

Bhola Umar Vs. Mt. Kausilla and anr.

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Court : Allahabad

Decided On : Dec-02-1932

Reported in : AIR1937All230; 140Ind.Cas.631

Appellant : Bhola Umar

Respondent : Mt. Kausilla and anr.

Judgement :

1. This is a defendant's appeal and arises in the following circumstances: One Lachhmi Narain, by caste Umar Banya, was the owner of a number of properties specified at the foot of the plaint. He died, leaving a widow Mt. Kausilla, the plaintiff-respondent, and the defendant-appellant, Bhola Umar, his uncle who obtained mutation of names in respect of the entire property in dispute. Thereupon the plaintiff sic the present suit for recovery of possession of her deceased husband's property on the ground that she was entitled to it under the Hindu law. The plaintiff's claim was resisted by the defendant on the allegation that she had re-married and, according to the custom of the caste, forfeited all rights in her deceased husband's estate. It should be mentioned at this stage that the plaintiff made no reference in her plaint to her re-marriage, a fact which, on being alleged by the defendant, was admitted by her, but she maintained that her re-marriage had not the effect of divesting her of the interest which she acquired in her deceased husband's property by the Hindu law of succession. A number of other issues were raised by the pleadings, but it is not necessary to make a mention of them in detail. One of the issues framed by the lower Court was:

What is the effect of Kausilla's (plaintiff 1) marriage with Mahadev? Does she thereby lose her right of inheritance in her husband's property under law or under any custom

2. A number of witnesses were examined on both sides on this issue, the defendant attempting to establish that a widow forfeits on re-marriage all rights in her first husband's estate and the plaintiff, adducing evidence to the contrary. The learned Subordinate Judge, who had laid the onus of proving a custom of forfeiture on the defendant, held that he failed to discharge the onus. Accordingly he found that the plaintiff is entitled to succeed to the property left by her first husband. He also found in favour of the plaintiff on other material issues arising in the case, with the result that her suit was decreed. The defendant appealed to this Court. The appeal came on for hearing before a Division Bench of this Court on 13th June 1932. The learned advocate for the appellant referred to a series of rulings of this Court in which it was held that, if a Hindu widow could contract a valid marriage after the death of her first husband in accordance with the custom of her caste, such re-marriage would not entail a forfeiture under Section 2, Hindu Widows Re-marriage Act (Act 15 of 1856), and to those of other High Courts which took a contrary view, viz., that Section 2 of that Act which provides for forfeiture, applies in any case. It was represented to the Bench that, in view of the conflict of judicial opinions on an important question like this, reference should be made to a Full Bench for a decision. Accordingly the following question of law was referred to the Full Bench:

Does a Hindu widow, who re-marries in accordance with a custom of her caste, forfeit thereby her rights in the estate of her first husband

3. It should be observed that it was assumed in the reference that the re-marriage was in accordance with the custom of the caste to which the widow belonged. The Division Bench did not decide the question of custom; indeed, any other question of fact, because if the Full Bench took the view which had been taken by other High Courts the plaintiff would forfeit her rights as an heir of her first husband even though by the custom of her caste, as distinguished from the statutory provision contained in Act 15 of 1856, she could re-marry. After a consideration of all the

authorities bearing on the subject, the reply of the Full Bench See : AIR1932 All617 was in the following terms:

In our opinion Section 2 of Act 15 of 1856 does not apply to the case of those widows who are entitled under the custom of their caste to re-marry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture of the Hindu widow's estate on re-marriage under the Act in such a case. We are further of opinion that the proof of mere custom of re-marriage would not be sufficient to involve forfeiture under the Hindu law, and that it would be necessary for the party claiming that the estate has been forfeited on account of re-marriage to prove that there is a custom of such forfeiture in such a contingency.

4. The case has now been laid before this Bench for disposal in the light of the pronouncement of the Full Bench on the important question of law which arose and which was referred to it. It will be seen from the reply given by the Full Bench that, if a Hindu widow re-marries in accordance with the custom of her caste and not because such marriage has been declared to be valid by the Hindu Widows Re-marriage Act (Act 15 of 1856), she does not forfeit her first husband's state, unless it is established that, in spite of the validity of the marriage, a forfeiture does occur under a custom of the caste. We have, therefore, to determine two important questions of fact: first, whether Mt. Kausilla was entitled to remarry after the death of her husband under a custom prevailing in the community of Umar Banyas, and secondly, if the first question is answered in the affirmative, whether as pleaded by the defendant, in spite of the remarriage being valid, she forfeited the estate of her first husband under a custom prevailing in her caste.

5. The question whether Mt. Kausilla could remarry according to the custom of her caste was not properly raised nor decided. As already stated, the plaintiff made no reference in her plaint to her second marriage after the death of Lachhmi Narain. The written statement made no mention of the non-existence of the custom allowing remarriage of a widow in that caste. It merely averred that a widow, who remarries, forfeits the estate of her first husband. When the case was in its initial stages it was admitted on behalf of the defendant that the remarriage of a widow

was permissible in the community to which the parties belonged. Now, in view of the provisions of the Hindu Widows Re-marriage Act (Act 15 of 1856), remarriage of a widow is permissible in the entire Hindu community so far as it affects the right of the widow in her first husband's property. The statement made on behalf of the defendant above referred to goes no further than to admit that a widow's remarriage is valid. It is silent on the further question whether the validity arises from the provisions of the Hindu Widows Re-marriage Act (Act 15 of 1856) or from an ancient custom prevailing in that community wholly apart from the Act. The practice of widow remarriage after 1856 in this community or in any other section of the Hindus may well be referable to the provisions of the Hindu Widows Remarriage Act and would not necessarily be indicative of an ancient custom existing before the passing of that Act. Unless, therefore, it is shown that the present practice is in pursuance of an ancient custom and not under the Act, the remarriage of a widow cannot be held to be under the custom of the caste. The earliest case of this Court, which has been followed in all later cases, laid down that:

A widow belonging to a caste in which there is not, and in 1856 was not, any obstacle, by law or custom, against the remarriage of widows did not, by marrying again, forfeit interest in the property left by her first husband in consequence of the passing of Act 15 of 1856: see *Har Saran Das v. Nandi* (1889) 11 All 330.

6. It should be noted that the existence of the custom in 1856 has been stressed, in this case and in other cases, because the practice of Hindu widows remarrying after 1856 would not necessarily be in pursuance of a custom of the caste. Having regard to the pronouncement of the Full Bench, which has merely affirmed the view taken in the sic quoted above, it is necessary to determine whether the validity of remarriage of a Hindu widow, where a question of forfeiture of the estate of her first husband is involved, arises from a pre-existing custom under which such remarriage is valid. The decision of the question whether forfeiture of her first husband's estate occurred by the operation of Section 2 of Act 15 of 1856 depends upon the answer to the question whether the marriage had the sanction of the custom of the caste as it was before that Act. If it had, according to the Full Bench view, Section 2 does not apply and no forfeiture would occur on that

ground. If it had not, the marriage itself is valid in view of the provisions of Act 15 of 1856; but forfeiture would occur under Section 2 thereof.

7. In the case before us, it is not admitted by the defendant that remarriage of widows belonging to the community of Umar Banyas is sanctioned by a custom which is ancient and has not come into existence since 1856. The plaintiff must establish the existence of such custom, if she is to escape the operation of Section 2 of Act 15 of 1856. It is possible for us to take the view that the plaintiff should have alleged and established such a custom, and she having omitted to do so, her suit should be dismissed. In view, however, of the imperfect pleadings which were laid before the lower Court for which both parties were responsible, we are of opinion that an opportunity should be given to the plaintiff to establish the existence of the custom referred to. As already stated, if the plaintiff succeeds in establishing such a custom, the further question which has been raised by the defendant falls to be considered, namely, whether one of the incidents of the custom of remarriage prevailing before 1856, is that a widow, remarrying after the death of her first husband, forfeits all rights in the estate of her first husband. Though the case went to trial on this issue, the evidence bearing on it is so meagre and vague that it is not desirable to base our decision on it. In ordinary circumstances we would not have ordered a retrial of this issue, but as an opportunity is being given to the plaintiff to establish the custom, which she has to prove, it is more satisfactory that the defendant should also be allowed a fresh opportunity to establish the custom of forfeiture as alleged by him. Accordingly we remit the following issues, under Order 41, Rule 25, Civil P.C., for trial by the lower Court: (1) Whether, according to ancient custom, a widow belonging to the community of Umar Banyas could contract a valid remarriage before the passing of the Hindu Widows Remarriage Act (Act 15 of 1856); and (2) if issue 1 is found in the affirmative, does such widow forfeit her right in the property of her first husband according to the custom prevailing in the said community before 1856? The findings shall be returned in four months. Parties shall be at liberty to adduce evidence on both the above issues. On receipt of findings ten days shall be allowed for objections.

