

SA-684-2015

(JAGNNATH Vs SMT. SARJOO BAI)

25-10-2016

Shri Sanjay Sarwate, learned counsel for the appellant.

Whether approved for reporting: Yes/No
Order
(Pronounced on **10/2016**)

1. This second appeal is filed under Section 100 of the Code of Civil Procedure against the common judgment and decree passed by the First ADJ, Khandwa in regular Civil Appeal Nos.1-A/2013 and 3-A/2013 on 02.03.2015, whereby the Appeal No.1-A/2013 filed by Smt Sarjoo Bai was partially allowed in reference to the decree of the trial Court regarding perpetual injunction, but was partially dismissed in relation to the counter claim filed by Sarjoo Bai and the regular Appeal No.3-A/2013 filed by original plaintiff Jagannath was totally dismissed and both of these appeals were filed against the judgment and decree passed by the Second Additional Judge to the Court of First Civil Judge, Class-II, Khandwa in Civil Suit No.69A/2009 on 30.10.2009, whereby the suit of plaintiff Jagannath was partially decreed only in reference to the relief of perpetual injunction and the counter claim filed by defendant No.1 Smt. Sarjoo Bai was totally dismissed.

2. Undisputedly, original plaintiff Jagannath and original defendant No.1 Smt. Sarjoo Bai belongs to the caste "Kunbi" and the agricultural lands bearing survey No.1100 area 0.24 hectare and land bearing survey No.1103 area 1.57 hectare, total area 1.81 hectare of Gram Chhirwel of Tahsil and District Khandwa is

disputed lands of the relating suit and it was purchased by Smt. Dropta Bai (deceased) by registered sale-deed dated 25.09.1975. Smt. Dropta Bai was wife of Ramlal, who had expired in the year 2003 issueless and intestate. It is also undisputed that by an order dated 20.03.2002 of the mutation register of village concerned, disputed lands were mutated in the name of plaintiff Jagannath, but the above-mentioned order was cancelled by an order dated 19.01.2008 (Ex. D-6) passed in relating revenue appeal.

3. Plaintiff Jagannath filed plaint before the trial Court on 30.10.2009 on pleadings that after the death of previous Bhoomiswami Dropta Bai, disputed lands are recorded in his name in revenue papers. Dropta Bai after ending her matrimonial relation with husband Ramlal, had performed second marriage with him, according to customs of their caste and the name of the plaintiff was recorded in revenue papers, voting papers and bank accounts as husband of Dropta Bai in her lifetime and the plaintiff Jagannath and Dropta Bai had lived in village Chhirwel from 1983-84 up-to the time of Dropta Bai's death in the year 2003 as husband and wife. Plaintiff Jagannath has sold 1.101 hectare as part of total land of disputed land bearing survey No.1103 by a registered sale-deed dated 12.06.2006 to the purchaser Gadbad. Defendant No.1 Smt. Sarjoo Bai and her brother Gulab Chand on 26.10.2009 had threatened the plaintiff to dispossess from the disputed lands and the matter was reported to police station Chhaigaon Makhan. Thus, suit was filed for a decree of declaration of title of plaintiff and for perpetual injunction.

4. Defendant No.1 Sarjoo Bai denied all the adverse pleadings despite above-mentioned admitted facts in her Written Statement

filed on 14.09.2010 and in the same Written Statement, she filed her counter claim on pleadings that the disputed lands remained jointly recorded in the name of Kanhaiya, who was husband of defendant No.1 and Trilokchand till the year 1985-86, but thereafter Trilokchand become monk and for about previous 40 years the disputed lands were remained in exclusive title and possession of Kanhaiya. Dropta Bai had executed an agreement on 27.09.1975 (Ex. D-10) in favour of Kanhaiya in relation to retransfer of disputed lands on the basis of that defendant No.1 Sarjoo Bai had become Bhoomiswami of the disputed lands. Plaintiff Jagannath was never married to Dropta Bai and he was living as a servant with Dropta Bai and by taking undue advantage of this capacity, Jagannath got his name mutated in revenue papers in relation to disputed lands. On receiving the information about mutation of Jagannath, defendant No.1 Sarjoo Bai had filed revenue appeal, which was allowed by the SDO, Khandwa and the mutation order dated 20.03.2002 passed in favour of Jagannath was cancelled and Jagannath's revenue revision has also been dismissed by an order dated 11.11.2009 and the remanded mutation proceedings were pending before the Tahsildar Tappa, Chhaigaon Makhan. Plaintiff Jagannath is trying to forcefully dispossess the defendant No.1 and for recording his name in revenue papers, thus the relief of declaration of title and perpetual injunction were also claimed by defendant No.1 Sarjoo Bai by her counter claim.

5. Plaintiff Jagannath denied the pleadings of the counter claim filed by defendant No.1 Smt. Sarjoo Bai repeating his plaint allegations.

6. The trial Court framed six issues and after recording the evidence for the parties and hearing gave findings that Dropta Bai was not legally wedded wife of plaintiff Jagannath; Jagannath is not a legal heir of the deceased Dropta Bai in relation to disputed lands; defendant No.1 Sarjoo Bai is also not a legal heir of the deceased Dropta Bai; Sarjoo Bai is also not entitled to get the disputed lands as a legal heir; it was not proved that the disputed lands are in possession of defendant No.1 Sarjoo Bai, it was proved that the plaintiff Jagannath is in continuously possession holder of the disputed lands since lifetime of Dropta Bai. The counter claim of defendant No.1 Sarjoo Bai is time barred and the trial Court totally dismissed the counter claim of defendant No.1 Sarjoo Bai and it partially dismissed the suit of Jagannath in relation to the relief of declaration of title, but as the possession of Jagannath was found proved on disputed lands, it partially decreed this suit of plaintiff Jagannath only in relation to the relief of perpetual injunction. The First Appellate Court, in light of the provision of Section 37 and Section 41(j) of the Specific Relief Act, 1963, recorded the finding that as the plaintiff Jagannath has failed to prove any legal right in disputed lands, thus in absence of legal rights, he is not entitled for discretionary relief of perpetual injunction. In other words, the learned Appellate Court has totally dismissed the suit of plaintiff Jagannath and has maintained the decree of trial Court in relation to dismissal of counter claim of defendant No.1 Sarjoo Bai passed by the trial Court.

7. Learned counsel for the appellant has contended that it was proved by the documentary evidence and oral evidence of witnesses that the plaintiff Jagannath and Dropta Bai were living as

husband and wife for a long period and the name of Jagannath was mentioned as husband of Dropta Bai in voting papers, bank account and revenue records, thus the findings recorded by both of the lower Courts are erroneous that the divorce of Dropta Bai from her first husband Ramlal was not proved and the second marriage performed by Dropta Bai with plaintiff Jagannath in the form of "Pat Marriage" was not proved and as the possession of the plaintiff was found proved on the suit lands by both of the lower Courts, the First Appellate Court had erred in allowing the appeal of respondent No.1 partially in reference to the relief of perpetual injunction granted by the trial Court.

8. It is true that under the provisions of Indian Evidence Act, when a man and woman lived as husband and wife for a long period, then a presumption can be drawn of their marriage, but this presumption is not available, when the woman had been legally wedded previously to a different man. Admittedly, deceased Dropta Bai was legally wedded wife of Ramlal. It was necessary for plaintiff to prove that Dropta Bai had taken legal divorce from her first husband Ramlal. It is clear that on this point, no reliable evidence was produced by the plaintiff and it could not be presumed that Dropta Bai had taken legal divorce from her husband, as afterward she was living with plaintiff as his wife.

9. Learned counsel for the appellant contended placing reliance on a citation reported as **Ramcharan Vs Ramesh [(1996) 1 Vidhi Bhasvar 159]** that "Chhodchhutti" is a recognized custom of divorce where one spouse may give up the other spouse and "Bichhia" is a recognized custom of marriage where a lady may remarry another man after giving up former husband. But, in

the same citation, it has also been held that findings of marriage and divorce by customs are findings of fact. It is well established that such customs relating to divorce and second marriage are to be specifically pleaded and proved by the alleging party. Here, it would be significant to give the total pleadings made by the plaintiff Jagannath in his plaint, on this point:-

^^3- ;g fd Jherh nzksirkckbZ ds ifr jkeyky ls nzksirkckbZ dk oSokfgd laca/k lekIr gksus ds i'pkr nzksirkckbZ xzke fNjosy esa viuh ekrk ds lkFk jgrh Fkh] rFkk xzke fNjosy esa jgrs gq;s nzksirkckbZ us oknh ls tkfr fjokt ds eqrkfcd nwljk fookg fd;k ftlds vuqlkj Jherh nzksirkckbZ us vius uke ds lkFk ifr ds LFkku esa oknh dk uke gj txg ntZ dj;k ;gka rd dh jktLo [kljs esa nzksirkckbZ us Lo;a ifr ds LFkku esa oknh dk uke ntZ dj;k;A^^

10. It is clear from the above-mentioned total pleadings of the plaintiff Jagannath made in the plaint that even the commonly used name of the customs relating to divorce and second marriage have not been mentioned. Similarly, it is not mentioned that after what period from first marriage of Dropta Bai with Ramlal, their alleged divorce was happened at which place and even there is no any indication about time or gap between alleged divorce and second marriage of Dropta Bai. Similarly, there is no definite evidence given by the plaintiff witness Jagannath (PW-1) and Govind (PW-2) on these points.

12. In examination-in-chief, filed by the plaintiff Jagannath (PW-1) in the form of an affidavit, there is no specification about the name of customs relating to divorce and second marriage were given and similarly there is no indication about the time gap between first marriage of Dropta Bai and Ramlal and alleged divorce and

thereafter second marriage. Plaintiff Jagannath deposed that the husband of Dropta Bai, Ramlal was resident of village Takley. In cross-examination (para-11) plaintiff deposed that after about 40 years of the marriage Dropta Bai with Ramlal, Dropta Bai returned to village Chhirwel, which was her parent's village. In para-12, plaintiff deposed that the matrimonial tie between Ramlal and Dropta Bai had ended after 35-40 years after their marriage, but admitted that there is no any legal divorce from any Court between them, but voluntarily deposed that as their community custom, the elder people (Panch) of the society performed their "Chhodchhutti". In cross-examination, plaintiff deposed that he performed marriage with Dropta Bai in "part form" prevailing in their community. There is no definite pleadings and evidence about the alleged "Chhodchhutti" between Dropta Bai and Ramlal and it is not clear that in which village and in which year this alleged "Chhodchhutti" was happened. No any other witness was produced by the plaintiff on the point of alleged "Chhodchhutti" between Dropta Bai and her legally wedded husband Ramlal.

13. According to evidence of Jagannath (PW-1) and Govind (PW-2) in village Chhirwel, Dropta Bai had lived with plaintiff Jagannath as his wife for a long period till death of Dropta Bai. But it would be significant to mention here that in the registered sale-deed (Ex.P-1) executed on 25th September 1975, by which Dropta Bai purchased the disputed lands from vendor Chhagan, the name of husband of purchaser Dropta Bai is typed as Ramlal, though at that time Dropta Bai was shown as a resident of village Chhirwel. Thus, it is clear that even after the time when Dropta Bai started living in

village Chhirwel after the marriage and was purchasing agricultural lands, her husband was Ramlal. It would not have been possible, if before purchasing this land, any "Chhodchhutti" had happened between Ramlal and Dropta Bai. In Bhoo Adhikar Pustika, relating to same land (Ex. P-2), the name of Dropta Bai is written as "Dropta Bai W/o Ramlal", it appears that afterwards the name of husband Ramlal has been circled and over or below on different pages of Bhoo Adhikar Pustika, the name of plaintiff Jagannath has been written, but the name of Ramlal has not been struck out, though has been circled. In state of above-mentioned pleadings and evidence of appellant/plaintiff Jagannath, he is not able to get any help from the above-mentioned citation. It is clear that Dropta Bai had not obtained any legal divorce or customary "Chhodchhutti" from her husband Ramlal. In such state of pleadings and evidence of the appellant, both the lower Courts have not committed any error in holding that Dropta Bai had not obtain any divorce from her husband Ramlal and in such situation, she could not be legal wife of plaintiff Jagannath, though it appears that in Ration Card of village concerned, in some loan papers and in voting papers, the name of her husband is shown or recorded as Jagannath.

14. It is true that possession of the plaintiff was found proved on suit land, but the learned Appellate Court had referred to specific legal provisions of the Specific Relief Act 1963, under which in absence of any legal right or title, perpetual injunction could not be granted [please see **Premji Ratanev Shah Vs. Union of India, (1994)5 SCC**]. It appears that the evidence produced by the parties before the trial Court has been properly and legally

appreciated by the learned Appellate Court, which does not require any interference in this second appeal.

15. In view of above, I am of the considered view that there is no any substance or circumstance in the matter giving rise to any question of law rather than substantial question of law. The question of facts raised by the appellants does not call for any interference. Consequently, the appeal fails and is hereby **dismissed** in limine. No costs.

(ASHOK KUMAR JOSHI)
JUDGE

Amjad