
(2012) 07 CHH CK 0029
In the Chhattisgarh High Court
Case No : Second Appeal No. 721 of 1994

Rukman Bai

APPELLANT

Vs

Sukhman Bai

RESPONDENT

Date of Decision : 27-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 17

Citation : (2012) 3 CG.L.R.W. 131 : (2012) 4 CGLJ 576

Hon'ble Judges : Abhay Manohar Sapre, J

Bench : Division Bench

Advocate : Meena Shastri, for the Appellant; Anurag Dayal Shrivastava
Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Abhay Manohar Sapre, J.—This is a second appeal filed by the plaintiff u/s 100 of C. P. Code against the judgment/decreed dated 11/8/1994 passed by Additional District Judge, Manendragarh in Civil Appeal No. 7-A/93 which in turn arise out of judgment and decree dated 23/2/93 passed by Civil Judge, Class II, Manendragarh in Civil Suit No. 32-A/85. By impugned judgment and decree, both the Courts below (trial Court and first appellant Court) dismissed appellant's suit/first appeal respectively and declined to grant decree to the appellant's in her suit which was filed for seeking declaration of her exclusive title in suit land.

2. So the question which arises for consideration in this appeal is whether two Courts below were justified in dismissing appellant's suit/first appeal?

3. Facts of the case need mention to appreciate the issue involved in the appeal. In fact they lie in a narrow compass:

4. The appellant is the plaintiff whereas the respondent is the defendant.

5. The dispute relates to land bearing Khasra Nos. 231, 234, 352, 367, 463, 466/2, and area Nos. 2.566, 1.522, 3.354, 2.290, 0.721, 0.291 total Khasra

numbers six, and total area 10.744 (hereinafter referred to as "suit land").

6. The suit land originally belonged to one - Nanka belonging to Gond community. He married to one lady by name - Ghurni. Out of this wed lock, a girl - plaintiff (appellant) was born. It is the case of the appellant that during the subsistence of first marriage, Nanka married with another lady by name - Sukhwaria and out of this wedlock, another girl by name- Sukhman-defendant (respondent) was born. On the death of Nanka, (father)-, the name of his two wife's was recorded in the revenue record in relation to suit land and on their death, the name of appellant and respondent (plaintiff and defendant) were recorded in revenue records.

7. It is with this back ground, the appellant (plaintiff) filed a suit out of which this second appeal arises against the respondent (defendant) for a declaration that she is the exclusive owner of the suit land after the death of her father - Nanka and mother-Ghurni and defendant - who claims to be the daughter born out of second marriage of Nanka with his second wife - Sukhwaria has no right, title and interest in the suit land. It was alleged that Nanka had no right to marry with another lady during subsistence of his first marriage with Ghurni and hence the second marriage of Nanka with Sukhwaria out of which defendant was born was an illegal marriage and so was the daughter born out of such wed lock i.e. defendant. It was also alleged that even otherwise since the second marriage was between the close relatives (Sagotra) of one family (Nanka and Sukhwaria were alleged to be brother and sister) and therefore also the second marriage was illegal as per the custom prevailing in their caste. It was alleged that since Nanka was "Gond" (xksM+) by caste and hence as per the custom prevailing in their caste, second marriage was not permissible in their community so also the children born out of such wedlock had no legal status and nor did they acquire any right of inheritance in the property left by their father and mother after their death. It is essentially on these averments; the plaintiff filed a suit against the defendant and prayed for a declaration of her title over the suit land as being its exclusive owner.

8. The defendant denied all the material averments made in the plaint in her written statement. According to her, there was no such custom prevalent in the Gond community as alleged by the plaintiff. It was further alleged that on the death of Nanka, the names of his two wives i.e. respective mothers of plaintiff and defendant were entered and on wives deaths, the names of plaintiff and defendant were recorded as their respective heirs jointly in the revenue records.

9. The Trial Court dismissed the suit holding that plaintiff failed to adduce any evidence to prove the existence of any custom or/and any such right arising there from as prevalent in their community. It was held that what ever evidence which was adduced by the plaintiff to prove these material facts, the same was not held sufficient to return a finding in plaintiff's favour on this material issue. The plaintiff filed the first appeal before the District Judge who also while concurring with all the finding of the Trial Court dismissed the appeal. It is

against this concurrent finding of the two Courts, the plaintiff has felt aggrieved and filed this second appeal.

10. This second appeal was admitted for final hearing on following substantial questions of law:

1. Whether the Defendant/Respondent being the daughter born of Nanka from another lady is not entitled to inherit any share in the property of Nanka on his death?

2. Whether in the presence of legally married wife living, entertaining another lady even as second wife is void in law?

11. Having heard the learned counsel for the parties and on perusal of the record of the case, I am inclined to dismiss this appeal as in my opinion, it has no merit.

12. One can not perhaps dispute that the issue involved in this case is essentially based and centers around to the existence of the custom and rights arising there from in one community called "Gond". In other words, the plaintiff having come to the Court basing her claim on existence of particular custom being prevalent in the community recognizing certain rights to which she and defendant belong, she has to prove accordingly for obtaining the decree.

13. Custom is always considered as one of the source of law and is in fact one of the three sources of Hindu Law. Indeed it is ruled that when ever there is a conflict between a custom and a text of the Smritis, the custom overrides the text. It is ruled that under the Hindu system of law, clear proof of usage will outweigh the written text of the law. The Hindu customs recognized by the Courts are (1) local (2) class and (3) family customs.

14. What are the essentials of the valid customs are laid down and explained by Mulla in his classic treaty - Principle of Hindu Law in chapter II "source of Hindu Law" in Section 17 as under:

17. Essentials of a valid custom.- (1) A custom is a rule which in a particular family or a particular class or community or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly(p). it is further essential that it should be established to be so by clear and unambiguous evidence, for it is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends(q). It must not be opposed to morality or public policy and it must not be expressly forbidden by the legislature(r). It must not be in derogation of the fundamental rights of a citizen to hold and dispose of property by absolutely prohibiting alienation of property even after actual division(rl). Where the evidence shows that the custom alleged was not followed in numerous instances, the custom could not be held to be proved(s). A custom derives its force from the fact that it has, from long usage, obtained the force of law. It must be ancient; but it is not of the

essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality(t).

(2). It is incumbent on a party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. It must be established inductively and not be a priori methods. Custom cannot be matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another(u). It is well established law that custom cannot be enlarged by parity of reasoning since it is the usage that makes the law and not the reasons of the thing(v).

(3). Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the Court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any further suit between other parties fuller evidence with regard to the alleged custom should be forthcoming (w). A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case(x). Where, however, a custom is repeatedly brought to the notice of the Courts, the Courts, may hold that the custom was introduced into law without the necessity of proof in each individual case(y).

15. How and in what manner and what are its requirements for proving, the learned author in same Section says as under:

Family Custom.-In respect of family custom, the same principles are applicable, though, of course, in the case of a family custom instances in support of the custom may not be as many or as frequent as in case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs the consensus of opinion among members of the family, the traditional belief entertained by them and acted upon by them, their statements and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the Courts to be sufficient that a specific family custom pleaded in a particular case can be held to be proved(z). Custom binding inheritance in a particular family has long been recognised in India(ZI).

16. It is therefore clear from reading of the aforequoted classic passage that when a person sets up a plea of existence of any custom and rights arising there from in favour of any member of the community to which such custom is said to apply for enforcement of any of his rights against any member of the community (be that property or personal) and which is found to be in conflict with the law in force on the subject then the entire burden lies upon such person to prove existence of such custom prevailing in the community so also recognition of any right in the custom. In other words, if any person wishes to show that any

particular right of his be that personal or property is in conflict with the law prevailing in the Country due to its recognition in a particular custom prevailing in the community to which he belongs for its enforcement against any person of the same community then such right would prevail over the law in force provided it is proved with adequate evidence by such person that the custom and right both exists in accordance with law in their community.

17. Now examining the facts of this case in the light of the aforequoted principle of law, I have no hesitation in holding that concurrent finding of fact recorded by two Courts below that plaintiff failed to plead and prove the custom on which she had based her claim deserves to be upheld. In other words, when on appreciation of oral evidence adduced by the plaintiff, both the Courts below dismissed plaintiff's suit holding that she failed to lead any evidence on the issue of existence of custom and right in the property to the exclusion of any member of family, then this Court in its second appellate jurisdiction can not again undertake the appreciation of the same set of evidence with a view to find out as to whether any case of existence of custom and right as pleaded in the plaintiff has been made out or not? It is not legally permissible while hearing the second appeal u/s 100 ibid.

18. It is apart from the fact that I also notice that no substantial question of law was framed for attacking any specific finding contending that two Court below erred in either ignoring any particular piece of evidence (whether documentary or ocular) or that any particular finding was recorded dehores the pleadings or recorded against any provision of law requiring its reversal in second appeal. On the other hand, mere perusal of the two aforequoted questions of law would go to show that both are general in nature and do not challenge any specific finding of the two Courts below. Their answer on merits is not permissible in the light of concurrent finding of facts of the two Courts below.

19. Nevertheless, I perused the oral evidence of the plaintiff on whom the burden lies with a view to find out as to what kind of oral evidence was adduced by the plaintiff to prove custom and the rights recognized therein and whether she could be said to have discharged her burden for proving her case. I however notice that two Courts below did not commit any illegality in reaching to their respective conclusion while dismissing the suit for want of evidence.

20. As said earlier, the custom has to be, clear, customary, consistent and long in period in its application. It has to be proved by showing its origin, enforcement and recognition with the aid of documentary and oral evidence by citing instances of members of the community who took its benefit for settlement of their disputes intersee. It is only when the party relying upon such custom is able to prove it, the Court may consider it proper to give effect to enforcement of such custom for determining the rights of the parties else not. Such is not the case in hand because the plaintiff in this case did not lead any evidence of this nature and examined only two witnesses who in their oral evidence could not prove anything. They were therefore rightly disbelieved by the two Courts saying

that from their evidence nothing is established to prove existence of custom.

21. Learned counsel for the appellant no doubt made attempt to assail the finding recorded by the two Courts below by referring to oral evidence of the parties but in the light of what I have held supra, it is not possible to accept her contentions for reversal of the concurrent finding of facts.

22. In the light of foregoing discussion, it is not necessary for me to examine any other question for want of any substantial question of law framed on any such issues such as whether rights of the parties are then governed by any other law for the time being in force such as codified Hindu Law etc. It is for the reason that firstly no such alternate claim was pleaded by the plaintiff much less proved and secondly both the Courts below were not called upon to decide such issue on these lines in alternate. Such question therefore in my opinion does not arise for consideration in this appeal.

23. I may however make it clear that finding recorded by me in this appeal on the issue of custom is confined to the parties to this appeal because as stated supra, the plaintiff failed to prove the existence of custom in this case. Such finding therefore may not be construed as laying down the law on the subject regarding existence of custom in the community. In other words, the issue in question can still be examined in other case provided it is properly pleaded and proved. In the light of foregoing discussion, the second appeal is found to be devoid of any merit. It fails and is accordingly dismissed.

No order as to costs.