

Kunja Prusti and ors. Vs. Harekrushna Prusti and ors.

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Court : Orissa

Decided On : Feb-26-1990

Reported in : 70(1990)CLT269; I(1992)DMC326

Judge : P.C. Misra and ;A. Pasayat, JJ.

Acts : Hindu Widows Remarriage Act, 1856

Appeal No. : F.A.O. No. 112 of 1975

Appellant : Kunja Prusti and ors.

Respondent : Harekrushna Prusti and ors.

Advocate for Def. : R.K. Mohapatra, ;S.D. Das, ;B. Routray, ;S.M. Das, ;R.K. Das and ;U.K. Samal, Advs.

Advocate for Pet/Ap. : B. Pal, N. Prusty and Sk. Aziz

Judgement :

P.C. Misra, J.

1. Defendants 1, 2, 4 and 5 in O.S. No. 21 of 1973(1) of the Court of Subordinate Judge, Nayagarh are the appellants in this appeal. Respondent No. 1 filed the aforesaid suit praying for partition of immovable properties described in schedule 'A' and 'B' and moveable properties described in schedule 'C' of the plaint. The

plaint allegations show that schedule 'A' properties stood recorded alone in the name of defendant No. 1, whereas schedule 'B' properties are ancestral properties of the family in which other members of the family, namely, defendants 6 to 16 have got interest. According to the plaintiff, defendant No. 3 is the second wife of defendant No. 1 and plaintiff is the son of defendant No. 1 through the second wife. He claims 1/5th share out of schedule 'A' and 'C' properties and 1/20th share out of schedule 'B' properties. A further prayer has been made for a declaration that the registered sale deeds executed by defendant No. 1 on 27-7-1973 and 16-2-1972 in favour of the defendants 4 & 5 in respect of Ac. 13.12 decimals of land under Khata No. 149 of village Harirajpur out of 'A' schedule properties were sham, nominal, not supported by any consideration or legal necessity and that the said transactions would not bind the plaintiff.

2. Different sets of written statements were filed by the contesting defendants, which raised more or less identical pleas. The present appellant No. 1 (defendant No. 1) was the main contestant, according to whom defendant No. 1 did not marry defendant No. 3 and therefore, it was alleged that the plaintiff is not the son of defendant No. 1. According to defendant No. 1, plaintiff is the son of some one else and, therefore, his claim for a share in the properties of the family is wholly untenable. He denied the existence of schedule 'C' properties. As regards schedule 'B' properties, his case was that neither the plaintiff nor defendant No. 3 had ever been in possession thereof and the said properties have been finally divided by metes and bounds amongst the cosharers.

3. Both parties led evidence in support of their respective cases and the learned trial Court on a consideration of the entire evidence on record came to the following findings: (i) Defendant No. 3 had earlier married to one Gaintha, an agnatic brother of defendant No. 1 and after his death she married for the second time to defendant No. 1. (ii) The said marriage of defendant No. 1 to defendant No. 3 has been legalised as per the Hindu Widows' Remarriage Act, 1856. The plea taken at the trial by the defendants that in the absence of SAPTAPADI the marriage was invalid was negatived by the learned trial Court holding that it is not an essential ceremony and, therefore, the marriage cannot be held to be invalid for nonperformance of the said ceremony. (iii) Plaintiff was born out of lawful wed-lock

of defendant No. 1 and defendant No. 3 and is, therefore, entitled to a share in the family properties. (iv) Schedule 'B' properties have never been partitioned by metes and bounds as alleged by the defendants, though different co-sharers are possessing different parcels of lands as a matter of convenience. 328 Divorce & Matrimonial Cases 1992 (v) There was no passing of consideration under the sale deeds dated 16-2-1972 and 27-7-1973 which were created fraudulently to deprive the plaintiff from his legitimate share and, therefore, the same are void and not binding on the plaintiff. (vi) Though the movable properties given in the schedule 'C' of the plaint are non-existent, those which finds place in the report of the Commissioner, do exist and they are joint family properties and are liable to be partitioned.

4. The appellants have challenged the judgment and decree passed by the learned trial Court, mainly on the grounds (a) that the plaintiff is not the son of defendant No. 1 as the factum and legality of the marriage between the defendant No. 1 and defendant No. 3 have not been established and, (b) that the moveable properties in the report of the Commissioner have not been proved to be belonging to the joint family and a decree for a partition of those properties is, therefore, liable to be set aside.

5. So far as the first point relating to the validity of the marriage between the defendants 1 & 3 is concerned, Mr. Pal, learned Counsel appearing for the appellants has argued that since the orthodox Hindu Law did not recognise a widow marriage unless permitted by custom, the learned trial Court has erred in law in declaring marriage to be a valid in the absence of pleading and proof of custom by the plaintiff. In that connection, he has also argued that the Hindu Widows' Remarriage Act, 1856 was extended to the Ex-State of Nayagarh, to which the parties belonged, with effect from 1-1-1950 by the Merged States (Laws) Act, 1949 (Act 59 of 1949) and, therefore, the marriage of defendant No. 3, which is alleged to have been taken place some time in the year 1946 cannot be legalised by giving retrospective effect to the provisions of the said Act. Mr. Pal, in elaborating the said argument also argued that the ceremony of marriage requires SAPTAPADI to be performed for completion thereof and the same standard of proof would be necessary to establish the marriage of a widow, in the absence of

which there could be no valid Hindu Marriage.

6. Having heard Mr. Pal at length, we do not find any justification to go into the questions urged by him as to the validity of marriage between defendants 1 & 3. From the pleadings of the parties we find that the plaintiff's allegations in that behalf have not been challenged at all in the written statements. In paragraph 5 of the plaint the plaintiff has alleged as follows :-

'That Kunja Prusti, defendant No. 1, had married defendant No. 2 and although they lived long years of married life no child was born to them. Defendant No. 3 originally married Gaintha Prusti and defendant No. 12 is their son. In the year 1942 the said Gaintha Prusti died. In the year 1946 the defendant No. 1 took defendant No. 3, who was his agnatic elder brother's widow in marriage as his second wife and the plaintiff was born in 1947 out of the said wedlock. Some years after the birth of plaintiff, defendants 4 & 5 were born to defendant No. 2.'

All that was denied in the written statement is the factum of marriage of defendant No. 3 with defendant No. 2 and not the legality of their marriage for want of custom or otherwise. In view of the aforesaid pleadings no issue did arise as to whether the widow marriage was permissible in custom. If the validity of the marriage was not challenged on the ground that there was no valid custom permitting such marriage, it is futile to expect the plaintiff to lead evidence establishing the custom. Thus, the proof of the status of the plaintiff as the son of defendant No. 1 would solely depend upon as to whether in fact the marriage between defendant No. 1 and defendant No. 3 had taken place. The legal question as to whether the Hindu Widows' Remarriage Act, 1856 which was extended to the Ex. State of Nagpur on 1-1-1950 would legalise the marriages performed after such date prospectively or would also save the past marriages does not arise for consideration for the reason that once it is accepted that such marriage was permissible by custom, it would be valid irrespective of the effect of the said Act. We would, therefore, proceed to find out as to whether the factum of marriage has been established in this case.

7. Coming to the evidence adduced on behalf of the plaintiff, the evidence of P.Ws. 2, 3, 4 & 7 are relevant on this point. P. W. 2 is the Purohit in the second

marriage of defendant No. 3 with defendant No. 1, who has described the different ceremonies that were performed for completion of the marriage. According to him, SAPTAPADI was not performed as such ceremony is not required to be performed in Sudra Caste. Nothing has been brought about in the cross-examination to discredit his testimony. P.W. 3 is a caste man, who also happens to be the Secretary of Oda Samaj. The plaintiff had filed an application claiming certain properties which defendant No. 1 got recorded in his own name and in a meeting held for the purpose of deciding the said dispute it was resolved that the plaintiff would get one acre of land out of the lands which defendant No. 1 got recorded in his name. The proceeding of the said meeting is Ext. 2 in this case. The meeting was held in the presence of important persons of the village in which both plaintiff and defendant No. 1 were also present. All those who were present in the said meeting including the parties had put their signatures in the proceedings of that day (Ext. 2). In the said proceeding the status of the plaintiff as the son of defendant No. 1 through his second wife has been accepted. P.W. 4 is a co-villager, who was also a witness to marriage. Apart from the corroborating the performance of different ceremonies of marriage he has stated that after marriage Padma (defendant No. 3) remained with Kunja (defendant No. 1) as his wife. He also testified that the plaintiff was born one year after out of the said wed-lock. P.W. 7 is defendant No. 6 in the suit and he is related to defendant No. 1 as his cousin brother. He is also a witness to the marriage. He has repeated the details of the marriage performance and their living together thereafter. P.W. 8 is defendant No. 3 herself who has narrated the details of the marriage. P.W. 9 is the father of defendant No. 3, who also corroborates the factum of marriage. It appears from the evidence of all the witnesses referred to above that defendant No. 1 and defendant No. 3 were living together as husband and wife from 1946 onwards and they enjoyed the reputation of husband and wife in the society in which they lived. In the circumstances, a strong presumption in favour of factum and validity of a marriage and the legitimacy of its off-spring arises and the evidence adduced on behalf of the defendants in this case does not rebut the said presumption.

8. As already stated Ext. 2 is a strong piece of evidence in favour of validity of the marriage. The defendants have examined the President of their caste as P.W. 2.

He is also some way related to defendant No. 1. He was a participant in the meeting in which the plaintiff was recognised as the son of defendant No. 1 through his second wife, defendant No. 3, and was given one acre of land. Thus the genuineness of Ext. 2, to which defendant No. 1 is also 330 Divorce & Matrimonial Cases a signatory cannot be doubted. All these circumstances and evidence go to establish that defendant No. 1 had married defendant No. 3 and the plaintiff is their son. Since the validity of the marriage has not been challenged on any other grounds, the conclusion is irresistible that it was a valid marriage and the plaintiff is entitled to a share in the joint family properties as a son of defendant No. 1.

9. As regards the challenge to the decree for partition of the moveable properties found in the report of the Commissioner, the learned trial Court in the impugned judgment has observed that the details of the moveable mentioned in schedule 'C' of the plaint are by mere approximation. He has also noticed that neither the plaintiff nor any of his witnesses has breathed a word about the existence or otherwise of the moveable properties given in schedule 'C' of the plaint. The learned lower Court, however, found that the Commissioner, who was sent by the Court for inventory of the moveables. has furnished a list of the properties and the said properties were found in the house of defendant No. 1, which is a joint family house. The said properties have been assumed as ancestral joint family properties and held to be liable for partition merely on the ground that they were found in the joint family house in which defendant No. 1 was living. The aforesaid assumption of the learned trial Court that the properties found in the house of the joint family, where the defendant No. 1 was living, are joint family properties, is not supportable by law. The correct position is that there is no presumption that a family because it is joint, possesses joint property or any property whatsoever. Therefore, in a suit for partition, a party, who claims any particular item of property to be an item of joint family property, the burden proving that it is so rests on him. From the records of the Court below we find that a Commissioner was sent for inventory of the moveables under Order 39, Rule 7 of the Code of Civil Procedure. The report submitted by such a Commissioner is not evidence per se as is the case with a Commissioner deputed under Order 26 Rule 9, C.P.C. The Commissioner in this case has not been examined. The report of the Commissioner, therefore, does not

form a part of evidence in the suit. In the absence of the evidence forming a part of the record neither can the contents of the report be admitted in evidence nor the Court is entitled to examine its correctness. In this view of the matter, the partition of the moveable properties, the list of which appears in the Commissioner's report, must be held to be not admissible in law and the decree directing partition of the moveable properties is bound to be set aside.

10. In the result, the appeal is allowed in part to the extent as indicated above in respect of the moveable properties. The judgment and decree of the learned trial Court as regards the status of the plaintiff, his claim for partition of immoveable properties is hereby confirmed. The parties shall bear their own costs of this appeal.

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