
(2009) 08 OHC CK 0001
In the Orissa High Court
Case No : First Appeal No. 71 of 1993

Smt. Margaret Palai and Another	Vs	APPELLANT
Smt. Savitri Palai and Others		RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Hindu Marriage Act, 1955 — Section 2, 4, 5(1), 7, 8

Citation : (2010) 4 CivCC 837

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Advocate : S.S. Rao and P.K. Mishra, for the Appellant; S.K. Das and N.N. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

S. Panda, J.—This appeal is directed against the judgment and decree dated 21.12.1992 and 6.1.1993 passed by the learned Subordinate Judge, Chatrapur in Title Suit No. 76 of 1990 dismissing the suit.

2. Plaintiff No. 1 is the Appellant. She filed the suit for partition of the suit property along with mesne profits and costs. Plaintiff Nos. 2 and 3 are her daughters. During pendency of the suit, Plaintiff No. 3 died. Therefore, her name was deleted.

3. The case of Plaintiff No. 1 in a nutshell is that she married to one Debendra Palai in the year 1973 as per Hindu customs and adjusted herself in the Hindu Customs of the family. Debendra died on. 17.5.1987. The suit schedule lands are joint family properties of Debendra and his brother. After death of Debendra, she became helpless and demanded partition of her husband" share but all her attempts became fruitless. During settlement operation, all the properties were recorded in the name of Defendant No. 2 giving an impression that Debendra died unmarried and issueless. It was further claimed that Defendant No. 2 and Debendra had joint lease of salt cultivation wherefrom Defendant No. 2 was

getting an average income. The Plaintiffs, being the members of the joint family, are entitled to a share from the properties in question. Accordingly, finding no other way, they filed the aforesaid suit. Defendant No. 1 is the mother, Defendant No. 2 is the brother and Defendant Nos. 3 and 4 are sisters of Debendra. All the Defendants filed a common written statement contending, inter alia, that the Plaintiffs are neither Hindus nor the married wife and daughter of Debendra, Debendra was in love with a Christian lady. He converted his religion to Christianity and demanded his share from the joint family property of his father Govinda Polai. Therefore, there was a family settlement and Rs. 1 lakh in cash and 50 tolas of gold ornaments were given to Debendra towards his share in the joint family property and he severed all his connections from their family and properties. Defendants claimed that they had no knowledge about the alleged marriage of Plaintiff No. 1 with Debendra. The alleged marriage certificate was false and baseless. Debendra had kept a concubine at Ganja and died issueless in the year 1987. The alleged lease of salt cultivation was purely the personal belonging of Defendant No. 2 and temporary in nature. Hence, the same is not liable for partition. On the aforesaid assertions, they prayed for dismissal of the suit.

4. On the above pleadings, the trial court framed as many as four Issues. Since issue Nos. 2 and 3 are important, those two issues are quoted below:

2. If the suit schedule properties are the joint family properties of Devendra Polei and the Defendants and whether there was previous partition held between Debendra and the Defendants?

3. If the Plaintiff No. 1 is a Hindu widow and Plaintiff No. 2 is the daughter of Debendra and if they can maintain this suit for partition and entitled to a share from the suit schedule properties?

5. Both the parties adduced oral as well as documentary evidence in support of their plea. The trial court, considering the evidence on record, came to the finding that the entire suit property is the ancestral joint family property of both Debendra and Defendants except Ac. 6. 20 cent, of lands which are Stridhan property of Defendant No. 1-Savitri. All other properties have been recorded in the name of the Defendants due to death of Debendra. The land under Ext.D, registered sale deed No. 4152/90, exclusively belongs to Defendant No. 2 and there was no previous partition between the parties.

6. So far as issue No. 3 is concerned, the trial court recorded the findings that Plaintiff No. 1 was not a Hindu married wife of Debendra. After the death of Debendra, she became non-Hindu widow. Therefore, she was "not coming within the definition of "widow" to succeed the properties of the deceased Debendra under the Hindu Succession Act. As the marriage was not solemnized between any two Hindus as provided u/s 5(1) of the Hindu Marriage Act and Plaintiff No. 1 was not the married wife of Debendra and Plaintiff No. 2 being the daughter of a Christian woman born through a Hindu father, she is only entitled to separate

properties of her Hindu father in absence of any other Class-I legal heir. But under the law she has no right to claim or succeed to the interest of Debendra in his co-parcenary property. Hence, both the Plaintiffs are not entitled to any share from the ancestral property and the suit property is not liable for partition. On the aforesaid grounds, the trial court dismissed the suit.

7. Learned Counsel appearing for the Appellants submitted that whether the findings of the trial court are legally sustainable, two questions are required to be decided in this appeal, first, whether Plaintiff No. 1 is the married wife of Debendra and entitled to a share in the ancestral property and secondly, if it was held that the marriage between Debendra and Margaret was invalid, whether Plaintiff No. 2 being the illegitimate child of Debendra is entitled to any share in the ancestral property, whereas the learned Counsel for the Respondents supported the impugned judgment. In support of his contention, he has relied on the decision reported in K. Devabalan and Others Vs. M. Vijayakumari and Others, and S.P.S. Balasubramanyam Vs. Suruttayan alias Andali Padayachi and others, .

8. Hindu Marriage Act applies to a person who is a Hindu by religion within the meaning of Section 2 of the Act. Marriage may be solemnized between the two Hindus subject to fulfilment of conditions stated in Clauses (i) to (vi) of Section 5 of the Act. Section 7 says about the ceremonies for Hindu Marriage Act. A married may be solemnized in accordance with the customary rites or ceremonies of either party thereto. Apart from that Section 8 provides for registration for Hindu Marriage for the purpose of facilitating proof of such marriages. Section 4 of the Act gives overriding effect to the provisions of the Act over any custom or usage as part of Hindu Law in force immediately before

commencement of the Act. In other words, the Pre-Act uncoded laws will have no application to the marriage after coming into force of the Hindu Marriage Act. A marriage outside the scope of Hindu Marriage Act is not a marriage in the eye of law and a child born out of such marriage between a Hindu male and a non-Hindu female cannot succeed to the co-parcenary property left by his/her Hindu father in view of Section 8 of the Hindu Marriage Act.

9. The Plaintiff No. 1 in order to prove the marriage vide Ext.2, a document where it has been written as deed of marriage agreement and it was averred therein that Margaret and Debendra both were living in close intimacy for the past one year and they were desiring to live as husband and wife.

Margaret does not plead to prove to be a Hindu. She does not claim to have married Debendra by following the ceremonies of a Hindu marriage (Section 7) or by registration as provided u/s 8 of the Hindu Marriage Act. Therefore, she being the Plaintiff has failed to prove that she was the legally married wife of late Debendra. Hence, the case cited by the learned Counsel for the Appellant reported in K. Devabalan and Others Vs. M. Vijayakumari and Others, has no application to the facts of the present case as in the said case the marriage was

in dispute. However, in the aforesaid cited case neither party had a case that there was no valid marriage between the 4th Defendant and mother of the Plaintiffs.

10. The learned Counsel for the Appellants cited a decision of the apex Court in the case of S.P.S. Balasubramanyam Vs. Suruttayan alias Andali Padayachi and others, wherein it has been held that a man and a woman continuously living under same roof and cohabiting for a number of years, the law would raise presumption that they live as husband and wife.

In paragraph-2 of the said case it has been stated that the suit filed by Chimnathambi against his brothers claiming a share in the properties was terminated by compromise on 18.3.1952 i.e. prior to Hindu Marriage Act/Hindu Succession Act. On the face of Section 4 of the Hindu Marriage Act, the decision cited by the learned Counsel for the Appellant in the case of S. P.S. Balasubramanyam (supra) is not applicable to the facts of the present case.

11. The apex Court in the case of Gullipilli Sowria Raj Vs. Bandaru Pavani @ Gullipili Pavani, has held that the Preamble to the Hindu Marriage Act, 1955 itself indicates that the Act was enacted to codify the law relating to marriage amongst Hindus. Section 2 of the Act which deals with application of the Act reinforces the said proposition. Section 5 of the Act thereafter also makes it clear that a marriage may be solemnized between any two Hindus if the conditions contained in the said section were fulfilled. The usage of the expression "may" in the opening line of the section does not make the provision of Section 5 optional. On the other hand, it in positive terms, indicates that a marriage can be solemnized between two Hindus if the conditions indicated were fulfilled. In other words, in the event the conditions remain unfulfilled, a marriage between two Hindus could not be solemnized. The expression "may" used in the opening words of Section 5 is not directory, as has been sought to be argued, but mandatory and non-fulfilment thereof would not permit a marriage under the Act between two Hindus. Section 7 of the 1955 Act is to be read along with Section 5 in that a Hindu marriage, as understood u/s 5, could be solemnized according to the ceremonies indicated therein.

12. For a valid marriage under the Hindu Marriage Act, the following provisions of law are to be considered. For better appreciation, Sections 5 and 7 of the Hindu Marriage Act, 1955 are extracted below:

5. Conditions for a Hindu marriage - A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind: or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a mind or to such an extent as to be unfit for marriage and the procreation of children: or

(c) has been subjected to recurrent attacks of insanity

(iii) the bridegroom has completed the age of (twenty- one years) and the bride, the age of (eight years) at the time of the marriage;

(iv) the parties are not within the decrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

7. Ceremonies for a Hindu marriage - (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the saptpadi (that is, the taking of seven steps by the bridegroom and the bride jointly between the sacred fire), the marriage

becomes complete and binding when the seventh step is taken.

13. Section 5 of the Hindu Marriage Act lays down the conditions for a marriage to be solemnized between any two Hindus. Sections 5 and 7 of the Hindu Marriage Act make it clear that a Hindu marriage has both religious as well as secular aspects. Therefore, it is to be treated both as a sacrament and as a contract. It is a sacrament because there is emphasis on the performance of the customary rites and ceremonies including Saptapadi wherever it is treated as an essential ceremony for the completion of the marriage. It is a contract because this section deals with the capacity of the spouses to enter into an alliance for a marriage. Even under the original Hindu Law, marriage was a sacrament as well as a contract. Section 7 gives statutory recognition to the marriage under the Hindu law as a sacrament. The provision speaks for solemnization of marriage in accordance with customary rites and ceremonies. The word "solemnized" means, to celebrate the marriage with proper ceremonies with the intention that the parties should be considered to be married.

14. In the present case, it appears that the Plaintiff has not proved by adducing cogent evidence regarding the fact that she being a Hindu has followed all Hindu customs and rites after her marriage or she was converted to Hindu before the marriage. She only stated that she is observing some of the Hindu festivals. She did not examine any caste man or other persons who are acquainted with her day to day life. Ext.2 is an agreement. The said document has not proved a valid marriage between the Plaintiff No. 1 and Debendra as per Hindu law, Since Plaintiff No. 1 has failed to prove that she is the legally married wife of Debendra, she is not entitled to a share in the ancestral property. As Plaintiff No. 1 is not the married wife of Debendra, Plaintiff No. 2 cannot be said to be the

daughter of Debendra. During lifetime of Debendra, the property was not partitioned. Admittedly, the property is the ancestral property. Therefore, Plaintiff No. 2 is also not entitled to any share in the said ancestral property.

15. Accordingly, the impugned judgment and decree passed by the trial court is confirmed. The first appeal is dismissed. No costs.