

**(1969) 12 OHC CK 0006**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 536 of 1965**

Vaikuntam Mamikyamma

APPELLANT

Vs

Puppala

RESPONDENT

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**Date of Decision :** 24-12-1969

**Acts Referred:**

Evidence Act, 1872 — Section 114, 32, 50  
Transfer of Property Act, 1882 — Section 122

**Citation :** (1969) 12 OHC CK 0006

**Hon'ble Judges :** R.N. Misra, J

**Bench :** Single Bench

**Advocate :** N.V. Ramdas, for the Appellant; Y.S.N. Murty, for the Respondent

**Final Decision :** Dismissed

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## Judgement

R.N. Misra, J.—The plaintiff is in appeal against a reversing judgment of the learned District Judge of Koraput.

2. She filed the suit for declaration that she was the sole heir of her deceased husband Ramamurty and was entitled to the properties left by him. She also prayed for recovery of possession in respect of his properties upon a declaration that the gift by Ramamurty in favour of the defendant was invalid. She also made a claim for mesne profits.

Her case was that on 1-10-62 Ramamurty died issueless at Vizagapatam. The defendant was the wife of one Adinarayana of Jagadalpur, had left her husband and was living with Ramamurty, but was not his married wife. The suit properties were the self-acquisitions of Ramamurty and after him the plaintiff as the widow became entitled to succeed to such properties.

On 26-3-62, the defendant obtained the gift deed Ext. A in respect of the house located in Jeypore town. The narration in the deed of gift Ext. A was that the plaintiff had consented to the marriage of Ramamurty with the defendant; the defendant was the wife of Ramamurty and the house in question which was the

subject-matter of the gift had been constructed with the money of the defendant. All these allegations were false. The house was in possession of Ramamurty. The alleged gift had never been acted upon and possession had never been made over to the defendant. There was no acceptance of the gift within the lifetime of Ramamurty. It was further alleged that the consideration for the gift being illicit cohabitation the gift was illegal and could not be given effect to.

3. The defendant contended that she was not the wife of one Adinarayana and was the legally wedded wife of Ramamurty, and she (sic) had lived together as man and wife for more than 12 years until Ramamurty died on 1-10-62 leaving 3 sons and 2 daughters born out of the said wedlock and the plaintiff cannot be said to be the sole heir. The gift was valid and as admittedly the subject-matter of the gift was the self-acquisition of Ramamurty the husband was competent to make a gift of the same.

It was alternatively contended that Ramamurty had no ancestral property and was a bus conductor receiving a salary of Rs. 60/- per month. His earning was insufficient even to maintain the family. The defendant had 25 Tolas of gold. The house in question was constructed during the years 1960-61 out of the sale proceeds of the major portion of the gold and was thus really the Stridhan of the defendant. The deed of gift accepted the said fact. The gift was also accepted in fulfilment of a marriage promise which was to the effect that Ramamurty would provide a suitable residential accommodation for the defendant. The gift had been accepted and was acted upon. Thus the defendant acquired valid title in respect of the suit house.

4. The trial court found that the defendant had failed to prove that she was the wife of Ramamurty; consideration for the gift was illicit cohabitation; this being an illegal consideration the gift was invalid and inoperative and the suit properties belonged to Ramamurty and the plaintiff being his widow was entitled to the same on his death. On the aforesaid findings the suit was decreed.

5. The learned District Judge, however, did not agree with the trial court and came to find that the defendant was the wife of Ramamurty; the gift under Ext. A was valid and had been acted upon; there was absolutely no undue influence and in natural circumstances the gift had been made; the defendant had contributed for the construction of the suit house and the averments in the deed of gift were also correct. On these findings the learned District Judge directed the suit to be dismissed indicating therein that it was open to the plaintiff to file a separate suit for her share in respect of certain movables. It is against this reversing judgment of the learned Appellate Judge that the present Second Appeal has been brought before this Court.

6. The fact that the plaintiff is the first wife of Ramamurty is undisputed. Two questions arise for determination in this appeal, namely. (1) whether the defendant was the second wife of Ramamurty, and (2) Whether the deed of gift Ext. 1 is valid. The invalidity of the deed of gift is on the basis that the

consideration for it was an illegal purpose and, therefore, the gift would be inoperative. Once it is held that there was a valid marriage between the defendant and Ramamurty it can no more be held that Ext. A was tainted with illegality and was against public policy. The only point about the claim of the defendant under the deed of gift thereafter would be to determine whether the gift had been acted upon.

7. Therefore, it would be proper first to find out as to whether the defendant has been rightly held to be the wife of Ramamurty by the lower appellate court. The learned Appellate Judge relied on the evidence of D. Ws. 1 and 2 to accept the claim of marriage. He also relied upon the admission of Ramamurty in the deed of gift.

Certain circumstances weighed with the lower appellate court in coming to its conclusions. These circumstances are (a) continuous living of Ramamurty and the defendant as man and wife and the admitted position that they were having cohabitation, (b) the description of the defendant in the Postal Savings Bank Account as the wife of Ramamurty, and (c) bearing of 5 children -- 3 sons and 2 daughters -- by the defendant through Ramamurty. The lower appellate court further found that the plaintiff had been withheld from the witness box and her father had been examined as a witness for her. In view of the fact that peculiar allegations had been made in this case, the plaintiff would have been more competent to support them than any other even including her father. In the absence of any explanation as to why the plaintiff had been kept away from the court, the learned Appellate Judge drew adverse inference against the plaintiff.

8. Mr. Ramdas contends that the evidence of D. Ws. 1 and 2 could not have been accepted by the courts below in view of the fact that they were not competent to depose about the fact of marriage and the standard laid down regarding admissibility of evidence to show such relationship with reference to the provisions of Section 50 of the Evidence Act has been lost sight of by the lower appellate court. He emphasised on the principles indicated by their Lordships of the Supreme Court in *Dolgobinda Paricha Vs. Nimai Charan Misra and Others*, and also contended that the presumption arising out of continuous living was a rebuttable one as has been held by the Supreme Court in *AIR 1952 SC 231 (Gokal Chand v. Parvin Kumari)*.

He offered the criticism against the view of the lower appellate court that the learned Appellate Judge should have found that the inference of presumption arising out of continuous living was a rebuttable one and in the facts of the case it must be taken to have been rebutted. He further contended that the narration in Ext. A is palpably false. A portion of the contents of the said document may be translated in the following way:--

"As no issue has been born to me through my first wife, I have accepted you Adilakshmi as my second wife with the consent of my first wife. At that time I had bound myself by a solemn promise to give you some Immovable property.

But I have not executed any document as yet. The house in Sambar Tota Sahi in Jeypore town has been constructed with your money on a plot of land purchased by me and the municipal records stand in my name. In keeping with the promise made earlier I now make this deed of gift in your favour and put you into possession so that from today you would be the owner of the property and enjoy the same in your own right .....".

According to Mr. Ramdas, on the basis of the defence, taken it can be said that the second marriage took place sometime in 1950-51. By then the age of the plaintiff must have been about 11 to 12 years. The prospect of the plaintiff bearing a child through Ramamurty at that point of time must have been a physical impossibility, and as such the reason indicated for the second marriage must have been nonexistent.

He further contends that the question of taking the consent of the first wife, who would have been a minor child then, would also be an impossible proposition and in any event not a legal act. In the circumstances, according to Mr. Ramdas, these allegations are false and have been intentionally, made by Ramamurty on being prevailed upon by the defendant. He also challenges that the admission of the marriage with the defendant must be equally false and as such no importance should be given to the narration in Ext A and should not be held to tantamount to an admission of Ramamurty to the effect that the defendant was his married wife.

9. To counteract the submission of Mr. Ramdas, Mr. Murty's submission is that the age of the plaintiff has not been correctly indicated in the plaint and no issue was ever framed to find out as to what was the age of the plaintiff. In the circumstances, the basis upon which the argument in relation to the admission in Ext. A about the status of the defendant is advanced cannot be accepted. Indisputably the statement in Ext. A is entitled to great weight. It comes from the husband and is the statement of a dead person. As such, it is directly admissible under the provisions of Section 32 of the Evidence Act. Unless it can be held to be a document obtained by undue influence, the importance of the statement, cannot be belittled.

It has already been found by the lower appellate court that there was no undue influence in obtaining the document. The trial court has also not discarded Ext. A as being a document created under undue influence. In the circumstances, I find it difficult to throw out Ext. A as a document obtained under undue influence and would hold that Ext.

A is not tainted with undue influence. The admission contained in the document is, therefore, entitled to proper weight in the matter of finding out whether the defendant was the married wife of Ramamurty. The other features which weighed with the lower appellate court are also germane and material.

D. W. 2 is a witness who has been accepted by both the courts and the other witness is one who attended the marriage function. In respect of a witness who

saw something being performed and deposes about his seeing the performance conduct evidence may not be necessary and the standard indicated in Section 50 of the Evidence Act may not have to be applied. In the circumstances, the evidence of D. Ws. 1 and 2 must also be accepted to support the case of marriage. All the circumstances which have been referred to by the learned District Judge are validly applicable to the facts of the case and I would hold relying on them that the marriage of the defendant with Ramamurty has been established. I concur with the finding of the lower appellate court that the defendant was the married wife of Ramamurty.

10. This leads to the examination of the remaining point as to whether the gift has been acted upon. The courts below have found that the deed of gift was in the custody of the defendant and has been produced by her. The trial court found against the defendant for want of mutation. The time-lag between the gift and the institution of the suit is very short. The document is of March 1962 and the suit is of January 1963. Admittedly Ramamurty died only in October 1962. In the circumstances, want of mutation within the gap of about 3 months that intervened between Ramamurty's death and the institution of the suit cannot be at all an important feature.

Courts in India have taken the view that where the donor and the donee live together under the same roof and where they are closely related, delivery of possession may not be necessary and making over of the document and its acceptance may tantamount to acceptance of the gift. Reference may be made to the case in Adhikari Narayanamma Vs. Adhikari Thabitinaidu, for the purpose. In that view of the matter, I would also hold that that the gift had been accepted during the lifetime of Ramamurty and as such was complete and objection cannot be taken by the plaintiff that the gift had not been acted upon.

11. On the aforesaid analysis, the irresistible conclusions are that the defendant was the married wife of Ramamurty and the gift Ext. A had been validly made and was duly accepted. The Second Appeal has no merit and is dismissed.

The judgment of the learned District Judge stands confirmed. In view of the fact that the plaintiff and the defendant are co-widows, I would direct that both parties would bear their own costs throughout.