Milkhi Ram Vs. Milkhi Ram

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Court : Himachal Pradesh

Decided On : Jan-10-1996

Reported in : AIR1996HP116

Judge : Lokeshwar Singh Panta, J.

Acts : Evidence Act, 1872 - Sections 50 and 112; ;Hindu Succession Act, 1956 - Section 12

Appeal No. : Regular Second Appeal No. 135 of 1989

Appellant : Milkhi Ram

Respondent : Milkhi Ram

Advocate for Def. : S.S. Kanwar, Sr. Adv. and; Maninder Sodhi, Adv.

Advocate for Pet/Ap. : Bhupender Gupta, Adv.

Disposition : Appeal dismissed

Judgement :

Lokeshwar Singh Panta, J.

1. This appeal is directed against the judgment and decree dated 9-3-1989 passed by Additional District Judge (I), Kangra at Dharamshala whereby the appeal of the defendant was dismissed, thereby the judgment and decree of Sub-Judge 1st

Class, Nurpur dated 18-6-1985 decreeing the suit of the plaintiff was affirmed.

2. Milkhi Ram (respondent herein) was the olaintiff. Milkhi Ram (appellant herein)was the defendant. Respondent filed a suit based on the premise that he was the legal heir of Punnu deceased and was entitled to claim, withdraw and receive the amount deposited in Co-operative Society Aghar by Punnu deceased and the appellant had no right, title or interest in the estate or in the said amount, as neither he was legal heir nor entitled to the same in any manner. The respondent is claiming himself to be the heir of deceased Punnu being Punnu's mother's brother's son. He pleaded that the appellant was in no way connected with the deceased Punnu. Deceased Punnu son of Gurditta was the last male owner of the disputed land and he died on 1-6-1983 without leaving behind any issue and under the Hindu Succession Act, 1956 the respondent being the cognate of deceased Punnu, was his legal heir.3. The appellant resisted the suit of the respondent in his written statement. By way of preliminary objections, he pleaded that the respondent had got no cause of action and that the respondent was estopped from filing the suit by his act and conduct and that the suit was bad on account of mis-joinder of causes of action and parties. The suit was not valued properly for the purposes of court-fee and jurisdiction and that the plaint did not contain correct description of the land and lastly that the bank was the necessary party. In reply on merits, it had been admitted that deceased Punnu was the owner of the suit land but the relationship of the respondent with the deceased as disclosed in the plaint had been denied. It had been stated that Ghepli (whose son the respondent claims himself to be) was not married nor the respondent was born out of the wedlock of Ghapli and Smt. Chiri. The appellant asserted himself to be the only agnate/cognate of deceased Punnu.

4. On the pleadings of the parties, the trial Court framed the following issues :--

1. Whether the plaintiff is the sole legal heir of the deceased Punnu, as alleged? OPP.

2. Whether the plaintiff has locus standi to file the suit? OPP.

3. Whether the plaintiff is estopped from his act and conduct from filing the suit? OPD.

4. Whether the suit is bad for mis-joinderof causes of action and parties? OPD.

5. Whether the suit is properly valued, if not what is the correct valuation? OPP.

6. Relief.

5. The trial Court decided issues Nos. 1 and 2 in favour of the respondent, issues Nos. 3 and 4 against the appellant and the suit was found to have been valued properly for the purposes of court-fee and jurisdiction and ultimately decreed the suit of the respondent. The appellant feeling aggrieved against the judgment and decree of the trial Court, preferred an appeal before the First Appellate Court which was dismissed. The judgment and decree of the lower Appellate Court has been assailed in this second appeal.

6. The appeal was admitted on 3-8-1989 on the following substantial questions of law:-

'1. Whether plaintiff-respondent has, by leading evidence in accordance with Section 50 of the Evidence Act, duly proved that Shri Ghepli Was brother of Smt. Chiri?

2. Whether plaintiff respondent by leading relevant and admissible evidence under Section 50 has duly proved that he is the legitimate son of Shri Ghepli?

3. Whether the statements of Shri Krishan Gopal, PW-2 and Shri Jagat Ram PW-4 can be said to be relevant evidence under Section 50 on the question of relationship of plaintiff with Shri Punnu deceased?'

7. Shri Bhupendra Gupta, learned counsel for the appellant contended that both the Courts below have erred in decreeing the suit especially when the respondent has not produced any documentary evidence on record to prove or connect the relationship of Ghapli with Smt. Chiri or Pano wife of Shri Gurditta. The only evidence which was relevant could be that of the members of the family or of some persons, who had some special means of knowledge on the subject of

relationship. The evidence led by the respondent was inadmissible under Section 50 of the Evidence Act. He pleaded that Smt. Chiri had two sisters and their grand-children were alive. These persons were not produced during the course of evidence, and as such, material evidence was withheld. The trialCourt has not dealt with the question of relationship of Shri Ghepli with Smt. Chiri in detail and this was the most important question for determination. Both the Courts below had relied upon inadmissible and irrelevant evidence. The best evidence relevant to the decision of the case was Pedigree table, mutation of inheritance and birth and death entries which had been kept back by the respondent. To the Pedigree table prepared in the year 1983 and reflected by the trial court in its judgment it has not shown Smt. Chiri as the sister of Ghepli. After the enforcement of Hindu Succession Act, 1956, in the Pedigree table names of female ought to have been found mentioned if they were related to the males and absence of the name of Smt. Chiri as sister of Ghepli ought to have dislodged the case of the respondent. Lastly, he contended that the oral evidence adduced by the respondent is wholly irrelevant in comparision to documentary evidence.

8. Shri S.S. Kanwar, learned counsel for the respondent has sought to support the judgments of the Courts below. He contended that it has been established on record that Punnu deceased was son of Gurditta and Smt. Pano was sister of Gheplia. According to him the respondent claimed to be cognate of Smt. Pano. He submitted that the witnesses of the appellant admitted that Smt. Pano was sister of Gheplia and their relationship was established on the record. He said that the evidence produced on the record by the respondent is admissible under Section 50 of the Evidence , Act.

9. The trial Court in its judgment has given the Pedigree table of the parties and the same is not necessary to be repeated.

10. The respondent in order to prove that he is the son Gheplia produced Jagat Ram (PW-3). The age of the witness at the time of recording of the evidence was about 84 years. He deposed that he attended the marriage of one Naro with Gheplia. Said Naro was different from the Naro shown in the Pedigree table. He said that Smt. Naro after her marriage had been living in the house of Gheplia as

his wife and the respondent was born to them. According to the version of this witness, Marriage between Smt. Naro and Gheplia took place about 67/68 years back.Krishna Gopal (PW-2), the other witness has also supported the case of the respondent that the respondent was the son of Gheplia. The age of this witness was about 50 years at the (time) of recording of the statement. In addition to this oral evidence the respondent placed on record copy of Shajra Nasab (Ext. P-14). In this document respondent has been shown as son of Gheplia. The respondent has also produced copy of mutation (Ext. P-13). Vide this mutation, the property of Gheplia was mutated in the names of respondent and his mother Naro. On the top of the evidence of the respondent two of the defendants' witnesses namely Dewan Chand (DW-3) and Mangat Ram (DW-4) in their Cross-examination have admitted that they have learnt that Milkhi respondent is the son of Gheplia.

11. Shri Bhupender Gupta, learned counsel for the appellant contended that it has come in the evidence of respondent that themother of deceased Punnu had more sisters and that their progeny is alive and is still livingat Dhameta. Those persons should have been produced to prove Gheplia's relation withNaro and the respondent has also failed to produce any electoral roll or birth certificate of the respondent. Therefore, according to him, the evidence produced by the respondent is not admissible under Section 50. He placed reliance in Ajaib Singh v. Mann Singh, (1968) 70 Pun LR 83. In this case the learned single Judge of Punjab and Haryana High Court observed that Section 50 of the Evidence Act makes the opinion of a witness relevant only if the same was expressed by conduct. It is the witnesses' opinion based on his own conduct his outward or external behaviour towards the persons whose relationship was to be established that would be relevant. The conduct must be of such a type that must show to the Court that the witness himself was convinced about the said relationship. Two things are, therefore, necessary to make the evidence of a witness relevant under Section 50 of the Act. The first is that the witness should have special means of knowledge about the relationship, either as a member of the family or otherwise. Secondly, that witness must depose to his own conduct towards the persons whose relationship is in dispute and on the basis of which he hadformed the opinion about that relationship. It is not the conduct of those two persons inter se whose relationship was in dispute but the conduct of the witness himself towards

them which is material for the purposes of Section 50 of the Act. In State of Bihar v. Sri Radha Krishna Singh, AIR 1983 SC 684 relied upon by the learned counsel for the appellant, in para 24 it has been held:--

'It is well settled that when a case of a party is based on a genealogy consisting of links, it is incumbent on the party to prove every link thereof and even if one link is found to be missing then in the eye of law the genealogy cannot be said to have been fully proved.'

12. In Balaram Das v. Jayakrushna Dass, AIR 1972 Ori 141 learned single Judge observed that the Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. Opinion evidence about the existence of such relationship, however, is admissible provided such evidence satisfies the conditions laid down by Section 50. It is only 'opinion' as expressed by conduct which is made relevant. Section 50, however, does not state as to how the conduct or external behaviour which expresses the opinion of a person has to be proved. For this purpose one has to turn to Section 60. The portion of Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily mean that it must be proved only by the person whose conduct expressed the opinion. It can be proved either by the testimony of the person himself whose opinion is evidence under Section 50 or by some other person acquainted with the facts which express such opinion. In Shankhali Dhal (and after him), Gadadhar Dhal v. Nilamani Dei, AIR 1994 Ori 298, it has been observed by learned Single Judge that in the absence of direct document showing relationship between owner and daughters, oral evidence of 75 years old co-villager and neighbour of owner of land was not sufficient to infer relationship, in absence of some special circumstances under which the witness could form such an opinion especially when he had no relationship with the family of owner of the land.

13. In the decisions referred to above, the Apex Court and the High Courts have-laid down the essential requirements for the attraction of Section 50 of the Evidence Act. These decisions nowhere laid down that the relationship cannot be proved otherwise than by calling the persons who either are family members or

have special knowledge about the relationship. Section 50 speaks of relevancy of the evidence of the witnesses. It does not lay down that a relationship cannot be proved unless the persons referred in that Section are produced. In Sitaji v. Bijendra Narain Choudhary, AIR 1954 SC 601 Hon'ble Judges of the Supreme Court in para 10 observed as under:--

'A member of the family can speak in the witness box of what he has been told and what he has learnt about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight but not its admissiblity. This is therefore, legally admissible evidence which, if believed, is legally sufficient to support the finding.'

14. This proposition of law has been reiterated in Dolgobinda Paricha v. Nimai Charan Misra, AIR 1959 SC 914. Inpara 7 of the judgment Hon'ble Judges of the Apex Court observed:

'The conduct or outward behaviour must be proved in the manner laid down in Section 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of Section 50, and it must be proved in the manner laid down in the provisions relating to proof. That portion of Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope ofSection 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under Section 50 of by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the

testimony is in each case direct within the meaning of Section 60. This is the true inter-relation between Section 50 and Section 60 of the Evidence Act. While Section 50 affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special means of knowledge, the section does not imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. Section 50 does not put any such limitation.'

15. In the present case respondent has examined P.W. Jagat Ram who had attended the marriage of Ghepli and Naro parents of the respondent. P.W. Jagat Ram had not been cross-examined to the effect that Smt. Naro, the mother of the respondent had not . been living with Gheplia as his wife. Where a long cohabitation is proved, a presumption of legal wedlock arises. In Badri Prasad v. Deputy Director of Consolidation (AIR 1978 SC 1557), the Apex Court held :--

'When a man and woman had been living for about 50 years as husband and wife there is a strong presumption in favour of wedlock. There is no necessity of proving marriage either by examining the Priest or other witnesses. It has been further held that law leans in favour of legitimacy and frowns upon bastardy. Further, it is held that if a man and woman who live as husband and wife in society are compelled to prove half a century later by evidence that they were validly married, a few will, succeed. 'In the present case long cohabitation of respondent's mother with his father has been established by oral as well as documentary evidence referred to above. Presumption of lawful wedlock arises and the respondent as such shall bedeemed to be a legitimate son of Gheplia.Mere suggestion from appellant's side to the respondent's-witnesses that in fact Smt. Naro was Maid-servant in the house of Raja Bhikham Singh of Key and that Ghephlia was also a servant in the orchard of Raja and that they had developed illicit relations, is not conclusive evidence. It has also been suggested by the appellant that when said Naro took employment in the house of Raja she was already carrying pregnancy of 2/3 months. This was only a suggestion to the respondent's witnesses and none of the appellant's witnesses have got any personal knowledge about this fact. They have stated itonly on the basis of

information collectedfrom others and this being hearsay evidence is inadmissible. Both the Courts below have rightly come to the conclusion that respondent's mother Naro was a legally wedded wife of Gephlia and the respondent is legitimateson of Gheplia and Naro.

16. Shri Bhupender Gupta, learned counsel for the appellant contended that respondent's witnesses have referred to a woman Smt. Naro alias Chiri alias Pano whereas this was not case of the respondent in his pleadings and the respondent has created false evidence that Smt. Naro alias Chiri alias Pano was the name of one and the same woman. This contention raised deserves to be rejected. It was not the case of the appellant that Smt. Naro, Smt. Pano and Smt. Chiri were the three different women and that none of them was married to Gaphlia father of the respondent. In the absence of any contrary evidence regarding the distinct existence of three ladies by the names, as stated above, the evidence of the respondent that Smt. Naro alias Smt. Pano alias Smt. Chiri was the mother of the respondent is to be accepted as trustworthy and there exists no reason to discard it.

17. From the aforesaid discussion, it can safely be concluded and rightly so held by both the Courts below that Gokal was common ancestor between the respondent and deceased Punnu. It is undisputed thatSmt. Naro was the common ancestor between the appellant and the deceased Punnu. Once Gokal was found to be the common ancestor between the deceased and the respondent, the degrees of ascent of the respondent and the appellant from their respective common ancestors are the same. From the Pedigree table prepared and referred by the trial Court in its judgment, it is clear that both the respondent and appellant are cognates as both of them are tracing their relations to the deceased through lines in which females intervene. The definition of cognate in Clause (c) of Section 3(1) of Hindu Succession Act, 1956 excludes the requirement of blood relationship. It was not the case of the appellant that a cognate on the paternal side is to be preferred to the cognate on the maternal side. The rules as to distribution amongst the cognates have been laid down in Section 12 of the Hindu Succession Act. The first rule is that the degree in ascent are to be counted and the person fewer in degrees will be preferred. In the present case the common

ancestor as discussed above between the respondent and the deceased Punnu was Gokal who was at 3rd degree from the decreased. The common ancestor of deceased Punnu and the appellant was Naro. She was also at third degree from deceased Punnu. Thus, both the appellant and respondent are having equal degree of ascent. If the degrees of ascent are equal then the degree of descent are to be counted. The respondent is at three degrees from Gokal whereas appellant is at four degrees from Naro. The appellant being one degree remoter shall be excluded and the respondent will be preferred.

18. No other point was urged by the learned counsel for the parties.

19. In the result, for the foregoing reasons, the appeal fails and is accordingly dismissed. However, the parties are left to bear their own costs.