

Mt. Krishni Vs. Gannun

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Court : Himachal Pradesh

Decided On : Jan-07-1952

Reported in : AIR1952HP51

Judge : Chowdhry, J.C.

Acts : [Punjab Land Revenue Act, 1887](#) - Sections 45 and 158(2); ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 9 - Order 14, Rules 1 and 5 - Order 18, Rule 4; ;Hindu Women's Rights to Property Act, 1937 - Sections 1, 1(2) and 4; ;Bilaspur (Application of Laws) Order, 1949; ;Himachal Pradesh (Application of Laws) Order, 1949; ;Hindu Law; ;Bilaspur (Courts) Order, 1949

Appeal No. : Second Appeal No. 17 of 1950

Appellant : Mt. Krishni

Respondent : Gannun

Advocate for Def. : Balmukand, Adv.

Advocate for Pet/Ap. : Harish Chandra, Adv.

Judgement :

Chowdhry, J.C.

1. This is a second appeal by Mst. Krishni, the plaintiff-respondent Gannun being her deceased husband Tulsi's brother. Tulsi had predeceased his father Kakhu.

Kakhu died in 1994 B, and on 26-1-1995, the landed property which had stood recorded in his name was mutated half in the name of Gannun and half in that of Mst. Krishni. On the basis of this record Mst. Krishni applied to the revenue officer in 2004 for partition of her moiety share. This application was resisted by Gannun and, on being so directed by the revenue officer, he filed the present suit against Mst. Krishni on 22-7-2004 for a declaration that the defendant had no right, title or interest in the moiety share which stood recorded in her name and that the plaintiff was entitled to the correction of the revenue records by removal of the defendant's name and substitution of his own.

2. The plaint allegations were that the parties were governed by the Hindu Law; that Tulsi died as a member of a joint Hindu family consisting of himself & his father Kakhu and brother Gannun (the plaintiff); that the defendant became unchaste after her husband's death; that on the death of Kakhu the entire family property had devolved upon the plaintiff as the sole surviving coparcener and there was no right and interest which could devolve upon the defendant; that her name had been mutated in the revenue records unlawfully and by mistake; that the entire property had been in possession of the plaintiff; and that he had come to know of the wrong entry in the revenue records only during the partition proceedings instituted by the defendant.

3. The defendant's written statement, which is a clumsy handiwork of a petition writer, is a rigmarole of repetition and verbosity. The sum and substance of it however was that she traversed the plaint paragraph containing the allegation that the parties were governed by the Hindu Law, and that the property had devolved upon the plaintiff as a sole surviving coparcener on the death of Kakhu. She admitted that a son was born to her after the death of her husband, but she denied that she could for that reason be said to have become unchaste since, she alleged, the plaintiff had seduced her into illicit intimacy with himself in order to deprive her of her rights in the family property. She categorically denied there was illicit intimacy between her and any body else. She pleaded further that the parties, being members of an agricultural tribe, were governed by custom, described by her as Riwaj-i-zamindara, in matters of succession; that she had succeeded to a life interest in the moiety share in suit; that after the estate had vested in her it

could not be divested by the subsequent birth of her illegitimate child and she was entitled to remain in possession of the property; that the suit was time barred; that the suit was barred by estoppel because the plaintiff was present when the property was mutated in her favour on the death of Kakhu and he remained quiet thereafter until she applied for partition; that the suit for correction of revenue records was not maintainable; and that it was liable to dismissal with compensatory costs to her under Section 35 A, C. P. Code.

4. The learned Subordinate Judge dismissed the suit on 30-5-1949, but the learned District Judge of Bilaspur allowed the plaintiff's appeal on 6-11-1950 and granted a declaratory decree in favour of the plaintiff to the effect that the entries in the revenue records showing the defendant as owner of the moiety share in suit was incorrect and the plaintiff was entitled to have it corrected by the substitution of his own name for that of the defendant. The defendant has now come up in second appeal to this Court.

5. The learned District Judge has allowed the plaintiff's appeal and granted the aforesaid declaratory decree on two findings. Firstly, he has held that the defendant had failed to prove any custom whereunder a predeceased son's widow succeeds like a son; that the Hindu Women's Rights to Property Act, 1937, was not applicable as it had not been enforced in this State; and that under the Hindu Law the property in suit devolved upon the plaintiff as a sole surviving coparcener on the death, of his father. Secondly, he held that as the defendant's husband Tulsi died in 1988, that as a son was born to her in 1991 and that as the property in suit was mutated in her name after Kakhu's death in 1995, she had become unchaste before the devolution of property on her and therefore she was not entitled to inherit the property in suit.

6. The points raised by the learned counsel for the defendant-appellant before me were: (1) That there was no issue framed, nor any finding recorded by any of the Courts below, on the defence plea that the suit as framed was not cognizable by a civil Court; (2) that the alleged unchastity was no bar to the defendant's succession since, firstly, the only proof of moral lapse on her part was the birth of an illegitimate son and for that the plaintiff himself was responsible, and, secondly,

the alleged unchastity admittedly took place subsequent to the death of her husband; (3) that the defendant-appellant is entitled to the benefits of, and to succeed to the property in suit under the Hindu Women's Rights to Property Act, 1937; and (4) that the finding with regard to custom had been recorded against her without there having been any clear cut issue on that point and without the defendant-appellant having had the opportunity to substantiate her allegation in that behalf.

7. So far as the first point is concerned, that has obviously no force. This was not a suit for mere correction of any entry in a record of rights, annual record or register of mutations, as provided by Section 158(2) (vi), [Punjab Land Revenue Act, 1887](#). On the contrary, it was a suit under Section 45 of that Act by a person considering himself aggrieved as to a right, of which he professed to be in possession by an entry in a record of rights for a declaration of his right under Chapter VI of the Specific Relief Act, 1877, and therefore a suit cognizable by a civil Court.

8. The third point raised on behalf of the defendant-appellant is equally untenable. The observation made by the learned District Judge that the Hindu Women's Rights to Property Act, 1937, had not been in force in this State is not correct. That Act was applied to this State under the Bilaspur (Application of Laws) Order, 1949, which came into force on 29-6-1949.

At the same time, there is no doubt that the defendant-appellant is not entitled to the bene-fit of that Act since the Act is not retrospective. Section 4 of that Act lays down that nothing in that Act applied to the property of any Hindu dying intestate before the commencement of the Act. In the present case, whether the devolution on the appellant took place on the death of her husband or on that of Kakhu, the Act would not be applicable since both these events had taken place before the Act was applied to this State on 29-6-1949. It may be mentioned here that the provisions of the Act have not become a part and parcel of the Hindu Law by the mere fact of its enactment. As shown by Sub-section (2) of Section 1 of the Act, it extended when promulgated to the whole of British India including British Baluchistan and Sonthal Parganas but excluding Burma. In view of the definition of 'British India' in Section 3, Clause (7) of the General Clauses Act (X (10) of 1897),

the Act in question did not apply when promulgated to what were then described as the Native States of India. That being so, although the general provisions of the Hindu Law might have been applicable to the Native States, the benefits of the Act in question did not extend to them unless specifically applied. That specific enforcement of the Act in a State is necessary as a condition precedent to the application of its provisions in that State is apparent from the fact that it had to be applied to this State under the aforesaid Bilaspur (Application of Laws) Order, 1949. It has likewise been applied to the State of Himachal Pradesh by the Himachal Pradesh (Application of Laws) Order, 1948. I, therefore hold that the defendant-appellant is not entitled to the benefits of the Act in question.

9. As regards the question of unchastity, the only moral lapse attributed to the appellant is the birth of an illegitimate son. The exact point of time when the son was born to her has been found, and there is no controversy with regard to it. If this happening was tantamount to the appellant's unchastity according to the notions of the Hindu Law, its effect upon her rights will depend upon whether it existed at the time of, or occurred subsequent to, her becoming entitled to the property in suit. If the property in suit constituted coparcenary property belonging to the joint Hindu family consisting of Kakhu and his sons, or if, on the other hand, it was the separate property of the appellant's husband, she would have in either case to prove a custom entitling her to succeed to her deceased husband's interest on his death. In either of these cases the material point of time for judging the unchastity of the appellant would be when her husband died. And if that be so, the alleged unchastity would have no effect on her rights since admittedly the unchastity was subsequent to her husband's death. If, however, the property in suit constituted the separate property of Kakhu, the defendant-appellant would have to establish the custom that a predeceased son's widow is entitled to inherit in like manner as a son on the death of her father-in-law. The relevant point of time for considering the alleged unchastity would in that event be when Kakhu died. And in that case, if the alleged moral lapse did amount to unchastity under the Hindu Law, she would obviously be not entitled to succeed to any share. All that has, therefore, not been decided in this connection, and the decision of which is necessary for the disposal of this case, is whether the defence contention as to the plaintiff-respondent having seduced the defendant-appellant into illicit intercourse

with him with a view to depriving her of her rights in the property in suit was correct, and, if so, whether a moral lapse of that character did not amount to unchastity according to the notions of the Hindu Law.

10. The criticism of the learned counsel for the defendant-appellant as regards the way in which the question of custom has been dealt with by the Courts below is well founded. If the written statement of the defendant-appellant in this case was a rigmarole of repetition and verbosity, the issue framed by the learned Subordinate Judge on the question of custom is a labyrinth of involved language through which it is difficult for one to find one's way, especially for backward and unguided persons like the present parties. It may be mentioned here that the parties in the present case were not represented by any counsel in the trial Court. The relevant issue as originally framed, stood as follows:

'Are the parties governed by custom under which the widow of a predeceased son is entitled to succeed to her husband's share?' The issues were framed on 26-6-2005 and on the same date, two of the plaintiff's witnesses were examined. Then on 10-8-2005 two more witnesses for the plaintiff were examined. The case was then adjourned to 4-4-1949 (the dates are henceforward described according to the Gregorian calendar), on which date the defendant commenced her evidence. After one witness for the defendant had been produced the learned Subordinate Judge added on that date the words 'an unchaste widow or' before the word 'widow' in the issue as originally framed. The record shows that this was not done at the instance of any party. Obviously the learned Subordinate Judge did it of his own accord on realising in the course of the evidence produced before him that the issues as they stood framed did not contain anything as regards the plaintiff's allegation of the defendant's unchastity and the latter's plea of custom in that connection. Even then he did not succeed in achieving his object since the issue as amended took it for granted that the defendant was an unchaste widow.

Furthermore, the two questions of an unchaste widow & a predeceased son's widow being entitled to succeed on the ground of custom were jumbled into one and the same issue. It is apparent that the learned Subordinate Judge was alive to the fact of the issue being defective even after the said amendment, for, after

adding the said words to the issue, he went on to make the following note on the record: 'The parties are further informed that they have also to prove whether right of inheritance was lost by unchastity or not, and whether the defendant is unchaste and therefore not entitled to succeed.'

The learned District Judge was also constrained in his appellate judgment to break up the issue into its various components in order to dispose of the same.

Now, not only did the issue still remain defective despite the attempt of the learned Subordinate Judge to rectify it, but he was not justified in going on with the trial of the case after the amendment without giving the parties fresh opportunity of adducing evidence on the amended issue. It may be noted here that after amending the issue, and endorsing the same into on the record, the learned Subordinate Judge examined three more witnesses for the defendant on the same date and he further allowed the plaintiff, who had not appeared as a witness till then, to produce himself as if by way of rebuttal.

As stated above, the parties were not represented by counsel and, therefore, it is difficult to say how far they had understood the import of the said amendment and the Subordinate Judge's note, and whether they had really acquiesced in the trial of the suit being continued without their seeking any opportunity to summon fresh evidence in the light of the amendment and the note. The learned counsel for the defendant-appellant also argued that in view of the fact that the parties were not represented by a counsel it was the duty of the trial Court to have put proper questions to the witnesses in order to elicit statements from them relevant to the issues which he had framed. In support of this argument he cited 'LOCHUN SINGH v. HET NARAIN', 24 W R 232. Unfortunately, that journal is not available here, so that it cannot be said how far it would have supported his contention. I must, however, observe that the learned counsel went a little too far in propounding the aforesaid proposition even in the case of backward litigants, often unhelped by counsel, of these parts. If in a case where parties are unrepresented by counsel it were the duty of the presiding officer of a Court to put questions to witnesses of the parties in order to elicit answers from them relevant to the issues that arise in the case, it would, in fairness to the parties be equally his duty to put

questions to those witnesses in cross-examination also. That would, however, reduce the Judge into a factotum devoid of what has been called the cold neutrality of an impartial Judge. This much, however, is certain that, so far as the present case is concerned, the issues framed by the trial Court were inadequate and defective, and that the trial of the case was arbitrarily continued after making material amendments in the issues without giving parties the necessary opportunity, if they liked to have it, of adducing additional evidence on the amended issue.

11. Another glaring omission made by the trial Court was that it framed no issue on the defendant's denial of the plaintiff's allegation that the latter was in possession of the property in suit. There is no doubt that this point was not taken up on behalf of the defendant in any of the Courts below, and that it has not been taken up even in second appeal before me. The issue, however, did obviously arise from the pleadings of the parties and it was incumbent on the trial Court to frame that issue in view of the clear provisions of the proviso to Section 42 of the Specific Relief Act. In view of that proviso, before the Court could grant the discretionary relief of declaratory decree to the plaintiff it was necessary for it to find out whether the plaintiff, being able to seek further relief than a mere declaration of title (here it being the relief of possession, in case he was out of possession), he omitted to do so. The provision being mandatory, it is clear that without coming to a finding on the question of whether the plaintiff had omitted to seek the further relief to possession it was not possible for the trial Court to grant the discretionary relief sought in the present case, and therefore for its own guidance, if for nothing else, it was incumbent upon the trial Court to frame an issue on this point which clearly arose from the pleadings.

12. The facts disclosed above would justify interference in any second appeal, but much more so in a second appeal here which under the provisions of paragraph 32 of the Bilaspur (Courts) Order, 1949, has, to all intents and purposes, to be heard and disposed of as if it were a first appeal.

13. Acting under Order 41, Rule 25, C. P. Code, I frame the following issues and refer the same for trial to the lower appellate Court, the Court of the District Judge

of Bilaspur, with the direction that that Court will allow the parties to adduce such additional evidence as they might like to produce on those issues and then proceed to try those issues and return the evidence together with its findings thereon and the reasons therefor to this Court within three months of the receipt of the record. The lower appellate Court is further directed that after it has recorded its findings on the said issues it will give sufficient time to the parties to file objections, if any, against those findings, and that he will submit those memoranda of objections also, if any, to this Court. On receipt of the said evidence, if any, findings of the lower appellate Court and memoranda of objections, if any, the present appeal will again be put up for determination before this Court. The lower appellate Court is further directed that before proceeding to try the said issues it will either examine the defendant-appellant, or require her to file particulars, in order to ascertain what her case in regard to issues 5 and 6 is, i.e., whether the property was the joint family property of Kakhu and his sons, or the separate property of either Kakhu or Tulsi, and which of the customs referred to in the sixth issue is pleaded by her.

ISSUES

- '1. Was the defendant-appellant's illegitimate son born as a result of her union with the plaintiff-respondent? If so, did the plaintiff-respondent seduce the defendant-appellant into the illicit intimacy?
2. Did the plaintiff-respondent exercise the aforesaid seduction with the object of depriving the defendant-appellant of her rights in the property in suit?
3. If the findings on the above two issues be in the affirmative, and also even if the finding on only the first issue be in the affirmative and on the second in the negative, does it not amount to unchastity which could have the effect under the Hindu Law of depriving the defendant-appellant of her right to the property in suit?
4. Is there a custom, valid in law and binding on the parties, which has the same effect as the Hindu Law in the preceding issue?

5. Whether the property in suit was the joint family property of Kakhu and his sons, or the separate property of either Tulsi or Kakhu?
6. Is there a custom, valid in law and binding on the parties, whereunder (a) if the property in suit was coparcenary property of Kakhu and his sons, the defendant-appellant became entitled on her husband's death to the same interest as he himself had in the property, and, if so, what was the extent of that interest? or (b) if the property in suit was the separate property of Kakhu, the defendant-appellant became entitled as the widow of a predeceased son to inherit in like manner and, if so, what share?
7. Whether the plaintiff is in possession of the property in suit? If not, what is its effect on the suit?