

(2011) 09 AHC CK 0136

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 25104 of 2001

Smt. Bai

APPELLANT

Vs

Smt. Nirmala and Others

RESPONDENT

Date of Decision : 26-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 3
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 171,
171(1), 171(2), 174, 229B

Citation : (2011) 10 ADJ 691 : (2012) 1 AWC 686

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon'ble A.P. Sahi, J.—This petition has been filed by the mother of late Kali Charan, Smt Bai w/o Chedi the plaintiff in a suit u/s 229-B of the UP. Z.A. & L.R. Act, 1950 seeking a declaration that she is the sole successor to the holding of her son and not the respondent No. 1, Nirmala, who claims herself to be the wife of late Kali Charan.

2. The dispute began after the death of late Kali Charan. Chhedi Lal, who is the father of late Kali Charan, was the recorded tenure holder, and after his death. Kali Charan came to be recorded in the revenue records. It is alleged by the respondent No. 1, Nirmala that she is the widow of late Kali Charan and was, therefore, entitled to succeed to the holdings, and accordingly her name came to be mutated in the revenue records.

3. The petitioner Smt. Bai (since deceased) contested the said mutation proceedings but remained unsuccessful up to the High Court in Writ Petition No. 18437 of 2005 that had been filed by her substituted heir Bhonda. This Court while refusing to interfere with the mutation orders observed that the orders passed in mutation proceedings being summary in nature, would not come in the

way of the regular proceedings u/s 229-B of the U.R Z.A. & L.R. Act. The petitioner thereafter, filed a regular suit u/s 229-B seeking declaration of her rights on the ground that she being the lawful heir was entitled to succeed to the holdings of late Kali Charan and that the respondent No. 1, Nirmala was not the lawfully wedded wife of her son and, therefore, was not entitled to succeed to the holding. Nirmala during the pendency of the proceedings sold the same to respondent Nos. 5 to 7, who are respondents herein and it is they, who are contesting the present writ petition. The original petitioner, Smt. Bai also died during the pendency of these proceedings on 22.11.2003 and she is represented by petitioner No. 1/1, Bhonda claiming himself to be her nephew and to have succeeded to the property under a registered Will dated 4.4.2002. The substitution of the petitioner and impleadment of the respondent-vendees were allowed by this Court vide order dated 20.5.2005.

4. The suit was decreed in favour of the mother and the trial Court came to the conclusion that Nirmala had been married to Kali Charan. This finding, therefore, went against the plaintiff-petitioner but the trial Court, after having examined the respondent No. 1 and witnessed her demeanour, came to the conclusion that she had re-married, which was also reflected in the extract of the Family Register of the village where she was shown to be married to one Budhraj, and as such the respondent No. 1 had extinguished her rights to succeed to the holdings Kali Charan.

5. The respondent No. 1, Nirmala went up in appeal and the first appellate Court reversed the judgment of the trial Court holding that the plaintiff had not been able to prove the re-marriage of Nirmala on the basis of the evidence available and, therefore, Nirmala being the widow of Kali Charan was entitled to succeed under the provisions of Section 171 of the U.P.Z.A. & L.R. Act, 1950. The petitioner-plaintiff preferred a second appeal before the Board of Revenue that was dismissed affirming the order of the first appellate Court dismissing the suit. Hence this petition.

6. I have heard Sri R.C. Singh, learned counsel for the petitioner and Sri Anjani Kumar Mishra, learned counsel for the vendees of the opposite party No. 1, Nirmala.

7. Sri R.C. Singh submits that the trial Court in its judgment dated 6th April, 1991 held that the respondent No. 1 failed to dislodge the evidence of re-marriage that was led on behalf of the plaintiff. The plaintiff had proved the re-marriage with the help of a newspaper dated 20th July, 1989, namely, "Dainik Nav Karmyug". This was supplemented by the extract of Family Register of village Qazitola, which indicated that Nirmala was the wife of Budhraj. This was further supplemented by the certificate of the village Pradhan of the same village, where she was remarried. This certificate dated 5th July, 1990 was also placed on record.

8. In the light of the aforesaid evidence, the trial Court further went on to record

that during the course of her examination, the defendant, Nirmala had come in coloured-clothes and was wearing coloured bangles that reflects the signs-of a married Hindu woman. The trial Court held that this was in contradistinction to the apparel of a widow, who is normally not apparelled in any coloured clothes or coloured bangles. Not only this, the trial Court also noted her statement during cross-examination about her re-marriage where she admitted that her feet had been coloured which also indicates the sign of a married woman. Sri Singh further submits that this entire evidence of the marital status of Nirmala could not be dislodged by her and she did not produce any oral evidence to establish her status of a widow.

9. Sri Singh further submits that the revenue and irrigation receipts were also produced to demonstrate that the petitioner was in cultivatory possession over the land in dispute. _He further submits that as soon as the suit came to be instituted being original Suit No. 274 of 1988, the opposite party, who had succeeded in getting a mutation order in her favour on 30.6.1986 sold off the land through a sale-deed dated 6.4.1989. This conduct of the opposite party clearly demonstrates that she was not living as a widow and after her re-marriage, hurriedly disposed of the property to the detriment of the plaintiff, the sole survivor, the widow mother of late Kali Charan.

10. Sri R.C. Singh further submits that the first appellate Court without advertng to the impact of the said evidence particularly the Family Register and the demeanour of the opposite party that was observed by the trial Court, reversed the judgment and decree of the trial Court which is an erroneous approach. He further submits Chat the first appellate Court without considering the provisions of Section 3 of the Indian Evidence Act and the law as explained by the Supreme Court in the case of Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, , has wrongly exercised its jurisdiction in appeal to interfere with the discretion of the" trial Court. He, therefore, submits that the appellate order as well as the order of the Board of Revenue in second appeal deserve to be reversed. He submits that the Board of Revenue dismissed the appeal summarily when substantial questions of law were available, and without having framed the same the Board of Revenue committed an error by dismissing the appeal.

11. Replying to the said submissions of Sri Singh, Sri Anjani Kumar Mishra, learned counsel for the vendees of the opposite party No. 1 submits that the plaintiffs case, that the opposite party No. 1, Nirmala was not the wife of Kali Charan, was disbelieved and it was held that she was wedded to Kali Charan. He submits that once this finding has been affirmed then the burden lay on the plaintiff to prove the factum of re-marriage which they have utterly failed to do. He further submits that the opposite party No. 1, Nirmala clearly denied her re-marriage and merely because she had not proved to the contrary, the trial Court committed a manifest error by decreeing the suit.

12. He further invited the attention of the Court to the reference of the statement of opposite party No. 1 and further to the Family Register of village

Dhundui where it was recorded that Nirmala is the widow of late Kali Charan. He submits that the plaintiff herself in her statement had indicated that Nirmala and Karan had been cultivating the plots and it is only after the opposite party No. 1 had sold the land that the plaintiff started asserting her rights. He further submits that no rights were left to be survived by the petitioner plaintiff and the substituted heir Bhonda had taken contradictory stands relating to his title as stands reflected in his statement before the trial Court in relation to the claim set up by him. It is alleged that Bhonda during the course of the trial had indicated that he had purchased the land from the plaintiff, who was his aunt but later on during the substitution proceedings, he set up a claim after the death of the plaintiff on the basis of a registered Will. This contradiction also indicates that the newly substituted petitioner in place of the plaintiff has no case of his own and even the original plaintiff had been unable to establish her original stand of denial of the marriage of opposite party No. 1, Nirmala with Kali Charan. He further contends that the plaintiff having failed to establish her case, the trial Court wrongly decreed the suit on the basis of inferences drawn in the alleged weakness of the defence. Accordingly the first appellate Court and the second appellate Court have not committed any error in dismissing the suits. He, therefore, submits that the writ petition deserves to be dismissed as it calls for no interference by this Court under Article 226 of the Constitution of India.

13. Having perused the records and having appreciated the submissions raised on behalf of the parties, what appears is that the original plaintiff Smt. Bai had been denying the marriage of late Kali Charan with opposite party No. 1. Her claim that her son was a minor at the time of his death, was also disbelieved. The trial Court recorded that the date of birth of Kali Charan was 15th December, 1964 and he died sometime in September, 1986. The trial Court believed the marriage of opposite party No. 1, Nirmala with Kali Charan. This aspect could not be successfully disputed by the learned counsel for the petitioner and, therefore, this Court has to proceed on the premise that the marriage had taken place between Kali Charan and opposite party No. 1. The issue took a turn on the evidence being led by the plaintiff about the re-marriage of opposite party No. 1.

14. Before considering this aspect it has to be noted that the last male tenure holder was the father of Kali Charan, namely, Chedi. According to the normal mode of succession as provided u/s 171(1) and Section 171(2)(a), the widow of a male Bhumidhar dying intestate succeeds along with the male lineal descendant of the tenure holder in equal strips. It appears that the name of Kali Charan was mutated and he remained with his mother in possession of Plot Nos. 1672 and 1711 measuring an area of 1.91 Acres situated in village Tilausa. It is the succession to the said holding which is being claimed by the opposite party No. 1 on the basis that she is the lawfully wedded wife of Kali Charan and being his widow succeeds to the said holding on the death of Kali Charan. Neither the trial Court nor the first appellate Court delved into this aspect of succession by the plaintiff on the death of her husband Chedi, in terms of the aforesaid provisions, as, a mere entry of the name of Kali Charan, would not divest the

plaintiff of her independent rights to which she was entitled in accordance with the provisions referred to hereinabove.

15. The opposite party No. 1 could have inherited only that share to which Kali Charan was entitled after the death of Chedi provided the opposite party No. 1 establishes her marriage with Kali Charan. This issue was therefore vital to the respective entitlement of the plaintiff which was not adverted to by the Courts below. Needless to mention that it was nobody's case that the plaintiff had abandoned her right or surrendered her share of the holding to which she was entitled after the death of her husband Chedi. The Court, therefore, was under a duty to protect her interest under the statutory protection of succession given to a widow u/s 171(2)(a) of the 1950 Act. The plaintiff Smt. Bai was an equal share holder with her son in view of the provisions of Section, 171 of the 1950 Act on the death of her husband Chedi.

16. In the instant case as noted above, the trial Court accepted the marriage of the opposite party No. 1 with the plaintiff's son and the same having not been dislodged successfully, this Court will now proceed on the terms that Kali Charan and Nirmala were married as husband and wife.

17. Coming to the issue of re-marriage, the first appellate Court while reversing the order of the trial Court did not advert to the demeanour of the opposite party No. 1 that was closely and keenly observed by the trial Court to conclude that she did not give the appearance of living like a Hindu widow and on the contrary reflected her personality as a married woman. The appellate Court also did not advert to the statement and cross-examination of the opposite party No. 1, Nirmala, which had been noted by the trial Court that her feet were coloured which is usually a sign of a married woman. This was further supported by documentary evidence, namely, the extract of Family Register of village Qazitola and the certificate of the Gram Pradhan which had also been believed by the trial Court but was totally left out to be considered by the appellate Court. The appellate Court referred to the family register of village Dhundui where Kali Charan lived which only reflected the first marriage of the opposite party No. 1. Having failed to notice the evidence of the plaintiff, there was a serious lapse that gave rise to a substantial issue which remained unnoticed by the second appellate Court as well.

18. The appellate Court also branded Bhonda, the plaintiff's witness to be interested on account of his relationship and the nature of the conflicting modes of succession claimed by him from Smt. Bai. On both counts the first appellate Court has proceeded to record findings without taking care of the procedure prescribed in law for its guidance as explained in paras 8 and 18 of the decision in the case of Madhusudan Das v. Smt. Narayani Bai (Supra). This position of law ought to have been observed by the first appellate Court before proceeding to reverse the well considered findings of the trial Court.

19. To my mind it appears that this error might have crept in the judgment of the

first appellate Court as it proceeded to decide the appeal in the absence of counsel for the parties as recorded by itself. The lack of assistance by a counsel on facts and also on law at times gets reflected in such errors. The present case also appears to fall within that category. Had the counsel been present, the Court could have with their help, avoided having escaped these finer points of fact and law as noted hereinabove. The second appellate Court has also dealt with the matter cursorily by not framing questions that arose on such facts.

20. Lawyers are legal missionaries acting as officers of the Court performing a higher role than a mere midwife performance or a simple mediator. It is with their able assistance that the best of judgments are delivered. This strengthens the system and affirms the rule of law. If there is any shortfall in this as a result of a casual approach by lawyers, the outcome is hazardous. This is what is a legal misfortune for the litigant, which at times is also described as a hazard of litigation. Lack of responsibility and discipline therefore at times are attributable in such cases on lawyers which should be avoided, as it is the litigants interest which is supreme, involving the larger interest of society obliging Courts to lay down the law correctly so as to ensure deliverance of justice.

21. The law relating to inheritance by a widow is governed by the principles set out u/s 171(1)(iv) quoted here in below:

the widow or widowed mother or the father's widowed mother or the widow of any predeceased male lineal descendant who would have been an heir, if alive, shall inherit only if she has not remarried.

22. The order of succession is provided for in Section 171(2) (a) and (b) in so far as it concerns the present dispute between the mother and daughter-in-law. A combined reading of the said provisions excludes inheritance by a widow who has remarried. In the case of Smt. Kasturi Devi Vs. Deputy Director of Consolidation and Others, , a three judges Bench relying on the principles of Hindu personal law held that a widow mother, who had remarried would still be entitled to succeed her son who dies during her lifetime. This decision was rendered in relation to inheritance of an agricultural holding in a dispute during consolidation operations without noticing the provisions of the U.P. Z.A. & L.R. Act noted hereinabove. The said view therefore came to be reversed after noticing the provisions by a subsequent three judges decision of equal strength in the case of Parshanti Vs. Dy. Director of Consolidation and Others, .

23. At first flush it does appear that once a widow inherits the tenancy, she would not be divested of the inherited property even if she subsequently marries, but that is not the position relating to succession to a holding under the U.P. Z.A. & L.R. Act, 1950. As quoted hereinabove, the principles relating to succession clearly prescribe remarriage as a complete disqualification for a widow who stands divested of inheritance consequent to a remarriage. However, a transaction by a widow before remarriage would be valid as the disqualification occurs prospectively after remarriage. If a widow alienates her holding after

inheritance and before remarriage, such a transaction if validly undertaken would be saved. A widow before remarriage can exercise her right of disposition and her subsequent remarriage would therefore not be of any consequence as the property itself would stand vanquished. There would be no occasion left to attract the disqualification. In such disputes what is relevant is the date of remarriage and as to whether the transaction had taken place prior to the said date or not.

24. The law as enunciated by this Court and the Apex Court deserves reference at this stage. The Full Bench of our Court in the case of *Ramji Dixit and Another v. Bhrigunath and Others* 1964 RD 80, through the majority opinion has explained the distinction between the transfer of a property and the devolution of a property. This became necessary particularly in the case of inheritance of widows under the provisions of the UP. Z.A. & L.R. Act, 1950. It was held therein that if the widow remarries, then the course of devolution would be altered and on remarriage of the widow, the property will devolve on the other heirs minus the widow. It was further explained therein that so long as the widow does not remarry or incur any such disqualification, she will have a right of disposition and for that purpose she is absolute owner of the holding. Justice S.N. Dwivedi, as his lordship then was, held that devolution is concerned with succession whereas transfer relates to the power of the tenure holder to dispose of the property. The course of succession would govern the power of transfer. A widow, therefore, has a power of alienation prior to any disqualification being incurred by her as an heir on account of remarriage. Hon'ble The Chief Justice M.C. Desai concurred with the same in his own words and held as follows:

Inheritance can always be to the property left by the deceased; if he or she leaves some property it will be inherited but he or she is not bound by any law to leave property to be inherited. When the law lays down who will inherit property of the deceased it does not thereby compel him or her to leave property to be inherited what it means is that if he or she leaves any property it will be inherited by such and such persons.

25. The said judgment was upheld by the Apex Court in *Ramji Dixit and Another Vs. Bhrigunath and Others*, . The Apex Court held that a widow cannot be said to have a life estate in the holding upon succession by virtue of the special rules of devolution indicating divesting of the property on remarriage or any forfeiture of that kind.

26. The Apex Court however, carved out an exception to the aforesaid law in the case of *Smt. Mainia (Dead) through Lrs. Vs. Deputy Director of Consolidation and Others*, , holding that if after remarriage the widow continues to be in possession of the property then she may acquire independent rights by adverse possession depending upon the facts of a case. Here the widow after remarriage would be acquiring a new right and, therefore, the succession to her holding would be governed by Section 174 of the 1950 Act. Another decision which can be mentioned for the purpose of understanding the distinction of the modes of succession as provided for under the U.P. Z.A. & L.R. Act, 1950 in relation to a

female Bhumidhar is Mool Chand Vs. Kedar (Deceased) By Lrs. and Others, . This decision has referred to the earlier decision in the case of Ramji Dixit (Supra). Another decision rendered by the Apex Court on the undisputed legal position of the absolute ownership of a widow has been reiterated in the case of Audhar and Others Vs. Chandrapati and Others, . in a review petition, filed in a decided writ petition, a learned Single Judge of this Court explained the law relating to such succession holding that the widow has full right to dispose of her property in the case of Tulsi and Ram Autar Vs. Deputy Director of Consolidation and Others, .

27. There is yet another point which deserves notice as the first appellate Court has relied on the orders passed during the mutation proceedings. Needless to mention that the orders passed during the mutation proceedings are not admissible and binding evidence in regular proceedings where a suit has been filed under the statutory provisions of Section 229-B of the U.P. Z.A. & L.R. Act. The proceedings during the mutation are summary and do not confer any title and, therefore, they are not evidence of title. At the best they can indicate possession but that would depend upon the facts of each case. The first appellate Court, therefore, has also overlooked this principle governing mutation orders and has erred by placing heavy reliance on the same.

28. None of the Courts below have taken care to examine facts to deliberate on these important issues that clearly give rise to substantial questions of law that were not even framed by the Board of Revenue while dismissing the second appeal in limine. The conduct of the opposite party No. 1, Smt. Nirmala in hastily proceeding to execute sale-deeds and deserting her widow mother-in-law was certainly a strong and compelling circumstance obliging the Courts below to ensure full protection to a widow mother left lonely at the mercy of pure selfish interests. On the other hand, cases are not unknown where a widow daughter-in-law is driven out of her husband's house on the pretext that she was a bad omen that had caused the early death of her husband. In the instant case, unfortunately the mother-in-law is dead and the daughter-in-law has already departed with the proceeds of sale of the property at the very initial stage of the litigation.

29. For the reasons and conclusions as drawn hereinabove and in view of the law explained, the Courts below while reversing the order of the trial Court have not adverted to the issues indicated hereinabove. The status of inheritance of the petitioner-plaintiff from her late husband alongwith her son Kali Charan would be governed by the provisions of Section 171(2)(a). The issue relating to remarriage as believed by the trial Court had to be dealt with in the light of the legal position as explained in the case of Madhusudan Das (Supra). The mode of succession has, therefore, to depend upon the factum of the date of remarriage and the transactions entered into. It will have to be seen as to whether Nirmala could have disposed of the entire property, if she was entitled to do so, including the share of the plaintiff to which she was entitled by virtue of being the widow of Chedi. The Courts below having considered the issue of title on the basis of

mutation orders was also uncalled for.

30. Accordingly, the writ petition deserves to be allowed. The order of the first appellate Court dated 4.8.1992 as affirmed by the Board of Revenue on 12th January, 2001 are hereby quashed. The matter is remitted back to the first appellate Court, namely, the learned Commissioner Jhansi Division, Jhansi or the Additional Commissioner concerned for deciding the matter afresh as expeditiously as possible but not later than six months from the date of production of a certified copy of this order before it. The appeal shall be decided afresh in the light of the observations made hereinabove after giving the parties full opportunity of hearing.

31. In view of the protracted litigation between the parties, it is further provided that the possession over the property in dispute as existing today shall be maintained and no further third party rights shall be created by either the plaintiff or the defendant till the matter is disposed of.

32. With the aforesaid directions, the writ petition stands allowed.