d3 are the legitimate sons of the defendants. 1. He also held that the plaintiffs did prove that the partition deed made in the year 1960 by defendant 1 was illegal and void and was not binding on the plaintiff. He also proved that the partition deed made in the year 1960j by defendant 1 was illegal and void and was not binding on the plaintiffs. He held that each of the plaintiff was entitled to 1/4 the share along with defendant 1 in the suit properties and defendants 2 to 4 did not have any share and as such the plaintiffs were entitled for partition and separate possession. The learned trial Judge further held that the plaintiffs are entitled to last three years' means profits at the rate of Rs. 1,000/- per year from defendant 1 and that the issue as to alternative prayer to plaintiff 3 for maintenance did not survive. He accordingly decreed the plaintiff's suits.

10. Being aggrieved, defendant 1 to 4 came to this court in first appeal.

11. On the submissions made before me at the bar, the only point that arises for my consideration is whether there was valid marriage between defendant 1 and defendant 4 and defendants 2 and 3 their legitimate sons.

12. Let it be first noted here that it is an admitted position that the Bombay Provision of Hindu Bigamous Marriage Act, 1946, was not applicable to the then Kolhapur State till the year 1953 and therefore, the marriage between defendant 1 and defendant 4 which took place in the year 1948 was permissible despite the fact that defendant 1 had at that time a living wife. In other words defendant 1 at that time could marry a second wife during the lifetime of the wife. Viz., plaintiff 3.

13. The moot question is, whether there was a marriage at all between defendant 1 and defendant 4 and if there was on whether it was valid. In this connection the case of the plaintiff is that there was no marriage between defendant 1 and defendant 4 and that defendant 4 and the kept mistress of defendant. On the other hand defendant 1 and defendant 4 contended that they were legally wedded as per a form of the marriage known as Pat marriage. Both sides adduced evidence from the evidence on record than satisfied from the evidence on record that the case of defendants 1 to 4 is true and that the plaintiffs raised a false bogie of no marriage between defendant 1 and defendant 4.

14. Let us first examine the evidence adduced by the one on behalf of defendant 1 to 4. Defendant 4 deposed that she was married to defendant 1 about 4-8 days prior to the Gandhi murder. She also deposed that before the marriage with defendant 1 she was married to one Babu Chavan who had died before she married defendant 1. In other words she stated that she was a widow at the time when she married

defendant 1 in the year 1948. Her evidence further shows that the marriage took place in a temple in the presence of her parents and the parents of defendant 1 and other relatives including plaintiff 3. She described the ceremonies performed at this Pat marriage. Her evidence further shows that right from the day of her marriage with defendant 1 she began to stay with him as his wife along with plaintiff 3. A suggestion was made to her that in her community of high caste Marathas there was no custom of Pat marriage which suggestion was flatly denied by her. She also denied suggestion that she was married to one Krishan Aswale who was alive. Her evidence is fully corroborated by defendant 1 who deposed in the same terms and categorically stated that defendant 4 was his legally wedded wife and that defendants 2 and 3 were the sons born to her out of this wedlock. Further, there is another piece of corroborative evidence from the brother of defendant 1, Joti Vithu Bamane. He also deposed to the fact of Pat marriage between defendant 4 and defendant 1 in the year 1948 in a temple in the presence of the parents of both sides as also the police patil. These three witnesses were subjected to lengthy and searching cross-examination but were no shamen in any way although it is true that there are some minor discrepancies in their evidence to which the learned trial Judge has unnecessarily given undue importance. From this evidence I am fully convinced that there was Pat marriage between defendant 1 and defendant 4.

15. The evidence adduced by and on behalf of the plaintiff in this regard is not worthy of credence and acceptable. Thus plaintiff 1 examined himself as per Exh. 23. All that he stated in his evidence is that defendant 4 was the kept mistress of defendant 1 and the defendant 2 and 3 are their sons. He further stated that the case of the defendant 1 and defendant 4 that they were legally wedded was not true. Beyond this he has deposed nothing in his examination in chief about the marriage between defendant 1 and defendant 4. However, he admitted in the cross examination that the name of defendant 3 Balu was mentioned in the school register as the son of Ningu Bamane and further admitted that he did not know if defendant 4 was really a kept mistress of his father. This evidence therefore, is of no use. The plaintiff's next witness is plaintiff 3 herself. She also deposed that defendant 4 was the kept mistress of her husband and defendants 2 and 3 are born to defendant 4. The police patil of the village Parasharam Ramiji Patil, deposed that defendant 4 is not the legally wedded wife of defendant 1. He stated that although defendant 1 and defendant 4 stayed together they were not married. He was not sure whether defendant 4 was a widow before she was married to defendant 1. The evidence of this witness cannot be accepted as satisfactory and worthy of credence inasmuch as he first denied having knowledge about the partition deed made by defendant 1 but when his attention was drawn to such a partition deed he admitted having signed it and further admitted having signed it and further admitted that it was mentioned in the said deed that the marriage between defendant 4 and defendant 1 was a Pat marriage. He, however, maintained that defendant 4 was not married to defendant 1 and he could not state as to how it was written in the

partition deed that defendant 4 and defendant 1 were married as per par marriage form. We gave curious reasons as to why according to him there was no Pat marriage between defendant 1 and defendant 4, the reason being this marriage was not registered. The fact that the marriage was not registered does not mean that there was no marriage at all. Therefore, I am not inclined to accept the evidence of this witness. The last witness examined on behalf of the plaintiff is Badu Bhima Karambalkar. He also gave the same parrot-like version that defendant 4 was the kept mistress of defendant 1 and that they were not married. But in the cross examination he admitted that defendant 1 and defendant 4 were staying together for the last 20-25 years and defendant 4 had sons from defendant 1. He also admitted that defendant 4 was known as "Jan Ningu Bamane" in the villages. The evidence of this witness has to be accepted with a pinch of salt as he appears to be an interested witness, being a relative of plaintiff 3 who is the sister of his mother-in-law. In substance the evidence adduced on behalf of the plaintiffs is one of negative type inasmuch as the plaintiff did not adduce evidence to show that there was some kind of marriage between defendant 1 and defendant 4 but the said marriage was not valid. On the contrary, the witness examined on behalf of the plaintiffs insisted on saying that there was no marriage between defendant 1 and defendant 4 and that defendant 4 was the kept mistress of defendant 1.

16. As stated earlier the learned trial Judge unnecessarily attached too much importance to some minor discrepancies in the evidence of defendants 1 and 4. It was not warranted to have insisted upon documentary evidence to prove marriage between defendant 1 and defendant 4. He was also not right in holding that there was no valid marriage between defendant 1 and defendant 4 only because he was of the view that Pat marriage was not possible in the High Class community of Marathas. The learned trial Judge was laboring under a basic mistake that Pat marriage was not a recognised form of marriage by Hindu Law. All this is very clear from paras 8, 9 and 10 of this judgment where he laid great emphasis on small and insignificant points against defendant 1 and 4 in respect of their marriage. But regard being had to all the facts and the surrounding circumstances, I am more than convinced that there was Pat marriage between defendant 1 and defendant 4.

17. The law as to recognition of Pat marriage is well settled. We may usefully here refer to and rely upon a judgment of the Nagpur High Court in case of Mahadeo Sheroram V. Mr. Chandrabhagabai AIR 1946 Nag. 232 wherein it was held.

A Pat marriage that is a remarriage for a widow is a marriage in an approved form. The marriage is valid and the wife by a Pat ceremony is looked upon as a wife with the wife's duties, responsibilities and privileges."

It appears that the parties in the matter before the Nagpur High Court were Patils and I am told at the Bar that in all probability these Patils may also be Marathas. But that apart. As per law laid down by the Nagpur High Court Pat marriage is a

recognised and approved form of marriage among the Hindus.

18. Mr. Sawant learned Advocate appearing on Behalf of the plaintiffs submitted that the burden of proving marriage between defendants 1 and 4 and the legitimacy of defendants 2 and 3 lies on defendant 1 to 4 and that the evidence adduced on their behalf does not show that they have discharged this burden. I am afraid Mr. Sawant is not correct in his Submission inasmuch as when the plaintiffs alleged and averred that defendant 4 was not legally wedded wife of defendant 1 the burden of proof was on the plaintiffs to establish their assertion. It was held by this court in case of Hoovayya Kanthappa Shetty Vs. Renuks S. Shetty, that there was legal presumption in favour of marriage and legitimacy and the burden of proving a fact existing otherwise is on the party who challenged the marriage between two persons and the legitimacy of the children born of such marriage.

19. Apart from my conclusion as above that there was valid marriage between defendants 1 and 4, the settled law of presumption in this respect is also in favour of defendants 1 and 4 and against the plaintiffs. This law is to be found in Ss. 50 and 114, Evidence Act, 1872. Section 50 reads as under :--

"50 when the Court has to form an opinion as to the relationship of the person to another the opinion expressed by conduct as to the existence of such relationship of any person who as a member of the family or otherwise has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings sufficient to prove a marriage in proceedings under the Divorce Act, 1869 or in prosecutions under Ss. 494, 497 or 498, Penal Code.

Illustrations

The question is whether A and B, were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

the question is whether A was the legitimate son of B. the fact A was always treated as such by members of the family is relevant."

Section 114 reads as under :--

"114 The Court may presume the existence of any fact which it thinks likely to have happened regard being to the had common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."

20. I am of the opinion that in a well organised orderly and civilised society like ours which is not of loose and uncertain morals, the institution of marriage occupies an important place and plays a very vital role in the process of development of human personality. We have definite views and strong convictions about marital relations. The law as to presumption in favour of

marriage under Ss. 50 and 114, Evidence Act, is well crystallised. Thus when a man and woman live together as husband and wife for sufficiently long time and were treated as husband and wife by friends relatives and neighbours there is always a presumption in favour of their marriage. If children are born to such a couple there is a further presumption in favour of their legitimacy. The presumption in favour of marriage does not get mitigated or weakened merely because there may not be positive evidence of any marriage having taken place. But if there is some evidence on record that the couple had gone through some form of marriage the presumption gets strengthened. Therefore, though marriage ceremony said to have taken place may not be valid the marriage can be held to be valid by force of habit and repute and the onus of rebutting such a marriage would be on the person who denies the marriage. It may also be stated here that this presumption of law in favour of marriage and legitimacy is not to be repelled lightly by mere balance of probability. The evidence for that should be strong, satisfactory and conclusive. If the presumption is permitted to be rebutted lightly the weaker and vulnerable section of society viz., the women and the children could be the victims of the vagaries of uncertainties as to their positions and status in life. This would be very much detrimental to the development of their human personality. They would be the worst sufferers in the society.

21. We may here usefully refer to the judgments of the Orissa High Court and the Supreme Court in respect of law as to the presumption in favour of marriage and legitimacy. Thus in case of *Thakur Gokalchand Vs. Parvin Kumari*, the Supreme Court held that continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage. In case of *Bira Jena Vs. Tauli Dei and Another*, the Orissa High Court held that when there is evidence showing that a woman was in continuous exclusive keeping of man, marriage can be presumed. Like wise in case of *Badri Prasad Vs. Dy. Director of Consolidation and Others*, the Supreme Court held.

"A strong presumption arises in favour of wedlock where the partners have lived together for a long spell for a long spell as husband and wife, Although the presumption is rebuttable a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy."

The Supreme Court further held.

"If man and woman who live as husband and wife in society are compelled to prove half a century later by eye-witness evidence that they were validly married few will succeed."

22. In this view of the matter plaintiff 3 and her two sons (i.e. plaintiffs 1 and 2) and defendant 1 are all entitled to equal shares in the suit properties. Therefore, the suit properties will have to be partitioned and divided equally among these

seven persons and each will among these seven persons and each will have to be partitioned and divided equally among these seven persons and each will get $\frac{1}{7}$ the share in the entire suit properties. In view of the fact that there is reduction in the view shares of the plaintiffs there shall also be consequential reduction in the past means profits.

23. In the result. This appeal partly succeeds and accordingly the decree as passed by the learned trial judge is set aside and substituted as under:--

It is hereby declared that plaintiffs 1, 2 and 3 and defendants 1, 2, 3 and 4 shall have equal shares in the suit properties and each of them is entitled to $\frac{1}{7}$ the share in the said properties.

The plaintiffs are accordingly entitled to partition and separate possession of their shares amounting to $\frac{3}{7}$ of the suit properties.

As regards the past means profits for the three years the plaintiffs are entitled to Rs. 600/- per year from defendant 1.

The partition of the suit lands assessed to the Government shall be effected by the Collector or his gazetted subordinate officer as deputed by him who shall partition the suit lands and hand over separate possession of $\frac{3}{7}$ the share of the plaintiffs.

The partition of the suit house and the moveable properties shall be effected by the Copies already appointed by the lower court or to be appointed in that behalf.

Further means profits shall be determined by separate proceedings in accordance with law.

The court-fees shall be recovered from defendant 1 and copy of this decree should be sent to the Collector of Kolhapur District for recovery of the amount of court fees.

There shall, however, be no order as to costs.

24. Appeal partly allowed.