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Court : Punjab and Haryana

Decided On : Oct-10-1986

Reported in : AIR1988P& H156

Judge : S.P. Goyal and; D.V. Sehgal, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 5, 11, 12 and 16; Marriage Laws (Amendment) Act, 1976; Punjab Custom (Power to Contest) Act, 1920; [Punjab Land Reforms Act, 1972](#)

Appeal No. : Second Appeal No. 1932 of 1976

Appellant : Surjit Singh

Respondent : Mohinder Pal Singh and ors.

Advocate for Pet/Ap. : Mr. N.S. Gujral

Judgement :

D.V. Sehgal, J.

1. In these two. R.S.As. Nos. 1932 of 1976 and 41 of 1977 the learned single Judge has referred the following question of law for our considerations:--

'Whether validity of a marriage in contravention of clause (i) of Section 5 of the [Hindu Marriage Act, 1955](#)(hereinafter called 'the Act') performed after the

enforcement of the Act can be questioned by an aggrieved third party in a civil suit?'

2. The facts which have led to the above reference have been set out in detail in the order of the learned single Judge. All that be noted is that the learned First Appellate Court held that the marriage of Jasmail Kaur with Hari Singh, which allegedly took place after the coming into force of the Act was void as his previous wife was alive. The learned counsel for Jasmail Kaur had contended before the learned single Judge in the second appeal that the mere fact that the previous wife of Hari Singh was alive would not make her marriage with Hari Singh invalid because the decree of annulment of this marriage had not been passed under S. 11 of the Act. It was maintained that this marriage could be got annulled only on a petition presented either by Jasmail Kaur or Hari Singh and no third person was competent to challenge the validity of the marriage. In support of this contention, the learned counsel placed reliance on a single Bench judgment of this Court in *Baboo Ram. v. Mst. Karmi*, 1983 Marriage LJ 314. After setting out his reasons and placing reliance on a Division Bench judgment of the Allahabad High Court in *Smt. Ram Pyari v. Dharam Das*, AIR 1984 All 147, the learned single Judge observed that the law laid down in *Baboo Ram's* case (*supra*) that a third party is prohibited to question the validity of a void marriage even in a civil suit is open to doubt and needs a second look by a larger Bench. This is how the aforesaid question of law has come up for consideration before us.

3. Clause (i) of S. 5 of the Act lays down that a marriage may be solemnised between any two Hindus, if neither party has a spouse living at the time of the marriage. Section 11 lays down, inter alia, that any marriage solemnised after the commencement of the Act shall be null and void if it contravenes the conditions specified in clause (i) of S. 5. The Act deals with void marriages and voidable marriages. Section 11 deals with cases where the marriages are null and void. Section 12 on the other hand, provides for a marriage which is voidable at the option of the either party. thereto. The object of the latter provision is to lay down that until avoided a voidable marriage should be regarded as good for all purposes. The position of marriage which is void under S. 11 is, however, different. It is void ab initio and can be questioned at any time. Any person who

has got any interest in the matter can challenge a marriage by filing a regular civil suit for the declaration that the marriage is a nullity. Such a marriage is not a marriage at all in the eye of law. Section 11 of the Act, after its amendment by the Marriage Laws (Amendment) Act, 1976 is to the following effect :--

'11. Void marriages--Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in cls. (i), (iv) and (v) of Section 5.'

4. Before this amendment, the words 'against the other party' were not present in this section, and there was a controversy as to whether the petition seeking a decree of nullity of a marriage can only be filed during the lifetime of the spouse or even after his/her death. A learned single Bench of this Court observed in *Smt. Krishni Devi v. Smt. Tulsan Devi*, AIR 1972 Punj & Har 305, that since declaration of a nullity of a marriage appears to be a declaration of a status of a person, there is no reason why the death of one of the spouses should put an end to the right of the other surviving spouse to seek for such a declaration. While proposing the above amendment in S. 11 of the Act, the Law Commission summarised the position of law; including the jurisdiction of the Civil Court to grant a decree of declaration that a marriage is a nullity as under :--

'The Hindu Marriage Act is a piece of matrimonial law and decrees of nullity, contemplated by it, are decrees passed by matrimonial courts. It is fundamental that matrimonial courts have concern only with the marital rights of the parties to marriage (and incidentally with the rights of the children) but with nothing else. A petition for a decree of nullity in respect of a void or a voidable marriage can be made only by either the husband or the wife. It would not be appropriate to provide that a petition for the purpose can be made by a stranger to the marriage. A third party (for example, a person interested in the estate of either the husband or the wife) can certainly question the validity of their marriage in a civil suit and obtain a finding, or he may even bring a suit for a declaration that the marriage was void. But such a decree made by a civil court will not be a decree of nullity, as contemplated by matrimonial law. There is also a serious practical risk in allowing

the grant of decree of nullity after the death of either of the parties to the marriage, because the effect of it is to bastard and disinherit the issues who cannot so well defend the marriage as the parties both living themselves might have done. A void marriage can. no doubt be invalidated at the instance of other parties. but it is better not to incorporate the remedies of third parties into the Hindu Marriage Act, and confuse matrimonial relief with declaratory relief.'

5. There can be no scope for doubt that a third party, where civil rights are affected by marriage which is null and void under S. 11 of the Act, can bring it into question in a Civil Court which undoubtedly has the jurisdiction to adjudicate upon the same and give its verdict. The case law having bearing on the point has been elaborately discussed in the case of Smt. Ram Pyari (AIR 1984 All 1471(supra) and we need not set out the same again. We are in full agreement with the view taken therein. We, therefore, hold that the single Bench judgment of this Court in Baboo Ram's case (1983 Marriage LJ 314)(supra) does not lay down good law.

6. We, therefore, answer the above question in the affirmative and hold that the validity of a marriage in contravention of clause (i) of S. 5 of the Act performed after its enforcement can be question by aggrieved thrid party in a civil suit.

7. These appeals shall now go back to the learned single Judge with the answer noted above for their disposal on merits.

D.V. Sehgal, J.

8. I his judgment will dispose of Regular Second Appeals No. 1932 of 1976 and No. 41 of 1977 as both of them are directed against the same judgment and decree dt. 13-9-1976 of the learned District Judge, Faridkot. The facts giving rise to these appeals have been elaborately set out in the order dt. 20-5-1985 of Pritpal Singh, J., while referring a question of law arising in these appeals, to a larger Bench. I, however, find it desirable to give a brief resume of the facts to facilitate disposal of these appeals. Reference to the parties shall be made from Regular Second Appeal No. 1932 of 1976.

9. Hari Singh and Ishar Singh, sons of Krishan Singh sold 168 Kanals 19 Marlas of land situated in village Kauni to Surjit Singh, defendant-appellant, on 25-6-1955 for a consideration of Rs. 15,000/- . This alienation was challenged by Mohinder Pal Singh son of Hari Singh and Gurbal Singh son of Ishar Singh, plaintiff-respondents 1 and 7 respectively by filing a declaratory suit No. 320 of 1963, which was decreed by the learned Subordinate Judge 1st Class, Muktsar, on 13-5-1966 and the sale except to the extent of Rs. 5500/- was set aside and was held to be 'not binding on the reversionary rights of the heirs of the alienors. This decree was confirmed by the learned Senior Subordinate Judge, Ferozepur, on 1-7-1967. Hari Singh alienor died in Oct. 1971 while Ishar Singh alienor died on 6-9-1970. Mohinder Pal Singh, plaintiff-respondent No. 1. and Jasmail Kaur, claiming themselves to be the son and widow respectively of Hari Singh, along with Hardial Singh and plaintiff-respondents 2 and 7 to 9 who are the heirs of Ishar Singh, filed a suit for possession of land measuring 171 Kanals 7 Marlas detailed therein against appellant. They claimed that the said land had been allotted to the appellant during consolidation operations in lieu of the land which was the subject-matter of sale by Hari Singh and Ishar Singh alienors and that on the death of the said alienors the appellant as the alienee from them has lost his rights in the said land and the same has reverted to the estate of the alienors and, as such, they are entitled to take possession of the same. It was further claimed that Hari Singh had executed a will dt. 25-7-1961 bequeathing his entire estate in favour of Mohinder Pal Singh, plaintiff-respondent 1, and Jasmail Kaur. The appellant in his written statement denied the relationship of the plaintiffs with the alienors. He further pleaded that Jasmail Kaur was not the legally wedded wife of Hari Singh inasmuch as their marriage took place after coming into force of the [Hindu Marriage Act, 1955](#) (hereinafter referred to as 'the Act'), during the lifetime of the previously legally wedded wife of Hari Singh, namely Sahab Kaur. The claim of plaintiff-respondent 1 and Jasmail Kaur that they were entitled to succeed to the estate of Hari Singh on the basis of the will set up by them was also denied. It was pleaded that the marriage of Hari Singh with Jasmail Kaur had been declared void by a competent Court. Some other pleas were also raised in defence, which can be spelt out from the following issues framed by the learned trial Court on the basis of the pleadings of the parties :--

1. Whether the suit land has been allotted in lieu of the land sold by Hari Singh and Ishar Singh after consolidation ?
2. Whether Mohinder Pal Singh is the son of Jasmail Kaur, plaintiff 2, from the loins of Hari Singh ?
3. Whether marriage of Jasmail Kaur had been declared void by court. If so, its effect qua Mohinder Pal Singh ?
4. Whether Hari Singh vendor made a valid will in favour of Mohinder Pal Singh plaintiff?
5. Whether Hardial Singh is estopped from filing the present suit by his act and conduct ?
6. Whether the suit is not maintainable in view of the amendment of the Punjab Custom (Power to Contest) Act, 1920, by Punjab Act No. 12 of 1973?
7. Whether the plaintiff is entitled to possession of 168 Kanals 19 Marlas of land on payment of Rs. 5500/- to the defendant ?
8. How much area of land is owned and possessed by the plaintiffs ?
9. Whether a decree for possession can be granted to the plaintiffs beyond the permissible area as defined in the [Punjab Land Reforms Act, 1972](#) ?
10. Whether the defendants have made improvements on the suit land after sale '? If so, to what extent '?
11. Relief.

After receiving evidence, the learned trial Court decided issues Nos. 1, 4 and 7 in favour of the plaintiff-respondents, issue No. 2 in favour of plaintiff-respondent No. 1 and issues Nos. 3, 5, 6, 8, 9 and 10 against the defendant-appellant. As a result, the suit for possession of land, in dispute, was decreed in favour of the plaintiffs and against the defendant-appellant on payment of Rs. 5500/- , vide judgment and decree of the trial Court dt. 80-4-1975. The defendant-appellant preferred an

appeal which was decided by the learned District Judge, Faridkot, through the judgment and decree dt. 13-9-1976 which is the subject-matter of the present appeals. The findings returned by the trial Court on issues Nos. 1, 6 8, 9 and 10 were not challenged before it. Therefore, the same were affirmed. Finding on issue No. 2 was also affirmed as it was held that plaintiff-respondent-No. 1 claiming himself to be the son of Hari Singh, had filed the earlier suit. His locus standi to do so was not challenged by the appellant. He (appellant), therefore, could not challenge locus standi of respondent. 1 in the instant case. Under issue No. 3, it was held that the marriage of Jasmail Kaur with Hari Singh is void as it took place after coming into force of the Act when the latter already had a spouse living. The finding on issue No. 4 was modified. Since the factum of will made by Hari Singh in favour of plaintiff-respondent 1 and Jasmail Kaur was not assailed, the finding of the trial Court to this extent was affirmed. It was, however, held that the declaratory decree enures for the benefit of natural heirs of the alienors only and not the heirs under the will. As such, it was held that the will did not clothe Jasmail Kaur with any right. The finding on issue No. 5 recorded by the trial Court was also affirmed and it was held that Hardial Singh was not estopped from filing the suit. The learned District Judge thus partly accepted the appeal of the appellant. While he affirmed the decree of the trial Court to the extent of one-half share in the land, in dispute, in favour of the heirs of Ishar Singh, he dismissed the suit of Jasmail Kaur and decreed the same in favour of plaintiff-respondent No. 1 only to the extent of one-tenth share as he found that the remaining 4/10th share could not be claimed by him and that it could be claimed only by Sahab Kaur, the earlier spouse and widow of Hari Singh and her three daughters.

10. Regular Second Appeal No. 1932 of 1976 has been filed by Surjit Singh, defendant-appellant. During the pendency of the appeal, he died and his legal representatives were brought on the record. Regular Second Appeal No. 41 of 1977 has been filed by Mohinder Pal Singh and his mother Jasmail Kaur. It may also be noted here that, during the pendency of the litigation in the Courts below, Hardial Singh plaintiff died and his legal representatives were brought on the record. They are respondents 3 to 6 in RSA No. 1932 of 1976. Another development that has to be noticed is that a compromise was effected between the heirs of Hardial Singh and Ishar Singh, namely, respondents 2 to 9, and the

appellant in RSA No. 1932 of 1976. Civil Misc. No. 509-C of 1982 was made by the appellant and statements of the parties to the compromise were recorded by J.M. Tandon, J. (as he then was) on 26-2-1982. Respondents 2 to 9 gave up their right to one-half share in the land, in dispute. As such, the decree passed in their favour by the Courts below is set aside and their suit is dismissed.

11. Mr. Y.P. Gandhi, learned counsel for Surjit Singh appellant in RSA No. 1932 of 1976 contended that Mohinder Pal Singh, respondent No. 1, has no right to succeed to the estate of Hari Singh as he was born out of the wedlock between Hari Singh and Jasmail Kaur, which has been held to be void by both the Courts below. No doubt, when these appeals were heard by Pritpal Singh, J., the learned counsel for respondent No. 1 did contend that, since no decree was passed at the instance of either of the two parties to the marriage, under S. 11 of the Act, Surjit Singh appellant could not bring the same into question in the present proceedings. A question of law on this point was referred by Pritpal Singh J., to a larger Bench, vide his order dt. 20-5-85, which was answered by a Division Bench to which I was a party, vide judgment dt. 10-10-1986. It was held that a third party, whose civil rights are affected by a marriage which is null and void under S. 11 of the Act, can bring it into question in a Civil Court which undoubtedly has the jurisdiction to adjudicate upon the same and give its verdict. This contention of the learned counsel for respondent No. 1 having thus been repelled, all that is to be seen is whether he has a right to succeed to the estate of Hari Singh. Section 16 of the Act, as substituted by Act No. 68 of 1976. is to the following effect:-

'16.(1). Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been. valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act. 1976(68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under S. 12, any child begotten or conceived before the decree is made, who would have

been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under S. 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

12. Mr. Gandhi contended that S. 16 *ibid* could not have retrospective effect. I do not agree with this contention. The language of the said provision makes it clear that any child of a marriage which is null and void under S. 11 of the Act who would have been legitimate if the marriage had been valid, shall be legitimate whether such child is born before or after the amendment of 1976 and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under the Act. There is therefore no scope for doubt that respondent 1 is the legitimate child of Hari Singh and has the right to succeed to his estate.

13. Mr. N.S. Gujral, learned counsel for the appellants in RSA No. 41 of 1977, has raised two contentions before me. His first submission is that, since the will dt. 25-7-1961 executed by Hari Singh in favour of Mohinder Pal Singh and Jasmit Kaur, appellants therein has been held by both the Courts below to be validly executed, both of them succeeded to the estate of Hari Singh and they had a right to seek possession of one-half share in the suit land being the estate of Hari Singh. He contends that the learned District Judge has wrongly concluded that only an heir of an alienor, as a result of intestate succession, could bring a suit for possession and succeed in securing a decree for the same and not an heir who succeeds on the basis of a will by the alienor. I find force in this submission. The final Court in *Giani Ram v. Ramji Lal*, AIR 1969 SC 1144, has held that under custom when a declaratory decree setting aside an alienation is passed at the instance of a presumptive reversioner, the property alienated reverts to the estate of the alienor

at the point of his death and all persons who would, but for the alienation, have taken the estate, will be entitled to inherit the same. Thus, the alienee loses the subsisting right or interest in such property at the point of death of the alienor and it forms part of his estate. The successors of the deceased alienor shall inherit the same irrespective of the fact whether the succession is intestate or as a result of a testament by him. I, therefore, set aside the finding of the learned District Judge on issue No. 4 and restore that of the learned trial Court. The result is that Mohinder Pal Singh and Jasmail Kaur succeeded to one-half share in the land, in dispute, on the death of Hari Singh. They had a right to sue for possession of the same and secure a decree.

14. The next submission of the learned counsel, though it is rendered merely academic in view of the finding given above, is that Mohinder Pal Singh was entitled to struck possession of the entire one-half share in the land in suit, which was alienated by his father Hari Singh, from the alienee on the death of Hari Singh. His submission is again based on the ratio of the judgment in Giani Ram's case (*supra*). I find force in the same. Surjit Singh alienee was left with no subsisting interest in the property, in dispute, on the death of Hari Singh. Therefore, Mohinder Pal Singh could secure possession of the entire one-half share in the suit land, which reverted to the estate of Hari Singh on his death. Simply because there are some other heirs of alienor which in fact would not be there in view of the will executed by him as mentioned above, the alienee cannot be allowed to usurp his estate. The learned District Judge, in my view, was, therefore, wrong in curtailing the decree passed in favour of Mohinder Pal Singh to mere one-tenth share of suit land.

15. The result is that Regular Second Appeal No. 1932 of 1976 partly succeeds in that the decree for one-half share in the suit-land passed in favour of the heirs of Hardial Singh and Ishar Singh, namely, respondents 2 to 9, is set aside in view of the compromise deed filed with C.M. No. 509-C of 1982, and their suit is dismissed. However, as against Mohinder Pal Singh respondent 1, this appeal is dismissed. Regular Second Appeal No. 41 of 1977 is allowed, the judgment and decree of the learned District Judge, modifying that of the trial Court and dismissing the suit of the appellants therein beyond 1/10th share in the suit-land,

are set aside and the decree of the trial Court for possession of one-half share in the suit-land in their favour is restored. The parties, however, are left to bear their own costs.

16. Order accordingly.

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