

(1972) 08 AHC CK 0012
In the Allahabad High Court
Case No : Second Appeal No. 2326 of 1965

Smt. Shephali Chatterjee and Others	Vs	APPELLANT
Smt. Kamala Banerjee and Others		RESPONDENT

Date of Decision : 17-08-1972

Acts Referred:

Hindu Marriage Act, 1955 — Section 17
Special Marriage Act, 1954 — Section 15, 16, 44
Succession Act, 1925 — Section 33

Citation : AIR 1972 All 531 : (1972) 42 AWR 796

Hon'ble Judges : T.S. Misra, J

Bench : Single Bench

Advocate : R.C. Ghatak, for the Appellant; K.P. Bose, Sharafat Ali and A. Banerji, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Misra, J.—This is a plaintiff's appeal arising out of a suit for possession and recovery of damages from the defendants. The plaintiffs alleged that the house in suit was owned by her husband M. P. Chatterji. The marriage of the plaintiff No. 1 with M. P. Chatterji was performed under the provisions of the Special Marriage Act, 1872 and out of this wedlock the plaintiffs Nos. 2 to 4 were born. Subsequently M. P. Chatterji developed illicit connections with the defendant No. 1 and both of them started living in a separate house. The defendants Nos. 2 to 6 are the sons of the defendant No. 1. The plaintiff contended that the defendant No. 1 was not legally married with M. P. Chatterji and M. P. Chatterji died in the year 1959 and the plaintiffs claimed themselves to be his heirs and legal representatives. The defendants reside on the first floor of the house which was purchased by M. P. Chatterji and the plaintiffs have sought for their eviction therefrom.

2. The suit was contested by the defendants. They alleged that plaintiff No. 1 was a legally wedded wife of late M. P. Chatterji. On the other hand, the

defendant No. 1 was not (sic) his legally wedded wife and as such the defendants being the heirs and legal representatives of M. P. Chatterji have right, title and interest in his property including the house in suit. Consequently, it was pleaded that the plaintiffs were not entitled to seek the eviction of the defendants. They also pleaded that a settlement had taken place between the parties to the suit and in that view of the matter as well the suit was not maintainable.

3. The trial Court, on a consideration of the evidence, found that the plaintiff No. 1 was married to M. P. Chatterji and that marriage was performed under the provisions of Special Marriage Act, 1872 and that the plaintiffs Nos. 2 to 4 are the sons and daughters of late M. P. Chatterji. The trial Court also held that the defendant No. 1 was also married to M. P. Chatterji according to Hindu rites and her marriage was valid. Consequently it was held that defendants Nos. 2 to 6 are the legitimate sons and daughters of M. P. Chatterjee. It was however, held that no settlement between the parties, as pleaded in the written statement, took place between the parties. At the same time it was held that the defendants had share in the house in dispute and that plaintiffs were not entitled to any damages or to the relief of ejectment as both the parties to the suit were co-owners. The suit was accordingly dismissed. The plaintiffs thereupon filed an appeal. The appellate Court below concurring with the findings recorded by the trial Court dismissed the appeal. The plaintiffs have now come to this Court in second appeal.

4. The learned Counsel for the plaintiff contended that the marriage of M. P. Chatterji with the plaintiff No. 1 having been performed under the provisions of the Special Marriage Act 1872. M. P. Chatterji was prohibited from marrying the defendant No. 1 during the lifetime of his first wife, namely, the plaintiff No. 1, in view of Section 16 of the Special Marriage Act. He argued that u/s 16 of the said Act a person marrying under this Act. who during the lifetime of his wife, contracts another marriage was subject to the penalties provided in Sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of his wife. As M. P. Chatterji married the defendant No. 1 during the lifetime of the plaintiff No. 1 he committed an offence u/s 16 of the Act. The act of marrying being an offence was thus prohibited by law and as such the marriage of M. P. Chatterji with Smt. Kamla Banerji was void. It was argued on behalf of the appellants that an act which is an offence is illegal and prohibited by law. The act of marrying again during the lifetime of the plaintiff No. 1 being an offence was illegal and unlawful and as such the marriage of M. P. Chatterji with Smt. Kamla Banerji was void. She therefore, was not entitled to inherit the properties left by M. P. Chatterji. I find no force in this contention. Section 16 of the Special Marriage Act of 1872 is as follows:--

"Every person married under this Act who during the lifetime of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in Sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion

which he or she professed at the time of such second marriage."

5. The following are the ingredients of Section 16 of the Act: (1) the first marriage of a person must have been performed under the provisions of the Special Marriage Act; (2) during the lifetime of his wife that person contracts another marriage; (3) by contracting another marriage he commits an offence; and (4) he thereby subjects himself to the penalties provided in Sections 494 and 495 of the Indian Penal Code. The first three ingredients mentioned above must exist in order to attract the provisions of Section 16 of the Act. The second marriage must have been performed during the lifetime of the first wife and that second marriage must be a valid marriage. If the second marriage is not a valid marriage the person concerned cannot be deemed to have committed an offence u/s 16 of the Act. The offence is provided in Section 16 whereas the penalties to which the person concerned would be subject are those which are provided in Sections 494 and 495 of the Indian Penal Code. The clause "contracts any other marriage" obviously means contracts any other valid marriage. If the second marriage was not valid it would be no marriage in the eye of law and in that event it cannot be said that the person concerned had contracted another marriage during the lifetime of his first wife. A marriage of a Hindu to be valid must be performed in accordance with Hindu rites and the Hindu law applicable to the parties concerned at the relevant time. In the instant case both the Courts below have found that the first marriage of M. P. Chatterji with the plaintiff No. 1 was solemnised under the provisions of the Special Marriage Act. The Courts below also found that during the lifetime of the plaintiff No. 1, M. P. Chatterji again married Smt. Kamala Banerji the defendant No. 1, and that second marriage was performed according to Hindu rites. The defendant No. 1 and M. P. Chatterji thereafter lived together as husband and wife and the defendants Nos. 2 to 6 were born out of that wedlock. The marriage of Smt. Kamla Banerji with M. P. Chatterji having been performed in accordance with Hindu rites was valid.

The learned Counsel for the appellants urged that as M. P. Chatterji contracted another marriage during the lifetime of plaintiff No. 1, the second marriage was void as it was prohibited by Section 16 of the Act. This contention ignores a very important aspect. It is nowhere provided in Section 16 of the Act that the second marriage contracted during the lifetime of the first wife is void. In this connection it would be worthwhile to notice the provisions of Section 15 of the Act which stipulate that every person who being at the time married, procures a marriage of himself to be solemnised under this Act shall be deemed to have committed an offence u/s 494 or Section 495 of the Indian Penal Code, as the case may be, and the marriage so solemnised is void. Thus not only a penalty on married person marrying again under the Act was provided by Section 15 but the marriage so solemnised was declared void by the statute. Section 16 does not declare specifically that the second marriage contracted by the person who is already married under the Act shall be void if that second marriage was contracted during the lifetime of his first wife. It is also significant to note that u/s 15 of the Act it is provided that the person concerned shall be deemed to have

committed an offence u/s 494 or Section 495 of the Indian Penal Code. It means that a person who procures a marriage of himself to be solemnised under the Act though he was already married would commit an offence u/s 494 or Section 495 of the Indian Penal Code and shall be liable to be prosecuted for the same. However, Section 16 does not provide that the person who marries second time during the lifetime of his first wife shall be deemed to have committed an offence u/s 494 or Section 495 of the Indian Penal Code. If he does so he would be committing an offence of marrying again u/s 16 of the Act, itself. The penalty to be imposed on him would be that which is provided in Sections 494 and 495 of the Indian Penal Code. The act of marrying again during the lifetime of the first wife is made an offence u/s 16 of the Act u/s 494 the second marriage must be void by reason of the law-applicable to the person violating the provisions of Section 494. Section 495 of the Indian Penal Code provides a higher penalty when the fact of first marriage is concealed from the person with whom the subsequent marriage is contracted. A Hindu marriage is not a contract but a sacrament. It becomes complete and binding the moment it is performed and solemnised in accordance with the customary rites and ceremonies of either party thereto. Section 16 as pointed out earlier, does not declare the second marriage void if it was performed during the lifetime of the first wife, who was married to the person concerned under the provisions of the Special Marriage Act.

In this connection reference may also be made to Section 44 of Special Marriage Act, 1954 and Section 17 of the Hindu Marriage Act, 1955. Section 17 of the Hindu Marriage Act provides that any marriage between two Hindus solemnised after the commencement of that Act is void if at the date of such marriage either party had a husband or wife living and the provisions of Sections 494 and 495 of the Indian Penal Code shall apply accordingly. Similarly Section 44 of Special Marriage Act, 1954 also stipulates that if a person already married under the provisions of the Special Marriage Act, 1954 contracts any other marriage during the lifetime of his first wife shall be subject to the penalties provided in Sections 494 and 495 of the Indian Penal Code and the subsequent marriage shall be void. No such provisions declaring the subsequent marriage void is however, to be found in Section 16 of the Special Marriage Act of 1872. In the absence of any such provision the second marriage validly performed and solemnised cannot be held to be void. The marriage of M. P. Chatterji with Smt. Kamla Banerji, having been performed in accordance with Hindu rites and the law prevalent amongst them did not become void because of the fact that it was solemnised during the lifetime of the plaintiff No. 1. Sri M. P. Chatterji by marrying the defendant No. 1 during the lifetime of the plaintiff No. 1. might have committed an offence and might have been prosecuted for the same u/s 16 of the Act but that is quite a different matter. The learned Counsel for the appellant referred to the various decisions, namely, 90 ER 750, (1833) 131 ER 846, 150 ER 717, (1857) 10 ER (HL) 1326, Gherulal Parakh Vs. Mahadeodas Maiya and Others, to substantiate his contention that an act which is an offence is illegal and prohibited by law. There is no dispute about the principles laid down in those decisions. The act of

Sri M. P. Chatterji, marrying second time during the lifetime of plaintiff No. 1 might have been an offence u/s 16 of the Act and he might have been prosecuted for the same but from this it does not follow that the second marriage with the defendant No. 1, which, was valid having been performed according to the customary Hindu rites became void. Section 36 of the Act did not declare such subsequent marriage void.

6. The learned Counsel then argued that as the marriage of M. P. Chatterji with the plaintiff No. 1 was performed under the provisions of Special Marriage Act, 1872 the succession to his property would be governed by the provisions of the Indian Succession Act and the plaintiffs alone would be entitled to succeed to his properties. He contended that defendant No. 1 would not be included within the term "widow" as mentioned in the Indian Succession Act. He also contended that as the marriage of defendant No. 1 was void, she could not be held to be a widow of M. P. Chatterji, I do not find any substance in these contentions. The marriage of M. P. Chatterji with defendant No. 1 was valid and not void. He died interstate on 2nd October, 1959. Both the plaintiff No. 1 and the defendant No. 1 are his widows. In view of the provisions of Section 24 of the Special Marriage Act, 1872, the succession to his property would be regulated by the Indian Succession Act. As he had left behind lineal descendants as well the provisions of Section 33 of the Indian Succession Act would be attracted. The Special Marriage Act, 1872 does not declare the second marriage of a person contracted during the lifetime of his first wife as void, nor does it provide that the lady whose marriage was solemnised under the provisions of the Special Marriage Act, 1872 alone would be regarded as "widow" for the purposes of inheritance. No such exception is provided even in the Indian Succession Act. That being so, the term "widow" in Section 33 of the Indian Succession Act should include "widows" as the singular should include the plural. Consequently the property of Sri M. P. Chatterji devolved on the plaintiff No. 1, defendant No. 1 and his lineal descendants. The defendants cannot, therefore, be evicted from the house in suit as trespassers nor can they be held liable to pay damages. The suit for their ejectment and recovery of damages was therefore rightly dismissed. No other point was urged.

7. In the circumstances the appeal fails and is accordingly dismissed. However, in view of the peculiar circumstances of the case the parties shall bear their own costs of this appeal.