

Twarku Vs. Surti

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Court : Himachal Pradesh

Decided On : Nov-29-1996

Reported in : AIR1997HP76

Judge : Kamlesh Sharma, J.

Acts : [Evidence Act, 1872](#) - Sections 17, 32(5) and 114

Appeal No. : R.S.A. No. 378 of 1995

Appellant : Twarku

Respondent : Surti

Advocate for Def. : T.R. Chandel, Adv.

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

Disposition : Appeal dismissed

Judgement :

1. In this Regular Second Appeal under Section 100 CPC appellant-defendant. Twarku, has assailed decree and judgment dated 10-10-1995 passed by District Judge. Shimla, whereby his appeal was dismissed and decree and judgment dated 30-4-1992. of Sub-Judge 1st Class. Theog. District Shimla. was affirmed. Sub-Judge 1st Class had decreed the suit of respondents-plaintiffs Smt. Surti to the following effect:--

'In view of my findings on the above issues the suit of the plaintiff is decreed and the plaintiff is declared the exclusive owner in possession to the suit land comprised in Khewat No. 11/15 Khasra No. 67 min and 68/7 kim No. 2 measuring 18-1 bighas situated in Chak Jungle Rohru. Tehsil Theog. District Shimla, H.P. which is the immovable property in Schedule 'A' and the plaintiff is entitled for the possession of immovable property however the plaintiff has not been able to prove the possession of the moveable property shown in schedule 'B' with deceased Sh. Dhanu thereby she is not entitled for the same. The plaintiff is entitled for the possession of the suit land and the compromise decree in Civil Suit No. 192/1 of 1985 dated 17-11-1986 Ext. PB) and the mutation Exl. PC are declared to be wrong and illegal as collusive and further plaintiff is not entitled for the mesne profits as claimed since no such benefits have been proved on record. However, there is no order as to cost. 'Decree sheet be prepared accordingly.'

2. The property in dispute is detailed in schedules 'A' and 'B'. annexed to the plaint. Late Dhanu son of Rubhi, resident of Barclti Pargana Shili Nali. Tehsil Theog. District Shimla. was owner in possession of the property in dispute. He died on 5-10-1985, mutation of his inheritance was attested in favour of pro forma respondent-defendant Sun, Panchmu Devi by order dated 18-9-1986 passed by Assistant Collector IInd Grade. Theog. without notice to Smt. Surti. In the appeal filed by Smt. Surti as well as Twarku the mutation dated 18-9-1986 was set aside and case was remanded to Assistant Collector IInd Grade. Theog for passing mutation order afresh after hearing the parties. Ultimately, by order dated 31 st May. 1988 mutation of inheritance of Dhanu was attested in favour of Smt. Surti holding her entitled to inherit the property of Dhanu in her capacity as his widow. Smt. Panchmu admitted that she was divorced by Dhanu on 21 -1 -1980. as such, she had no right to inherit his property. The claim of Twarku that he had been in cultivating possession of the land of Dhanu who was residing with him and also that being his agnate he has a right to inherit his property was rejected.

3. In the mean time. Twarku. along with three others, claiming themselves as agnates of Dhanu, filed Civil Suit No. 192/1 of 1985 (Plaint Ext. DW-1/D) against Smt. Panchmu for declaration that they are owners in possession of the land in dispute and she may be restrained from interfering with their possession and in the

alternative for decree for possession. It was alleged in the suit that the estate of Dhanu had devolved upon them as he had left no heirs of Class-1 and Class-11 as per the schedule attached to Hindu Succession Act. Smt. Surti was not made party to the suit. Ultimately, by order dated 7-11-1986 (Ext. DW-1/A) suit was decreed in terms of the compromise alleged to have been entered into between the parties and Twarku was declared owner in possession of land measuring 13-11 bighas out of the land indispute and Smt. Panchmu as owner in possession of remaining land in dispute measuring 4-10 bighas. As per the compromise. Twarku undertook to maintain Smt. Panchmu till her death.

4. After coming to know about the compromisedecree (Ext.DW-1/A). Smt. Surti filed a Civil Suit out of which the present appeal has arisen claiming herself widow of Dhanu who had married her on 20-3-1980 in accordance with local custom called 'Prana'. in vogue since time immemorial in the caste family and the communities of the panics to the marriage, which was also recorded in Panchayat on 5-4-1980. According to her. Dhanu had divorced his first wife Smt. Panchmu in accordance with the custom known as 'Reel' in vogue since time immemorial in the families of the spouse and the ilaqua. Being widow of Dhanu she is his only legal heir as he had died issueless and entitled to inherit his estate. She has challenged the compromise decree. Ext. DW- 1/A, on the ground that it was collusive and mala fide and not binding on her as she was not party in the suit. She has also alleged that Smt. Panchmu had falsely claimed herself to be the widow of Dhanu to defeat her rightful claim.

5. Smt, Panchmu did not resist the suit and admitted all the contents of the plaint as well as the claim of Smt. Surti by filing the written statement through her counsel but Twarku resisted the suit and denied all the allegations made in the plaint by filing written statement. Though he has admitted ownership in possession of Dhanu in respect of immovable property as detailed in schedule 'A' but has denied his ownership and possession over the moveable property shown in schedule 'B' attached to the plaint. He has also claimed possession of the immovable property since the lifetime of Dhanu as he was living with him. Twarku has denied that Dhanu had divorced his earlier wife Smt. Panchmu and had married Smt. Surti during his lifetime. According to him. earlier to 1985 she was

wife of Barfu Ram and (hereafter she was married with one Chandu Lal and remained with him up to 3-6-1986 and the Panchayat record was forged to create evidence in her favour. He has also averred in his written statement that he is legal heir of Dhanu. being his nearest agnate, as he died widowless and issueless. He has further denied that compromise decree, Ext. DW-1/A, was the result of conspiracy and collusion between the parties in the said suit.

6. On the pleadings of the parties the following issues were framed:--

1. Whether the plaintiff is the widow of deceased Dhanu as alleged. If so its effect? OPP.

2. Whether the deceased Dhanu was owner in possession of the immoveable and moveable property as shown in schedules A and B annexured with the plaint as alleged. If so its effect? OPP.

3. Whether collusive compromise decree in suit No. 192/1 of 85 dated 17-11-1986 is illegal null and void as alleged. If so, its effect? OPP.

4. Whether the defendant No. 2 is the legal heir of the deceased Dhanu as alleged, if so. its effect? OPD.

5. Relief.'

7. Issues No. 1 to 3 were answered in favour of Smt. Surti holding her widow of Dhanu on the basis of oral evidence of the parties as well as documents, a copy of family register, Ext. PW-7/B. and a copy of register of petition writer, PW-8/A. Being widow, Surti has been held entitled to inherit the landed property of Dhanu as shown in Annexure-A in the schedule attached to the plaint and the decree, Ext. DW-1/ A, is declared illegal and collusive having no effect on the rights of Smt. Surti. However, the moveable property, as shown in schedule 'B', is not held to be of Dhanu. Issue No, 4 is decided against Twurku that he has failed to show that he is legal heir of Dhanu, though, from pedigree table, Ext. DW-4, it is proved that he is distant relation of Dhanu but in the presence of Smt. Surti, who is class-1 heir of Dhanu he has no right to succeed to the estate of Dhanu. The findings of trial Court have been affirmed by the District Judge, hence, the present Regular

Second Appeal. 8. This Court has heard learned counsel for the parties and gone through the record. Admittedly, on the oral and documentary evidence on record both the Courts below have concurrently found that Smt. Panehmu, the first wife of Dhanu, was divorced by Dhanu in January, 1980 in accordance with custom of the ilaqua and the families of the spouse and thereafter his marriage with Smt. Surti had taken place in accordance with local custom called 'Prena' on 20-3-1980 and was recorded in the Family register, a copy of which is Ext. PW-7/B. It is also concurrently held by both the Courts below that in view of the status of Smt. Surti as widow of Dhanu only she has the right to inherit his estate and the compromise decree, Ext. DW-1/A. to which she was not a party, is not binding on her. Decree, Ext: DW-1/A, has also been held illegal and Collusive between the parties to the suit in which it was passed. This Court in exercise of jurisdiction under Section 100 CPC is not supposed to interfere with these findings of fact by re-appreciating the oral and documentary evidence on record unless the appellant is able to point out any substantial question of law arising in the appeal: Shri Bhupender Gupta, learned counsel appearing for the appellant, has argued that the substantial question of law arising in the present appeal is that without there being specific pleadings and proof of custom of 'Reet' pertaining to divorce both the Courts have concurrently held that Smt. Panehmu, the first wife of Dhanu. was divorced by him in January, 1980. According to him. similarly there are no pleadings and proof in respect of 'Prena' custom of marriage, according to which the marriage of Dhanu with Surti has been held to be solemnised as per the findings of Courts below. Shri Gupta, has urged that an entry dated 20-1 -1980 in the register of petition writer, Ext. PW-6/A, pertaining to execution of divorce deed between Smt. Panehmu and Dhanu in the absence of divorce deed on the record, cannot be relied upon as a document evidencing a divorce between them. Shri Gupta has also attacked. Ext. PW-7/B, which is a copy of family register, showing deletion of name of Panehmu as wife of Dhanu on the basis of divorce deed No. 183 dated 21-1-1980 and also name of Surti as his wife on the ground that it is not a substantial piece of evidence to prove either divorce between Smt. Panehmu and Dhanu and marriage between Surti and Dhanu. Shri Gupta has further attacked another document on the same ground, which is a copy of marriage register. Ext. PW-7/A. wherein the factum of marriage of Dhanu with Surti has been recorded at the instance of

Dhanu who along with Surti. had also put his thumb impression in the. remarks column. Shri Gupta has also pointed out that both the Courts below have ignored one material document. Ext. DX, which is a copy of the application which Surti had submitted in August, 1994, on the basis of which she was granted old age pension. According to Shri Gupta, had this document been taken into consideration by Courts below they would not have held her legally wedded wife of Dhanu as in the application form she has not represented herself as wife of Dhanu and has shown herself as daughter of Saniu. Verifying the contents of her application. President. Gram Panchayal Kelvi had reported that she was divorce though married 4/5 times and was working as labourer to earn her livelihood.

9, On the other hand. Shri T.R. Chandel. learned counsel for respondents, has supported the findings of Courts below. He has pointed out that divorce of Smt. Panehmu with Dhanu in January 1980 in accordance with custom prevalent in the 'ilaqua' as well as in the families of the spouse has been duly pleaded and proved. Shri Chandel has taken this Court through the pleadings and has successfully shown that in Para 2 of the plaint it is specifically pleaded that Smt. Panehmu, who was earlier wife of Dhanu. 'had ceased to be his (Dhanu's) wife on account of mutual divorce, which came into existence in January. 1980. in accordance, with the custom of the 'ilaqua' and the families of the spouse, recognised by all concerned and in vogue since time immemorial. The said divorce is called 'Reet' in local parlance.' In reply to this para, Twarku in his written statement 'has simply stated that this para is wrong and denied. It is further denied that Panehmu was once the wife of Dhanu. Since this denial is vague and not specific with regard to the allegations of custom of 'Reef prevailing in the 'ilaqua' and the families of the spouse or the factum of divorce between Dhanu and Panehmu which had taken place between them in accordance with the said custom in January. 1980 as specifically alleged in Para-2, reply to Para-2, is hit by Order 8 Rules 3 and 4 CPC.

10. In fact. despite denial in Para 2. Twarku. who has 'appeared as DW-1. has admitted in his cross-examination that divorce of Panchmu had taken place in 1980 but the continued living in the house of Dhanu and this admission has rightly been relied upon by the Courts below to hold that Panchmu was divorced by Dhanu. This Court further finds that while challenging the mutation dated 18-9-

1986 in favour of Panchmu before Sub-Divisional Collector. Theog. Twarku has specifically stated in his grounds of appeal (Exl. PG) that, 'Learned Assistant Collector has wrongly come to the conclusion that respondent (Panchmu) is the wife of deceased Dhanu. there is no evidence on record to show that the respondent is the wife of deceased Shri Dhanu when the appellant produced the photostat copy of divorce deed vide which Shri Dhanu deceased had divorced the respondent, moreover, the respondent is getting Rs. 50/- as old age pension from the Government for the last many years, these facts clearly show that the respondent is not at all the legal heir of deceased Shri Dhanu.'

11. Therefore, it cannot be urged on behalf of Twarku that there arc neither pleadings her evidence to the effect that divorce had taken place between Panchmu and Dhanu in January. 1980 in accordance with the custom of 'Reet' governing them. In view of admission of Twarku. that Panchmu was divorced by Dhanu and also that he had produced a copy of divorce deed before Sub-Divisional Collector, Theog, District Shimla. in his appeal. Ext. PG, non-production of divorce deed is not of much consequence though its execution is corroborated by document. Ext. PW-6/A, proved by Sher Singh. Petition Writer. PW-6 and also by entry in the Family register. Ext. PW-7/B, deleting the name of Panchmu as wife of Dhanu on the basis of divorce deed No. 183 dated 21-1-1980.

12. Coming to the other question, raised by Shri Gupta. that neither there are pleadings nor proof to prove that there was a custom of marriage known as 'Prena' governing Surti and Dhanu and also that their marriage had taken place in accordance with the said custom. Again Shri Chandel has referred to Para 4 of the plaint and reply thereto. In Para 4 it is specifically pleaded that. Shri Dhanu married the applicant (Surat) In accordance with local custom known as 'Prena'in vogue since time immemorial in the caste, family and community of the parties to the marriage. The factum of marriage was reported to local Gram Panehayat. Chikhar which was duly recorded in the register of marriages. The marriage took place on 20-3-1980 and recorded in the Panehayat on 5-4-1980, when the signatures/thumb impressions of the parties to the marriage also were taken on the said register.' This para is stated to be wrong and denied in the written statement. It is further denied that. 'Shri Dhanu deceased married the applicant in

accordance with the 'Prcna' custom, this is all concoction by the applicant. Shri Dhanu never married the applicant in any forms of the marriage. The applicant was married by Shri Chandu Lal on 19-8-1985 and she remained with Shri Chandu Lal up to 3-6-1986 as his wife. The applicant sought divorce from said Shri Chandu Lal on 3-6-1986. Prior to 1985, the applicant was the wife of brie Shri Barfu Ram and thus there is no question of the applicant being the wife of Shri Dhanu deceased. The applicant has forged the false Panehayat record with a view to create false evidence in her favour. It is denied that the marriage took place on 20-3-1980.' From this reply, it is clear that Twarku has not denied that there was a local custom of marriage known as 'Prena', in vogue since time immemorial in the caste, family and community of Dhanu and Surti. However, he has denied their marriage in any form and has alleged that she was wife of Barfu Ram prior to 1985 and Chandu Lal from 1985 to 3-6-1986 and thereafter divorced by him. So far 'Prena' custom is concerned, it has been duly proved by the witnesses, namely. Jama. Gorkhia. Natnia and Kewal Ram. PW-2 to PW-5 and Chandu Lal, DW-3. and not denied by Twarku. when he appeared as DW-1. To prove his case that she was already married, he has produced Barfu Ram. DW-2 and Chandu Lal. DW-3 but their statements do not inspire confidence and have rightly been rejected by both the Courts below. On the other hand, the marriage between Surti and Dhanu was performed in accordance with 'Prena' custom has been duly proved by the statements of Jama. Gorkhia. Natania and Kewal Ram. PW-2 to PW-5. who had participated in the said marriage and If some part of their statements is in contradiction to the statements of Surti, PW-1, in respect of her presence at the time of death of Dhanu, as pointed out by Shri Gupta. learned counsel. It is not material and deserves to be ignored for the reason that their statements were recorded after about five years of the death of Dhanu.

So far documents. Ext.PW-7/A and PW-7/B. are concerned, these are: copy of entry in marriage register and copy of family register respectively and have been proved by Hari Dass, PW-7. Secretary. Gram Panchayat, Chikhar. Ext. PW-7/A is a copy of entry in marriage register, which is an official document prepared and maintained by Gram Panchayat under Rule 44 (3) of H. P. Gram Panchayat Rules. 1971, which provides that Gram Panchayat shall undertake registration of marriage and shall maintain a register in Form 4. The perusal of Annexure PW-7/A

clearly shows that after their marriage on 20-3-1980 in accordance with 'Prena' custom, Dhanu and Surti got it registered with the Panchayat and entry in this regard was made in the marriage register. The factum of their marriage was reported by Dhanu on 5-4-1980 and admitting it as correct both of them have put up their thumb impression in remarks column.

Similarly. Ext.PW-7/B, is a copy of family register, which is prepared and maintained under Rule 5 of the said Rules which provides that a register shall be prepared by every Gram Sabha in Form-1 which shall consist of two parts; Part-I shall contain the names and particulars of persons, family-wise, residing in a village which forms - part of the Sabha and Part-2 shall contain that who are entitled to be the members of the Sabha under Section 5 (3) of the Act. PW-7/B is a copy of entry made in the family register maintained in Form-1 in which the name of Panchmu as wife of Dhanu stands deleted on the basis of divorce deed No. 183 dated 21-1-1980 and name of Suni as wife of Dhanu finds mention. The representation made by late Dhanu. as recorded in PW-7/B. is very much relevant to prove that he had married Surti as provided under Sub-section (5) of Section 32 of the Indian Evidence Act. Those documents were prepared in the year 1980 when neither party) knew that the present dispute will arise after the death of Dhanu. as Mien, it cannot be said that these documents were prepared in order to defeat the claim of Twarku. Moreover, presumption of correctness arises in respect of these documents as these were prepared and maintained by public officers in due discharge of their duties.

13. Coming to document, Ext. DX. which, according to Shri Gupta, learned counsel appearing for Twarku. should be treated as admission of Surti that she was not married at the time she made this application. Ext. DX, for old age pension in August, 1984 and relying upon these documents her marriage with Dhanu stands falsified. Whatever may be the contents of these documents, these were admittedly not put to Surti at any stage when she appeared as PW-1 on 1-3-1988 and 19-12-1989 and PW-8 on 26-3-1992 though this document was already produced on record by Devi Singh, DW-6. on 18-1-1992. Therefore, her statement in cross-examination on 26-3-1992 that she was getting old age pension from Government and her form was filled in by Pradhan at her instance cannot be

treated as her admission in respect of the contents of Ext.DX that she was not married and divorced in August, 1984 when she made this application.

14. After holding that the contents of this document cannot be considered as admission of Surti. this Court need not discuss the case law how admission is to be proved and for what purpose it can be used. In view of this, even if both the Courts below would have considered the document Ext. DX their findings would not have been different than what they have recorded that Surti was married to Dhanu in accordance with 'Prena' custom of marriage.

Therefore, the result of above discussion is that findings of fact arrived at by both the Courts below need not be interfered with in this appeal and the decree and judgment dated 10-10-1995. passed by District Judge. Shim la and decree and judgment dated 30-4-1992. passed by Sub-Judge 1st Class. Theog, are confirmed.

The appeal is dismissed. No order as to cost. Interim stay order, if any. is also vacated.

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