

(2006) 08 DEL CK 0233
In the Delhi High Court
Case No : CS (OS) No. 2021 of 2003

Shree Bhagwan and Others	Vs	APPELLANT
Suraj Bhan and Others		RESPONDENT

Date of Decision : 03-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 7 Rule 11, Order 7 Rule 5, Order 9 Rule 4, Order 9 Rule 9
Hindu Marriage Act, 1955 — Section 11, 12, 16, 16(1), 16(3)
Marriage Laws (Amendment) Act, 1976 — Article 68
Penal Code, 1860 (IPC) — Section 494, 495

Citation : (2006) 08 DEL CK 0233

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : R.K. Singh, for the Appellant; M.P. Sinha, for Defendant Nos. 2 to 4 and R.S. Endlaw, for Defendant No. 7, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—The plaintiffs have filed this suit for Possession and Permanent Injunction in respect of premises bearing No. F-243 (124-C), Village Katwaria Sarai, New Delhi. In the Plaint it has been asseverated that the plaintiffs are the children of late Shri Bhima who died on 15.6.1978 leaving behind the suit property; "that the plaintiffs" father late Shri Bhima had two wives. Smt. Nathoo since deceased was his legally wedded wife ..."; "that it was during the lifetime of Smt. Nathoo (plaintiffs mother) that the father of the plaintiffs had brought Smt. Kalawati in his house and kept her with him as his Keep to the knowledge of the plaintiffs mother as well as the villagers and the brotherhood. The Defendant No. 4 was not the wedded wife of Shri Bhima; no marriage ceremony ever took place between the two with the result that though the Defendant No. 4 had given birth to Defendants No. 1 to 3 from Bhima, but they were illegitimate sons and not competent in law to inherit anything from the moveable and immovable properties left behind by Shri Bhima" "The father

of the plaintiffs had permitted the Defendants No. 1 to 4 to reside with him in the red portion and remained therein in the lifetime of the plaintiffs" father. The status of Defendants No. 1 to 4 as qua the property in their possession was that of the licensee and they enjoyed the said status during the lifetime of the plaintiffs" father who died on 15.6.1979 ... however they have been staying therein with the permission of the plaintiffs."

2. In the Written Statement, Defendants No. 2 to 4 have, inter alia, pleaded that they are owners of the said property which was partitioned in 1970 "and the respective partition shares were handed over to the respective co- sharers, who have since then remained in possession and occupation of the portions falling in their shares"; that after the death of late Shri Bhima the Defendants No. 1 to 4 sold the portion measuring 150 sq. yards of their shares to Shri Surinder Singh s/o Shri Bhoop Singh, who instead have transferred the same in the name of Defendant No. 7. It is further been pleaded that the possessory title of these Defendants has matured into ownership rights as they have been born and brought up in the suit property. It is submitted that these Defendants have the same rights of inheritance over properties left by their father late Shri Bhima. It is further submitted that plaintiff No. 1 had filed a similar suit for Permanent Injunction which was dismissed in default after these Defendants had filed their Written Statements. The assertion that Defendant No. 4 was not married to late Shri Bhima or that no marriage took place between them has been denied. In para 5 of the Written Statement it has been asserted that "Defendant No. 4 is the legally wedded wife of late Shri Bhima and Defendants No. 1 and 3 are born out of their wedlock."

3. In is No. 11061/2003, the Defendants were restrained from alienating, transferring or parting with possession of the portion of the property in their occupation vide Orders dated 24.11.2003. is No. 11906/2003 was filed one month thereafter by the plaintiffs. In terms of Orders dated December 19, 2003 the Defendants have been enjoined from carrying out any construction in the suit property without due sanction as required from the concerned authorities. On April 26, 2004 all pending applications were disposed of and it was ordered that if any construction is made by the Defendants in the suit property, the same would be done without prejudice to the rights and contentions of the plaintiff and that Shri Ravindra Singh would not claim any equity in respect thereof. The Defendants were restrained from parting with the possession or creating any third party interest in the suit property. is No. 6691/2004 has been filed by Defendants No. 2 to 4 against the plaintiff restraining them from raising any unauthorised construction falling in the share of late Shri Gian Chand (plaintiff No. 2). is No. 8651/2005 has been filed by Defendant No. 7 praying that Orders dated 26th April, 2004 be varied to the extent that the Applicant may be permitted to induct tenants/licensee in the suit property. is No. 2252/2006 has been filed by Defendant No. 7 praying for the rejection of the Plaint.

4. The first question be determined is the nature of the rights of Smt. Kalawati

and her children from late Shri Bhima; the fact that the said children are from the loins of late Bhima has not been controverted by the plaintiffs. The vague and contradictory pleadings in the Plaint have already been noted above viz. that it has variously been pleaded that Bhima had two wives, and elsewhere that Smt. Kalawati was his keep. In *S.P.S. Balasubramanyam Vs. Suruttayan alias Andali Padayachi and others*, , it has been held that where a man and woman have been living under the same roof and cohabiting for a number of years, a presumption would arise that they were living as husband and wife. Learned Counsel for the plaintiff has submitted that on a holistic reading of the Plaint it will be evident that the plaintiffs do not accept Smt. Kalawati as the wife of late Bhima. However, in my opinion on a strict and holistic reading of the Plaint there is no justification for not treating Smt. Kalawati as the second of the two wives of late Bhima. Pleadings should be drawn up carefully especially with regard to the most fundamental ancestral aspects of the dispute between the parties. This should be sufficient reason for passing orders predicated on this assumption. However, considerable argument has been generated on the issue of Smt. Kalawati married status in the context of Section 16 of the Hindu Marriage Act. In *Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others*, , the debate was whether Section 16 was ultra virus since it had resulted in one group of illegitimate children from being treated as legitimate. The Court held that there was no distinction or sub categories amongst illegitimate children and all of them would inherit the properties of their parents, but not of any other relatives.

5. Thereafter, in *Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others*, , the Court observed as follows:

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 which 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.

5. So far as Section 16 of the Act is concerned, though it was enacted to legitimize 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 obstinate 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 envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse 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 amount 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.

6. In Union of India Vs. Raman Iron Foundry and Steel Rolling Mills and Another, , the Court came to the conclusion that since only a bald statement having been made in regard to the factum of marriage without any attempts to amplify or prove the statement through any witnesses Section 16(1) did not come to the aid of the children. Savitri Devi and Others Vs. Shanti Devi, contains a finding that admittedly the second "wife" was a Christian and Therefore, no marriage could have been performed under the Hindu Marriage Act. Section 16 was, Therefore, obviously not available to the children of the second wife.

7. Section 16 of the Hindu Marriage Act before the amendment by Article 68 of 1976 and at present is reproduced below in juxtaposition for ease of reference -

Section 16. Where a decree of nullity is granted in respect of any marriage u/s 11 or Section 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 it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a

decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of the 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 Section 16(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, 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) 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.

8. A careful reading of this provision manifests that it deals with both the contingencies of void as well as voidable marriages. The first sub-section of Section 16 ordains that children born from a marriage that is null and void shall nevertheless be legitimate regardless of their time of birth and whether or not a jural finding has occurred declaring the marriage to be void. In my view, the reference to legal proceeding is entirely unnecessary and otiose, and its inclusion could be justified only to underscore the indefeasible nature of the legitimacy of the progeny. The second sub-section of Section 16 bestows the same legitimacy rights on the offspring of a voidable marriage provided their conception had not occurred after the voidable marriage was declared to be a nullity. It is palpable that a somewhat contradictory or anomalous situation has been created by the statute which may have to be rectified by jural engineering. Another aspect of the defective craftsmanship in Section 16 has been duly noted in *Kalliani Amma* where the Apex Court roundly rejected the argument that the beneficent and ameliorative characteristics of the statute could not be extended to illegitimate children of void marriages performed before the Hindu Marriage Act came into force. Their Lordships opined that "whenever an enactment is attacked on the ground of discrimination, it becomes the duty of the Court to look into the legislation as a whole and to find out why class legislation was introduced and what was the nexus between the classification and the object sought to be achieved by it". After analysing *Heydon's* rule relating to the interpretation of statutes, and the sweep of a non-obstante clauses, the Court opined that - "In

view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents." The anomaly that still remains is that children born from void marriages are better placed than those from voidable marriages. This is because in the latter case the children who have been conceived after a decree of nullity has been pronounced would not enjoy legitimacy. It is doubtful whether this was the intention of Parliament. It would have been advisable not to have two sub-sections dealing disparately with the offsprings of void and voidable marriages as was the position prior to the amendment. It can fairly be presaged that a child conceived after a voidable marriage has been so declared by a Court, will challenge the distinction carved out in the two sub-sections namely that whilst he would not be entitled to claim a share in his parent's property, the progeny of a null and void marriage can nevertheless do so. This precise conundrum has not been unravelled in Kalliani Amma. The fact that the concept of a voidable marriage may not have been known prior to 1955 makes no appreciable difference. The proviso to the old Section corresponds to third sub-section of the present Section. It should not be overlooked that a marriage that is void cannot be cured, rectified, remedied or ratified whereas voidable nature of a marriage is dependent on the volition or action of the spouses concerned. I will not dilate on the issue any further as it does not directly fall for consideration in this litigation.

9. The plaintiffs have pleaded that no marriage ceremony had taken place between their late father and Defendant No. 4 and hence the marriage was void. Black's Law Dictionary defines 'void' as - "Null; ineffectual; nugatory; having no legal force or binding effect; unable in law to support the purpose for which it was intended." In the context of the dispute in hand the same Dictionary states a voidable marriage to be "one which is valid when entered into and remains valid until either party secures lawful court order dissolving the marital relationship." Accordingly, if a marriage is void owing to the factum of a wife being then alive, the performance of a marriage ceremony would remain bereft of legal efficacy and would be a contradiction in terms. Section 5 enunciates that a marriage may be solemnized between two Hindus if neither of them has a spouse living at that time. Accordingly, if a spouse is then living, no marriage can be solemnized. Section 17 needlessly repeats this position and is platitudinous in its mention of Section 494 and 495 of the Indian Penal Code. It may assume significance in determining criminal culpability for the offence of bigamy. Section 494 of the Indian Penal Code contemplates only the act of "marrying" which has been construed in Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another, to require the performance of marriage rituals. This is necessary in order to distinguish between carnal intercourse and purported conjugal intercourse, with only the latter inviting punitive consequences. Where it is not possible for a marriage to take place the carrying out of a ceremony cannot

change the ineffectual, inept and legally inefficacious character of that event. Therefore imparting constituents of criminal culpability into civil law would not be justified. Reliance by the learned Counsel for the plaintiffs on the decision in Sudershan Karir is of no avail as the Court had returned the finding that the 'second' marriage had not been proved at all and only a bald averment in this regard had been made, without any effort to prove it.

10. The eldest of the Defendant sons of late Bhima is over fifty years. Since the plaintiffs admit that he is born from the loins of late Bhima, the second marital union would have taken place before the coming into force of the Hindu Marriage Act, 1955. This Suit indubitably seeks to unsettle events of a half-century vintage, and that too where Bhima died a quarter century prior to its filing. Should the Court assume the role of an idle spectator and permit such stigmatic litigation to trundle to Trial and thence to inevitable dismissal is the question which requires careful cogitation. Courts have always leaned towards preserving family arrangements and maintain peace and harmony in the home. Although stated in the context of family arrangements or settlements very recently the Apex Court has recommended in Hari Shankar Singhania v. Gaur Hari Singhania AIR 2006 SCW 3330 that technical considerations should give way to peace and harmony in the family. This approach is palpable on a perusal of Ram Charan Das Vs. Girjanandini Devi and Others, . In Sahu Madho Das and Others Vs. Mukand Ram and Another, the Court opined that "a family arrangement can, as a matter of law, be implied from a long course of dealings between the parties ... and we have such a course of dealings here." Their Lordships thereafter observed thus - "The conduct of the various members of the family is relevant to show that their actings, viewed as a whole, suggest the existence of the family arrangement on which the defendants rely. At this distance of time gaps in evidence that would otherwise be available have to be filled in from inferences that would normally have little but corroborative value. But circumstanced as we are, inferences from the conduct of the family is all that can reasonably be expected in proof of an arrangement said to have been made in 1875. The statements that Har Devi and Maha Devi made as witnesses are Therefore as relevant as recitals made by them in deeds and statements made by them in pleadings. they do not in themselves prove the fact in issue, namely the family arrangement, because, in the absence of Section 32(3), they are not admissible for that purpose, but as their conduct is relevant these statements are admissible as evidence of that conduct".

11. I.A. 2252/2006 has been filed by Defendant No. 7 invoking Order VII Rule 11 of the CPC and praying for the rejection of the plaint as it does not disclose any cause of action. Mr. Singh, learned Counsel for the plaintiffs, has relied upon Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, in which His Lordship S.B. Sinha, J. has reiterated that the question whether a plaint discloses a cause of action must be found out from reading the amendments in the plaint itself, which must be taken as correct at that stage. Evidence has not to be looked into. Previous precedents were mentioned

including D. Ramachandran Vs. R.V. Janakiraman and Others, . The following passages from Liverpool and London are indeed instructive -

150. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegation a cause of action is shown. In Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another, this Court held:

By the express terms of Rule 5 Clause (d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed it has merely to satisfy itself to that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defenses which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him.

151. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars.

12. However, the Supreme Court has not always discouraged the dismissal or rejection of a plaint as is evident from a reading of Raj Narain Sarin (Dead) through Lrs. and Others Vs. Laxmi Devi and Others, . The Additional District Judge Agra had rejected the plaint drawing strong reliance on T. Arivandandam Vs. T.V. Satyapal and Another, in which the Apex Court had laid down that is that is meritless in the sense of not disclosing a clear right to sue the Trial Court should exercise its powers under Order VII Rule 11 of the CPC, "since bogus litigation ought to be shot down at the earliest." The Supreme Court thereafter upheld the rejection of the plaint in circumstances where the transfer of property was sought to be challenged after forty years. This decision is fatal to the plaintiffs' cause. Similar views have been expressed in Azhar Hussain Vs. Rajiv Gandhi, viz. that the "purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the Court." In Shri Ramesh Kumar Sharma Vs. The Ambassador, Royal Netherlands Embassy, New Delhi and another, the plaint was rejected since the dispute was found to be barred by the principles of res

judicata. Order VII Rule 11 was invoked in Smt. Gurbux Kaur and Smt. Gurdev Kaur Vs. Shri Hari Singh and Others, and Md. Akhtar Hossain Vs. Suresh Singh and Others, since the claim was barred by limitation. In Manmohan Suri and Another Vs. Sunil Kumar Arora and Others, it was found that since the plaint contained only bald statements it was justifiably rejected by the Guardian Judge. In Malvika Madan Sehgal and Another Vs. M.M. Sehgal Limited and Others, the suit was dismissed as it was found to be time-barred and containing vague and vexatious allegation. The Courts are struggling under the weight of the exponential increase in litigation and lest they come to a grinding halt Judges must respond by separating the wheat from the chaff. Stillborn or vexatious legal actions must be given the earliest burial. It is with this motivation and urgency that the present suit must be decided.

13. PLEADINGS ? The plaint should set out precisely and concisely the facts and averments necessary for the grant of the prayers contained in it. Only a novice would disclose details of the evidence in the power and possession of the plaintiff at that point in time. This is the gist of Order VI Rule 2 of the CPC. It is equally axiomatic that evidence cannot be led in variance with the pleadings. Hence the absolute requirement that pleadings should not be ambiguous or ambivalent. Parties cannot approbate and reprobate. If Courts should endeavor towards maintaining peace and harmony in the family they should not disturb the arrangement which has seen prolonged user; they should exercise jurisdiction with circumspection and only where a clear cut case has been disclosed. In the present case I find that since the plaintiffs have themselves pleaded that their father had "two wives", even though in other parts of the plaint they have disdainfully referred to their step mother as their father's keep, the only consequence in allowing the suit to travel to Trial would be to destabilize family harmony. This view is tempered to no mean degree, by the fact that the second marriage could have occurred at a point in legal time, when a second marriage was permissible in Hindu Law. It cannot be ignored that the plaintiffs have failed to file a Replication to the Written Statement of Defendant No. 4 while they have done so in response to the Written Statement of the stranger to the family viz. Defendant No. 7.

14. LIMITATION ? As has already been noticed the second marriage of Late Bhima to Defendant No. 4, Smt. Kalawati, took places over a half century ago since the oldest/eldest of the sons from this wedlock is over fifty years old. The Memorandum of Parties describes Defendants No. 1 to 3 as the sons of Late Bhima and Smt. Kalawati as his "w/o., i.e. either "wife or widow". It prima facie appears that in his lifetime Late Bhima had put his family in possession of different portions of his property. The cause of action for claiming possession would definitely have arisen on the death of Late Bhima which occurred on 15.6.1978, if not earlier. A self-serving and wholly unsubstantiated asseveration has been in paragraph 5 of the plaint that the Defendants 1 to 3 have been staying in the suit property "with the permission of the plaintiffs." In the next paragraph it has been pleaded, but bereft of even bare details, of the date when

the plaintiffs demanded and requested them to vacate the premises. The bald statement that the Defendants finally refused to vacate the premises in July 1997 is too vague to merit the case proceeding to Trial, especially where the parties belong to one family and have been residing in separate portions of the Immovable property belonging to their late Father. The suit is barred by limitation.

15. PREVIOUS ACTION DISMISSED ? In their Written Statement Defendants 2 to 4 have mentioned that plaintiff No. 1 had initiated a suit for permanent injunction, bearing Suit No. 403/1994, which was dismissed in default in the Court of Shri Shahabuddin, Civil Judge, Delhi. These facts have not been controverted by the plaintiffs. The provisions of Order IX Rule 9 of the CPC specify that where a suit has been dismissed the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. Even if Rule 4 of Order IX is applied the present suit stands barred.

16. For these manifold reasons and grounds the present suit for Possession and Permanent Injunction is not maintainable and is without merit. It is accordingly dismissed. Interim Orders and arrangements are recalled. All pending applications also stand disposed of. The parties shall bear their respective costs.