
(2011) 04 DEL CK 0303

In the Delhi High Court

Case No : Regular Second Appeal No. 90 of 2007

Sh. Narain Singh and Others

APPELLANT

Vs

Smt. Birmati and Others

RESPONDENT

Date of Decision : 28-04-2011

Acts Referred:

Hindu Succession Act, 1956 — Section 8
Specific Relief Act, 1963 — Section 34, 34A

Citation : (2011) 04 DEL CK 0303

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Sukhda Dhamiza, S.K. Rout and S.K. Sharma, for the Appellant;
B.D. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 17.01.2007 which had endorsed the finding of the trial judge dated 18.07.2002 whereby the suit filed by the Plaintiff Narain Singh seeking the declaration to the effect that their brother Braham(1.15 p.m.) Prakash be declared as dead as he had been missing since June 1976 and the Plaintiffs (three in number) and Defendant No. 2 be declared as the only legal heirs of the estate of Braham Prakash had been dismissed.

2. The three Plaintiffs and Defendant No. 2 are brothers. They are sons of Rati Ram. They had another brother namely Braham Prakash who was reported missing since June 1976. Defendant No. 3, Smt. Birmati, was married to Braham Prakash as per hindu rights in 1972. In June 1976, Braham Prakash went missing; all efforts to trace him failed. No issue was born out of the wed lock of Smt. Birmati and Braham Prakash. Braham Prakash could not be found. Thereafter Birmati was taken as a wife by Defendant No. 2 being his brother; the date of the ceremony was in dispute. By way of this suit, the relief as aforementioned had been sought.

3. Defendant Nos. 2 and 3 contested the suit; it was stated that Defendant No. 2 had taken Defendant No. 3 as his wife in Jan 1985 which was after a period of seven years from 1976 when Braham Prakash was reported missing. Contention was that the Defendant No. 3 being the legally wedded wife to Braham Prakash, she alone was entitled to succeed to the property of the Braham Prakash; she was the sole legal heir.

4. On the pleadings of the parties, the following issue was framed:

Whether the suit is maintainable in view of provisions of Section 34 of Specific Relief Act, 1963?

5. Relying upon the aforementioned statutory provision which had not come to the aid of the Plaintiff, the suit of the Plaintiff was dismissed. In appeal, this position was endorsed.

6. This is a second appeal. It had been admitted and on 26.03.2007, the following three substantial questions of law had been formulated. They inter alia reads as follows:

1. Whether the succession to a male Bhumidar is governed by the provisions of Delhi Land Reforms Act, 1954 or by Hindu Succession Act, 1956?

2. Whether the courts below misapplied and misconstrued the provisions of Section 34 of the Specific Relief Act in declining the relief of declaration?

3. Whether the courts below have correctly decided the case by disposing of a preliminary issue?

7. On behalf of the Appellant, it has been urged that the judgment of the trial court is illegal and arbitrary; the suit could not have been decided only on a preliminary issue. There was a twofold prayer made in the plaint. The first prayer which had sought the decree of declaration that since Braham Prakash was not found alive since the year 1976 and he be declared as a dead man and thus prayer was well maintainable under the provisions of Section 34 of the Specific Relief Act; the court should have granted this relief in favour of the Appellant. The second prayer was also to the effect that Birmati having been married to Samay Singh in the year 1980, at the time when the succession opened which was in the year 1983 (7 years from 1976), Birmati was not the widow of Braham Prakash; she was already a married woman. This has not been taken into account by the impugned judgment in the correct perspective. It is liable to be set aside.

8. Arguments have been rebutted. It is pointed out that judgment, on no score, calls for any interference.

9. Record shows that before the first appellate court, an application had been filed under Order 23 Rule 1 of the Code by the Plaintiff/Appellant. This application was dated 03.09.2002. By way of this application, the applicant had prayed to give up relief No. (A) i.e. with regard to this prayer for declaration to

the effect that Braham Prakash may be declared as a dead man. This permission had been granted and prayer (A) had accordingly been deleted. The only prayer which now remained was prayer No. (B). By virtue of this, the Plaintiff had sought a declaration to the effect that three Plaintiffs and Defendant No. 2 who are the brothers of the deceased Braham Prakash be declared as the only legal heirs of Braham Prakash as Birmati had got married to Samay Singh in this intervening period and no longer being the widow of Braham Prakash, she was not entitled to his estate. This relief was refused.

10. The trial judge whose judgment had been endorsed by the impugned judgment had returned the following finding on this score.

Now coming to the second prayer that the Plaintiffs and Defendants No. 2 be declared as the only legal heirs of the missing Braham Prakash, to the exclusion of Defendant No. 3, the settled legal position is as follows. u/s 34A declaration that the Plaintiff is entitled to any legal right as to any property is maintainable and can be granted in a case if the facts of that case so warrants.

15. There can be no doubt as to the said legal position. However, whether in the facts of the present case such declaration is maintainable or not is the point to be considered.

16. It is settled legal position that declaration is a discretionary relief and cannot be claimed by a party as a matter of right. It is also true that such discretion is to be exercised on sound legal principles. The court has to make a sound judgment as to whether is reasonable or not under all the circumstances of the case to grant the depletory decree prayed for. Declaration relief u/s 34 of Specific Relief Act is more in nature of an equitable relief than a legal remedy. Where Plaintiff has no law or equity in his favour, court will not grant declaration.

17. In the light of above legal position, let us examine whether the claim of the Plaintiffs in the present case is maintainable. Under Hindu Succession Act 1956, to the estate of a person dying intestate, class I heirs shall succeed inheritance rights to the exclusion of class II heirs. Section 8 of H.S. Act provides that the property of a male Hindu dying in estate shall devolve firstly upon class I heirs and such devolution is to the exclusion of others mentioned in lower class heirs. In the schedule appended to the said Act, widow is shown as a class I heir and brothers are shown as class II heirs. Thus under Hindu Succession Act 1956, if a widow of an intestate is alive she alone would be entitled to succeed to the properties of the estate if there are no other class I heirs.

18. In the present case it is the admitted case of the parties that Defendant No. 3 was lawfully married to missing Braham Prakash according to Hindu rites and ceremonies. The said marriage of Defendant No. 3 is admitted by the Plaintiffs as well as by Defendant No. 2. The only ground on which Plaintiffs challenge the succession rights of the Defendant No. 3 is that she is disqualified to succeed to the properties of Braham Prakash because she has married again Defendant No. 2 within next seven years for the date when said Braham Prakash went missing.

The Defendant No. 2 and Defendant No. 3 on the other hand have denied that they were married within seven years of Braham Prakash being missing. According to Defendant No. 2 and Defendant No. 3 they were married after seven years. Be that as it may, even if we assume that the Defendant No. 3 was married to Defendant No. 2 within seven years from the date when Braham Prakash went missing, in law that does not make any difference so far as rights of Defendant No. 3 regarding succession of properties of her erstwhile husband is concerned. Hindu Succession Act 1956 does not disqualify any widow from succeeding to the properties of the intestate even if she has married to some other person. The Defendant No. 3 was not divested of her right to succeed to the properties of Braham Prakash merely by reason of her remarriage with Defendant No. 2 even if we assume that succession opened in the present case after said Sh. Braham Prakash went missing for seven years or more. Even on notional death of Braham Prakash the erstwhile husband of Defendant No. 3, the property of Braham Prakash would be deemed to have devolved on the Defendant No. 3 being his widow.

19. The above said view finds support from the decision of Bombay High Court reported as Baburao Parashuram Ukhare and Others Vs. Smt. Laxmibai and Others, To the same effect is the judgment of Hon. S.C. in Smt. Gajodhari Devi v. Gokul and Anr. 1990 MLR 48.

20. Thus, there is no law which takes away the widow's right to succession which vested in her when succession opened. The law nowhere says that the widow has to be divested of her right to succession on re-marriage.

21. Once we come to the conclusion that Defendant No. 3 has a settled legal right to succeed to the properties of her erstwhile husband and her right is to the exclusion of Plaintiffs and Defendant No. 2 as they are class II heirs, there exists no right in favour of Plaintiffs and Defendant No. 2 to succeed to the properties of Braham Prakash. When there exists no right in favour of the Plaintiffs and Defendant No. 2 and the right exists only in favour of Defendant No. 3 can the Plaintiffs seek any relief by way of declaration which would amount to conferring any right which in law does not exist in favour of Plaintiff. The answer should be in negative. No one can seek declaration of a non-existing right. Law does not permit such a declaration.

11. This finding does not in any manner call for any interference. Birmati, even as per the case of the Plaintiff, was the legally wedded wife of Braham Prakash. Contention of the Plaintiff is that after Braham Prakash went missing, Birmati got married to Samay Singh in 1980. This was refuted. The contention of the Defendant was that parties had got married only in 1985. Be that as it may, even assuming that the case set up by the Plaintiff that Birmati had married Samay Singh in 1980 is correct, this marriage of Birmati with Samay Singh would be a void marriage as the presumption of death of Braham Prakash could have arisen only after 7 years of his having got missing; he had been got missing since 1976. Even assuming that Birmati had married Samay Singh in 1980, there being no

averment that this marriage was as per custom, one spouse marrying another person in the lifetime of a living spouse is illegal; such a marriage would be a void marriage. It cannot be recognized in the eye of law. Either way, Birmati, was a class I heir. The three Plaintiffs and the Defendant No. 2 being brothers are class II heirs. There is no dispute to this position. As per the case of the Plaintiff, the succession to the estate of Braham Prakash would open in 1983 i.e. 7 years from the date of his having gone missing which was in 1976. In view of the fact that the Plaintiff had given up prayer No. (A) and there being no declaration to the effect that Braham Prakash was a dead man in the year 1983; he was only missing; even on the notional date of the opening of his succession in 1983, his estate necessarily had to devolve upon his deceased widow i.e. Birmati. The impugned judgment on no score suffers from any perversity.

12. It has also been pointed out by the learned Counsel for the parties that the land in dispute had since been acquired and, in fact, compensation for the said acquisition had also been received by Birmati, although the same is under challenge. Be that as it may, this Court is sitting in second appeal and can interfere with the findings of the court below only if a substantial question of law arises. The impugned judgment had correctly interpreted the provisions of Section 34 of the Specific Relief Act; this is admittedly a discretionary relief. The preliminary issue about the maintainability of the suit being strictly a legal issue was rightly adverted to and answered without trial.

13. On no count, does the judgment call for any interference. Substantial questions of law are answered against the Appellant and in favour of the Respondent. There is no merit in the appeal. Dismissed.