

(1961) 08 MP CK 0028
In the Madhya Pradesh High Court
Case No : First Appeal No. 39 of 1958

Smt. Mira Devi and Others	Vs	APPELLANT
Smt. Aman Kumari		RESPONDENT

Date of Decision : 31-08-1961

Acts Referred:

Special Marriage Act, 1954 — Section 17, 2, 22, 23, 24

Citation : AIR 1962 MP 212 : (1962) ILR (MP) 273 : (1962) JLJ 911 : (1962) 7 MPLJ 248 : (1962) MPLJ 248

Hon'ble Judges : T.C. Shrivastava, J;S.P. Bhargava, J

Bench : Division Bench

Advocate : A.R. Choubey and M.L. Shrivastava, for the Appellant; Y.S. Dharmadhikari, for the Respondent

Judgement

Shrivastava, J.

The suit out of which this first appeal arises was filed by the respondent Smt. Aman Kumari for possession of homefarm lands lying in several villages and for possession of movables. The respondent has also filed an appeal (First Appeal No. 120 of 1958) against the judgment in that case. This judgment governs the disposal of both the appeals.

In the erstwhile State of Korea which merged within Madhya Pradesh in 1948, there was a zemindari called "Patna Zemindari". It was held by one Jagdish Prasad Singh till his death in 1942. The respondent Smt. Aman Kumari is the widow of the said Jagdish Prasad Singh. He had also left behind a son Gopal Saran Singh who died in 1948. The appellant Smt. Mira Devi claims to be his widow, having married him on 4-7-1941 under the Special Marriage Act, 1872 (III of 1872)--hereinafter referred to as the Act of 1872. Appellants Vijay Prasad Singh and Lalit Prasad, Singh are sons of Smt. Mira Devi from the deceased Gopal Saran Singh. After the death of Jagdish Prasad Singh, the Zemindari was resumed by the Korea Darbar in 1945, but the home-farm lands in several villages were allowed to be retained by the heirs of the zemindar. The present

dispute relates to these homefarm lands and the agricultural houses and other property in those villages.

The plaintiffs case was that she and Gopal. Saran Singh, jointly inherited the property left by Jagdish Prasad Singh and after the death of Gopal Saran Singh, she became the sole owner of the property. She pleads that the homefarm lands were cultivated by her till 1949 when after the death of Gopal Saran Singh the defendants came to Patna and ousted her From her house taking possession of all the properties. The plaintiff stated that her husband was a Raj Gond governed by Hindu Law in the matter of succession. She denied that defendant No. 1 Smt. Mira Devi ever married Gopal Saran Singh or that the marriage was valid in law. Accordingly, she claims that the defendants have no right in the property left by Gopal Saran Singh. The validity of the marriage was attacked on the ground that Gopal Saran Singh was below 18 years of age on the date when the alleged marriage is said to have taken place and because such a marriage is not recognized.

The defendants pleaded that Jagdish Prasad Singh and Gopal Saran Singh were not Raj Gonds but were Gonds of aboriginal origin. They were not hence governed by Hindu Law but by custom in the matter of succession. Defendant No. 1 claimed that she was legally married to Gopal Saran Singh who was over 21 years on the date of marriage and the other two defendants are his sons. The defendants asserted that after the death of Jagdish Prasad Singh, the whole estate passed to his son Gopal Saran Singh and after Gopal Saran Singh to the defendants. They admitted that the lands were managed by the plaintiff till 1949; but it was explained that this was on behalf of Gopal Saran Singh. After Gopal Saran Singh's death, the defendants took possession of the lands as desired by the Plaintiff herself who voluntarily surrendered possession of all land to them. Thereafter, the defendants continued in possession of the lands and a patta for the lands in suit was granted by the Madhya Pradesh Government in their favour.

The trial Court held that the zemindar was a Raj Gond governed by the Hindu Law of succession. The defendants' case that Smt. Mira Devi had married Gopal Saran Singh under the provisions of the Special Marriage Act was accepted and it was held that the marriage was valid. The marriage effected a severance of Gopal Saran Singh from the family and he thus got a third share in the property. The other two-third continued with Jagdish Prasad Singh and his wife (plaintiff) and passed to the plaintiff after the death of Jagdish Prasad Singh. The Court thus decreed the claim for two-third share allowing the defendants one-third share. Both the parties have filed appeals against the decision claiming that the whole share should be given to them.

During the course of arguments before us, the defendants did not contest that the parties are Raj Gonds and are governed by the Hindu Law in matters of succession.

Before we consider the question of the shares of the parties in the properties, it is necessary to decide whether Smt. Mira Devi married Gopal Saran Singh as alleged and whether the marriage is valid. So far as the performance of the marriage ceremony is concerned, we have on record the marriage certificate (Ex. D-10) issued by the Marriage Registrar under the Special Marriage Act, 1872. The statements of Smt. Mira Devi and the attesting witnesses L.S. Sherlekar and S.N. Trivedi along with the certificate prove the solemnization of the marriage beyond doubt.

The respondent Smt. Aman Kumari objects to the validity of the marriage on the ground that Gopal Saran Singh was below 21 years of age and as the consent of his father to the marriage was not obtained, it was contrary to the condition No. 3 in Section 2 of the Special Marriage Act, 1872. We have, therefore, to decide whether Gopal Saran Singh was under 21 years of age on 4-7-1941, the date on which the marriage was celebrated. (After discussing the evidence in Paras 9-13, the judgment proceeded;)

From the material on record, we find it amply proved that Gopal Saran Singh was born in 1919. He was thus more than 21 years old when his marriage under the Special Marriage Act was celebrated on 4-7-1941. Consent of the father to the marriage was not, therefore, necessary. The marriage cannot be attacked as invalid on this ground.

The second ground on which the marriage is challenged is that Gopal Saran Singh was not a Hindu but a Gond belonging to the aboriginal tribe and Smt. Mira Devi was a Hindu and therefore the marriage could not be solemnized u/s 2 of the Special Marriage Act, 1872, as amended in 1923. That section permits a marriage between two persons both of whom do not profess any of the seven faiths specified therein or between two persons both of whom profess any of the four specified, faiths. It was contended that a marriage between a person professing one of those faiths and a person not professing any of those faiths is not permissible under that section and is therefore absolutely void. This contention is supported by the decision in *Ratan Behari Datta Vs. Margaretha Heh*, .

In the instant case, Smt. Mira Devi was undisputedly a Hindu Brahmin. As regards Gopal Saran Singh, the recitals in the plaint show that he was a Raj Gond Hindu. To this, the reply of the defendants was that they were Gonds of the Adivasi tribe following tribal customs and not rules of the Mitakshara School. The pleadings of the parties are thus the exact opposite of what they should have said to support their case on this point. However, the finding is that the parties belonged to Raj Gond class, who had according to the plaintiff adopted Hindu Law of succession,

The position of Raj Gonds has been considered by this High Court in *Chattar Singh v, Roshan Singh* ILR (1946) Nag 159: (AIR 1946 Nag 277). The Court observed:

""The distinction between a Hindu and a person who is subject to Hindu Law is at times apt to be blurred but the distinction is there. The Gonds have, as is well-known, adopted in the course of time whether for reasons of propinquity or snobbery several Hindu usages and customs, but) this does not make them Hindus either in the ethnological or complete theological sense."

The Court then concluded that Gonds are not Hindus and proceeded to consider the contention that Raj Gonds which are a branch of the Gonds had become Hindus. On a review of the authorities, their Lordships repelled, the contention holding that Raj Gonds were not Hindus. In *Dashrath Prasad v. Laloo Singh* 1951 Nag LJ 616: (AIR 1951 Nag 343), Bose, J, (as he then was) laid down that "Raj Gonds are not Hindus but the presumption is that they are governed by Hindu Law unless contrary is shown". It is clear from these decisions that although Raj Gonds have adopted the Hindu Law for some purposes, they have not thereby become Hindus. The adoption of a particular law is different from changing faith.

Strictly speaking, therefore, the marriage between Gopal Saran Singh and Smt. Mira Devi could not be celebrated u/s 2 of the Special Marriage Act. That brings us to the question whether a marriage contrary to the conditions specified in Section 2 is void ab initio, or whether it is valid until set aside by Court u/s 17 of the Act of 1872.

This question was considered by a Special Bench of three Judges of this Court in *Ganeshprasad v. Damayanti* ILR (1946) Nag 1: (AIR 1946 Nag 60) (SB) and it was held that Section 2 does not lay down the conditions of the validity, of the marriage but merely prescribes the forms which have to be filled in by the parties. It was held that Section 17 only gave a discretionary power to Court to declare the marriage "null or dissolved". It was finally concluded that such a marriage was not void ab initio.

The view taken by the other High Courts is contrary. In *Basana Sen Vs. Aghore Nath Sen*, it was held that want of consent of the guardian when it was necessary u/s 2 rendered the marriage absolutely void. In *Arvindam v. M. Venderian* AIR 1939 Hyd 205 the provisions contained in Section 2 were considered mandatory and a marriage contrary to those provisions was held absolutely void. Their Lordships followed the Calcutta view in *Basana Sen Vs. Aghore Nath Sen*, , in preference to the view of the Nagpur High Court. A similar view has been taken in *Jayalakshmi v. Soundararajan* AIR 1949 Mad 808 and *Parbati Mukerjee v. Samrendra Nath* AIR 1951 Punj 88 (SB).

We consider ourselves bound by the view of the Special Bench of three Judges of this Court in *Ganesh prasad's case* ILR (1946) Nag 1: (AIR 1946 Nag 60) (SB) (supra). We do not agree that that view requires reconsideration. The word "may" used in Section 17 clearly gives discretion to the Court to declare the marriage null or to dissolve it. A matrimonial court may not consider it fit to exercise its discretion against granting such a declaration in suitable cases. We may add that Section 17 of the Act of 1872 did not contain any general

declaration about such marriage being void as is now found in the corresponding Section 24 of the Act of 1954 which open with the words: "Any marriage solemnized under this Act shall be null and void and may be so declared by a decree.....etc."" It is clear from this language that the marriage is void independent of any declaration by Court at all. This was not the position under the Act of 1872 where the power of the Court had to be invoked to produce such an effect.

At any rate, so far as the condition regarding "faiths" of the parties is concerned, the matter does not involve difficulty in view of the following observations in Ganesh prasad's case ILR (1946) Nag 1: (AIR 1946 Nag 60) (SB) (supra):

"We are agreed that the Act does not require formal admittance to any of the faiths specified in Section 2, nor does it require that any of them should be outwardly embraced. All it lays down is that the declarant should make a formal profession of one or other of those faiths before the Marriage Registrar. In our opinion, any person can profess the faiths mentioned whether or not he or she has actually been admitted to any of them, and even if he or she is not recognised by others as belonging to one or other of them."

The Calcutta High Court which took a different view of the implications of Section 2 on other conditions observed in Dr. Niranjan Das Mohan Vs. Mrs. Ena Mohan and Others, that all that the Act requires is a declaration of the faith at the time of the marriage. Thus, it appears that it would be sufficient if the party professes Hindu faith at the time of marriage, and this the deceased Gopal Saran Singh, in the instant case, declared at the time of marriage (vide Ex. D-10). We hold that the attack on the validity of the marriage on this ground must fail.

The last ground against the validity of the marriage urged by Shri Dharmadhikari for the respondent is that the Special Marriage Act was never in force in Korea State and therefore the marriage was invalid as amongst Raj Gonds of that State, a marriage outside the community of Raj Gonds is not permitted. We may in this connection refer to Conflict of Laws by R.H. Graveson (1955, Third Edition), page 131 where after reviewing the case law, the learned author formulates the modern rule as follows:

"The essentials of a marriage are governed by the law of the domicile of each party at the time of marriage..... while the formalities are governed exclusively by the law of the place of celebration applicable to the particular type of marriage celebrated."

"Essential requirements of marriage" in this passage refers to the provisions of law prohibiting marriage on various grounds. In paragraph 21 of the judgment, the trial Court has observed that the evidence adduced by the plaintiff is insufficient to prove a custom that Gonds or Raj Gonds cannot marry outside their tribe. The witnesses for the plaintiff do not positively depose to such a prohibition. All that they say is that Raj Gonds generally marry within their caste or tribe. That is true about every caste or tribe. Something more is needed to

prove a positive prohibition, e.g., the person who contracted such a marriage was treated by the tribe as having ceased to belong to the tribe etc. We agree that the evidence does not establish any positive prohibition. Thus, there was no contravention of any essential requirements of marriage in the law or custom governing the parties. So far as the form of the marriage is concerned, it was valid according to the place of celebration which took place in Wardha where the Special Marriage Act was in force. The marriage was thus valid as the form was according to the *lex loci celebrationis* and there was no prohibition in the *lex domicilii* against the marriage.

The contention that the marriage must be treated as invalid for the purpose of the succession of lands in Korea State is without any substance. It is true that succession to immovable property is governed by the law of the place where the property is situated. This only means that the persons who have a right in the property and their shares will be determined by such law. However, the question whether the claimant is a wife or a husband of the deceased would be determined by the law relating to the status of marriage. The personal status of a man accompanies him everywhere as also the status of domestic relations on the principle of universality of status recognized in all countries. As Graveson observes in *The Conflict of Laws* on page 114:

"This principle of universal recognition has led English Courts, for example, to accept the status of a child legitimated under the law of a foreign domicile, for many years before the principle of legitimation by subsequent marriage of the child's parents was introduced into English law by the Legitimacy Act, 1926; to recognise the status of husband and wife between parties who could dissolve their marriage by consent and registration....."

In this connection, distinction between status and incidents of status should not be lost sight of. The relationship between spouses is a question of status. It is only the latter which would be governed by the law of the situs of the immovable property; but in administering such law, the relationship would have to be taken as valid according to the law of the place of the celebration of marriage.

In view of the discussion above, we hold that the marriage between Gopal Saran Singh and Smt. Mira Devi (defendant No. 1) was valid and the other two defendants born of this marriage are legitimate sons of Gopal Saran Singh. We shall now consider the question of inheritance.

Sections 22 and 23 of the Special Marriage Act, 1872, were as follows:

"22. The marriage under" this Act of any member of an undivided family who professes, the Hindu, Buddhist Sikh or Jaina religion shall be deemed to effect his severance from such family.

A person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act shall have the same rights and be subject to the same disabilities in regard to any right of succession to any property as a person to whom the Caste

Disabilities Removal Act, 1850 applies.'''

The effect of these sections is that such a person, on performance of the marriage, ceases to be a member of the joint family. His share in the family properties becomes defined at once and vests in him separately. He cannot later claim any right of survivorship in the family properties. However, it follows from Section 23 that he is not debarred from asserting his rights as an heir to any one to whom he could inherit but for the marriage under the Act. The saving of his rights under Section 23 is personal to him and does not extend to his children.

That being the position, it is clear that Gopal Saran Singh became separated from the family in 1941 as soon as the marriage under the Special Marriage Act was celebrated. At that time, the family consisted of Jagdish Prasad Singh, his wife (plaintiff) and his son Gopal Saran Singh. It is settled law that when a partition takes place between a father and his son the mother is entitled to a share equal to that of the son. "Partition" here does not mean partition "by metes and bounds" but denotes the severance of the jointness of the family. All that is necessary to constitute a partition of a Hindu family is a definite and unequivocal indication of his intention by a member of the joint family to separate himself from the family and separately enjoy his share in the joint family property.

If such a declaration is made, the shares of the individual members become defined and vest in them separately. In the instant case, the declaration is not made by the individual member; but performance of the marriage leads to the severance of the family by a statutory provision. Essentially, the situation does not differ from the case of the declaration of an intention by a coparcener to separate. The coparcener who marries under the Special Marriage Act knows that severance will follow on such marriage.

By his act of contracting the marriage, he can be deemed to have made the necessary declaration to separate. We hold that there was a partition between Gopal Saran Singh and his father when the former married and therefore the plaintiff was entitled to one-third share of the family properties as her separate share; Jagdish Prasad Singh and Gopal Saran Singh each got a third share.

When Jagdish Prasad Singh died in 1942, inheritance opened, to the one-third share held by him. It has been conceded before us by both the parties that the Hindu Women's Right to Property Act, 1937, was not in force in Korea State at the material time. The inheritance would thus be governed by the provisions of Hindu Law as they stood without that Act. A separated son excludes the widow from inheritance under Hindu Law and therefore Gopal Saran Singh would inherit to Jagdish Prasad Singh's share in preference to the plaintiff.

The learned Judge of the trial Court decided the case on the assumption that the Hindu Women's Right to Property Act, 1937, Applied to Korea State; but as we have already said, this was not the position. The mere fact that administration in Korea was carried on on the same principles as prevailing in the neighbouring

districts of British India is not enough to make every statute of British India applicable to Korea. The learned Judge relied on the decisions in *Girdharilal v. Fatehchand*, (S) AIR 1956 MP 145 and *Manorama Bai v. Ramabai*, AIR 1957 Mad 289; but these decisions consider the special effect of the Act of 1937 and are not helpful. As Gopal Saran Singh's right of inheritance was preserved by Section 23 of the Special Marriage Act, 1872, he inherited the share of Jagdish Prasad Singh.

After the death of Gopal Saran Singh, his estate would devolve on the defendants according to the provisions of the Indian Succession Act as provided in Section 24 of the Special Marriage Act. Under the Indian Succession Act, the widow and lineal descendants of the deceased exclude the mother and therefore the property left by Gopal Saran Singh would pass to the defendants in preference to the plaintiff.

That disposes of the main contentions of the parties. We may here briefly refer to one or two points which were raised in arguments. On behalf of the plaintiff, Shri Dharmadhikari argued that the jagir was resumed by the Korea Darbar in 1945 (vide Ex. D-12) and the home farm lands continued in the plaintiff's possession by sufferance. The defendants have no rights in them. On the same hypothesis, the defendants contend that after the resumption of the jagir, neither party had a right to the lands which vested in the Government and as Government granted a patta of the lands to the defendants, they should be considered to be fully entitled to the lands. We do not agree that either of these contentions is correct. The home farm lands appertained to the jagir and were family properties. If the Korea Darbar resumed the jagir but left the lands with the family, the parties would continue to have the same rights in them as they had in the jagir. They thus held the lands jointly--the plaintiff having one-third share and the defendants having the remaining two-third.

In view of the findings above, the appeal filed by the plaintiff (First Appeal No. 120 of (1958) is dismissed and the appeal filed by the defendants (First Appeal No. 39 of 1958) is partly allowed. The decree of the trial Court is modified by substituting "one-third share" for the words "two-third share" wherever they occur in the decree. As regards costs, considering that both the parties had claimed a whole share in the suit and appeal and the success is divided, we direct that the defendants shall pay one-third of the costs of the lower Court to the plaintiff and the costs of the appeals shall be borne as incurred.