

(1991) 12 RAJ CK 0026

In the Rajasthan High Court

Case No : C. Miscellaneous Appeal No. 155 of 1990

Smt. Rajesh Kumari and Others

APPELLANT

Vs

Smt. Uma Devi and Another

RESPONDENT

Date of Decision : 04-12-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Criminal Procedure Code, 1973 (CrPC) — Section 125, 283, 384, 387
Hindu Marriage Act, 1955 — Section 11, 5
Penal Code, 1860 (IPC) — Section 405
Succession Act, 1925 — Section 383

Citation : (1992) 3 WLC 551 : (1991) WLN 432

Hon'ble Judges : N.K. Jain, J

Bench : Single Bench

Judgement

N.K. Jain, J.—This miscellaneous appeal is directed against the order of learned District Judge, Bikaner dt. 5.5.90 whereby he has granted temporary injunction in favour of I he respondents.

2. In brief the facts stated by the petitioner No. 1 are that she was married to Balram Singh in the year 1956 and had four sons and one daughter by this wedlock. They were living in the house of her father in law at Bkaner. It was alleged that after his transfer, relations between then became strained. Balramsingh filed a divorce petition but the same was dismissed on 4.5.92. He preferred an appeal by the same was also dismissed as withdrawn. The father of the appellant Manoharlal deceased bequeathed his house situated at Ranibazar in favour of the appellant No. 1 on 3.11.84 Balramsingh died at Bhilwara on 28.7.88. On 10.3.89, the appellant applied for succession certificate before the District Judge, Bikaner. Succession certificate was issued on 10.9.89. Respondent Umadevi filed an application for temporary injunction on the ground that she is a lawful wedded wife of Balram Singh and prayed that the appellant may not withdraw any amount from Bank or post office on the basis of succession certificate. The trial court grented injunction on 5.5.90. Hence, this misc. appeal.

3. This appeal is pending since 7.8.1990. As agreed by the learned Counsel for the parties the case has been finally heard.

4. Mr. K.C. Samdariya, learned Counsel for the respondent has raised a preliminary objection that since the order is passed u/s 151 C.P.C., misc. appeal Under Order 43 Rule 1 C.P.C. is not maintainable.

5. First of all, I proceed to consider preliminary objection. A bare perusal of the application dt. 15.1.90 shows that it has not been mentioned in the application that under which section it has been moved and only "Sthagan" has been mentioned at the top of application (whether it is under order 39 Rule 1 or u/s 151 C.P.C), but in para 5 of the application all the conditions enumerated under Order 39 Rule 1 and 2 exist. Thus, the preliminary objection is not sustainable. That apart this Court has power to convert this appeal into revision and the same is treated as revision petition.

6. Mr. H.C. Jain, learned Counsel for the appellant has submitted that the learned trial court is not justified and without his jurisdiction, restrained the appellant from withdrawing amount on the basis of succession certificate even confirmed by the High Court vide order dt. 1.9.1990. He has also submitted that the appellant is the only legally wedded wife. The alleged will executed in favour of the respondent has not been submitted by her before the learned MJM with the suit or application on 8.9.1988. He has also submitted that the respondent Uma Devi took possession of the house hold articles at Bhilwara, immediately after the death of Balram Singh on 25.7.89. A complaint was fitted against Uma Devi, but he has not filed any will at that time also nor before the learned Magistrate while taking cognizance against her u/s 405 IPC on 23.12.1988. He has further submitted that original will was never produced by the respondent in the trial court and also in the High court earlier. He has submitted that Section 5 of the Hindu Marriage Act, 1955 provides condition for a valid marriage and Section 5(1) neither party has a spouse living at the time of marriage. And Section 11 of the Hindu Marriage Act, 1955 provides void marriages, it says that "any marriage which is in contrevention of any one conditions specified in Section 5(1)(IV)(V) is void". Thus, the so called marriage between the respondent Umadevi and deceased Balram Singh is void and she cannot get any right on account of such void marriage. Mr. Jain, has further submitted that Umadevi w/o Rajesh filed an application u/s 125 Cr.P.C. on 4.4.64 against her husband Rajesh Kumar for maintenance in the court of Addl. Munsif which was ultimately discussed as withdrawn. Mr. Jain has submitted that the only remedy open to the respondent is to file a regular suit u/s 387 and not this revocation application and on injunction can be granted. Learned Counsel for the petitioner has lastly submitted that the revocation proceedings are likely to take some time and in case the order is not set aside the appellant would suffer irreparable loss despite succession certificate has been granted in her favour and she is prepared to give undertaking as mentioned in para 7 of the memo of appeal.

7. Mr. K.C. Samdariya, learned Counsel for the respondent has submitted that

while granting permission to withdraw the appeal, the High Court had kept open the remedy and hence it cannot be said that revocation does not lie and only remedy is to file a regular suit, therefore there is no illegality in the order as probate proceedings as well as revocation proceedings are pending. Hence, the learned trial court has rightly exercised discretion. He has placed reliance on *Mutukdhari Singh Vs. Smt. Prem Debi and Others*, R.L.W. 1977 326 and *Parvathi Pillai Meenakshi Bhai v. Velayudhan Pillai Karunakaran Nair* AIR 1953 T.C. 122.

8. I have heard learned Counsel for the parties and perused the impugned order as well as caselaw.

9. Admittedly, succession certificate was granted by the learned District Judge in favour of the petitioner. Revocation is permissible provided the case falls in the category enumerated u/s 283 and at the same time appeal can be preferred u/s 384 of the said Act or to file a regular suit u/s 387. Uma Davi filed an appeal and while granting permission to withdraw the appeal arising out of the same, this Court has kept the remedy open to the appellant Uma devi to avail such remedy which may be available to her and upheld the succession certificate. Now, the respondent by a petition u/s 383 of the Indian Succession Act, 1925 moved for revocation of succession certificate granted in favour of the petitioner on 10.9.89 and also filed an application for injunction. The basis of such a petition by the respondent is that she is also a married wife of the deceased as well as a will alleged to have been executed by the deceased in her favour. Admittedly, no probate has been granted and matter is pending therefore, all points will be decided by the learned court below and I need not enter into the merits of the case. Without expressing any opinion on the merits of the case, looking to the facts and circumstances of the case I deem it necessary to safeguard the interest of the petitioner who is a holder of succession certificate granted in her favour by a competent court on 10-9-89. This Court has power to impose reasonable condition and in the interest of justice a condition can be imposed on the respondent that in case she wants the order of learned trial court to be continued till the revocation proceedings are decided, Umadevi (non-petitioner) shall furnish a bank guarantee to the satisfaction of the court below of the like amount as per succession certificate within one month from today, in case she fails to do so or not the option within the aforesaid period from today, the petitioner will be free to withdraw the amount mentioned in the succession certificate provided that the appellant shall give an undertaking that immovable property mentioned in para 7 of the memo of appeal will not be transferred or mortgaged till the decision of revocation proceedings by the learned lower court, within 15 days before the case owned Court thereafter.

10. Consequently, this revision petition stands disposed of. The impugned order dt. 5-5-90 of learned Dist. Judge is modified to the extent observed above.