

Dilu Vs. Dhani Ram

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Court : Himachal Pradesh

Decided On : Jul-26-1991

Reported in : I(1993)DMC399

Judge : Devinder Gupta, J.

Acts : [Evidence Act, 1872](#) - Section 50

Appeal No. : Regular Second Appeal No. 181 of 1983

Appellant : Dilu

Respondent : Dhani Ram

Advocate for Def. : Anand Sharma and; Chhabil Dass, Adv.

Advocate for Pet/Ap. : K.D. Sood, Adv.

Disposition : Appeal allowed

Judgement :

Devinder Gupta, J.

1. This is plaintiff's appeal against the judgment and decree passed on April 28, 1983, by Additional District Judge, Kangra Division at Chamba, allowing the defendant's appeal and dismissing the plaintiffs suit thereby reversing the judgment and decree passed on March 30, 1981, by Senior Sub Judge, Chamba,

decreeing the plaintiffs suit. The appeal was admitted for hearing on July 21, 1983 but at the time of its admission no substantial question of law was formulated. As per the memorandum of appeal one of the substantial question of law arising is whether the judgment of the lower appellate Court is vitiated due to non-consideration of material evidence and misreading of the same. The other is whether the plea of customary marriage was made out from the pleadings of the parties and stood proved from the circumstances on record.

2. Plaintiff filed a suit for grant of decree for declaration that she being the widow of Swaran had succeeded to his estate exclusively and defendant had no right title and interest. Attestation of mutation of inheritance by the revenue authorities was bad in law and the same was ineffective and inoperative against her rights. As a consequential relief, she claimed a decree for confirmation of her possession as such. In the alternative, it was prayed that in case it was held that she was out of possession, decree for possession be granted. According to the averments made in the plaint, the suit property was owned by one Swaran son of Inder, who died in the month of November 1976 leaving behind plaintiff as his widow. She claimed that after the death of her previous husband Hira, Swaran had duly taken her as his wife as per the custom of the Illaqa and Biradari. Even the two minor daughters of the plaintiff from the loins of her previous husband, namely, Km. Leela and Km. Sita were treated and maintained by Swaran as his daughters. The marriage of Leela was performed by him by treating her as his own daughter and she (the plaintiff) was always treated by the deceased as his wife and as such being his widow she had rightly inherited his estate and was entitled to continue as such. The defendant by misstating the facts and in connivance with the revenue authorities got the mutation of inheritance of the estate of deceased entered and attested in his favour behind her back, which had conferred no right, title or interest on him and on that basis was trying to interfere with her rights. Attestation of mutation on April 21 1977, had given rise to a cause of action to her to file the suit, which was filed on June 16, 1978.

3. The suit was contested by the defendant, who denied the status of the plaintiff as widow of deceased and even denied the performance of marriage in accordance with the custom of illaqa, namely, Jhanjrara form with the deceased,

after the death of Hira. Defendant also denied that the deceased considered Leela and Sita as his daughters or that the plaintiff was in occupation of the estate left by deceased. It was pleaded by the defendant in the written statement that one of the daughters of plaintiff, namely, Naro was married to him eight years ago. The deceased was his maternal uncle. Due to Naro's marriage with him, it was not permissible for the plaintiff to have entered into any marital tie with his maternal uncle and there was no possibility of plaintiff having married the deceased prior to Naro's marriage with him. Had such a marriage been performed, it was not permissible for the deceased and plaintiff to give Naro in marriage to him because such a marriage with maternal uncle's daughter is prohibited in the Illaqa.

4. The Trial Court decreed the plaintiffs suit, after it came to the conclusion that plaintiff had proved that she was taken in Jhanjrara form of marriage by the deceased after the death of her previous husband, after such marriage both deceased and the plaintiff had been living together as husband and wife and the deceased even performed the marriages of the daughters of the plaintiff. The Trial Court also raised presumption in favour of marriage between plaintiff and deceased due to their long cohabitation. It also found the plaintiff to be in possession of the property. Feeling aggrieved, the defendant took the matter in appeal. The lower appellate Court reversed the findings of fact by allowing the appeal and dismissed the suit of the plaintiff. The reasons which prevailed with the lower appellate Court were that had Jhanjrara form of marriage taken place between plaintiff and Swaran, he would not have married plaintiff's daughter with defendant, who was his sister's son. It further held that the necessary ceremonies essential for Jhanjrara form of marriage were not proved to have been performed. Adverse inference was drawn against plaintiff in not having produced document known as Khewat drawn at the time of marriage. The evidence produced by plaintiff was held to be highly interested. It also found that there was no evidence produced on record to warrant a conclusion that plaintiff and deceased had been living together for long or that they were treated as husband and wife. Document Ex.PD, extract from birth and death register was not considered as relevant piece of evidence. It held that entry in the register was made somewhere in the year 1973-74 and not in 1970. This document was also held not to have been proved in accordance with law. The plaintiff has now preferred this Second Appeal.

5. I have heard the learned Counsel for the parties and have also gone through the records. Referring to the pleadings of the parties, the averments which the plaintiff made in para 3 other plaint, are to the effects that she was the widow of deceased. After the death of her previous husband Hira, deceased Swaran duly entered into marital ties with her as per the customs of Illaqa and Biradari. Not only this, the deceased always considered the minor daughters of the plaintiff, from her previous husband, as his own and even marriage of one of the daughters, namely, Leela was also performed by him considering her to be his daughter. The other daughter Sita was still unmarried. In paras 3 and 4 of the written statement, defendant denied that any marriage of deceased with the plaintiff was performed about 13/14 years ago. Plaintiff did not perform any Jhanjrara with Swaran deceased. Reading of this part of the pleadings of parties, it is evident that plaintiff did make reference of marital tie having been entered as per the custom of Illaqa and the Biradari. It was not stated by her that Jhanjrara was the form of marriage recognised under the custom. Reference to this form of marriage was made by the defendant in the written statement.

6. In the District Gazetteer of Chamba, compiled by Shri Thakur Sen Negi, State Editor, under the heading 'Marriage customs and rituals' there is a reference made with regard to widow's remarriage in the following words :-

'Widow remarriage is freely permissible in such caste's as the Rathis, the Jhinwars and the Kumhars, while, among the Brahmins, the Rajputs and the traditional business community collectively labelled as the Vaish castes and Sub-castes, it is unknown or rare. The only form of widow remarriage is the already described method of Jhanjrara. If a widow who does not remarry happens to be literate or capable of otherwise working for a living, there is no restriction on her honourably looking after herself. One unable to earn for herself in a respectable manner either remains dependent upon the household of the deceased husband or else goes back to her parental household.'

The only form of widow's remarriage is by Jhanjrara, which has also been described vividly at page 185 of the same compilation in the following words :- .

'Jhanjrara-This is a comparatively less formal and less regular form of marriage, which is resorted to, for example, when a widow or a divorced wife remarries. In this form of marriage, the prospective husband invites the future wife and some relatives and neighbours on both sides; A meeting is held in which a document commonly and loosely called a Khewat is drawn up. The Khewat is a document recording objections, if any, to the matrimonial alliance afoot and signifying consent of those present to the marriage, whether after some objections, to begin with, or without any objections at any stage. Once the ceremony of the Khewat is over and the Jhanjrara is recognised by the gathering, the lady washes the hands and feet of those present bowing in veneration before the respectable ones, and is rewarded with the blessings of those so honoured by her. The wed-lock is clinched by the lady being adorned with some ornaments, generally a nose ring, large or small, or a nose-pin long. The feast is thereafter given to all those present and it followed by dancing and singing. Sometimes the invitees offer small cash presents ranging in value between two annas and one rupee, and this offering is called bartan.'

Reading of the above extract from the District Gazetteers of Chamba, it would be but clear that the only form of widow remarriage prevalent as per the custom in Chamba is Jhanjrara of which reference has been made by the defendant in his written statement, although the plaintiff pleaded that her marriage with the deceased was performed as per the custom. This pleading was sufficient enough and no further particulars were required to be stated by the plaintiff in her plaint, especially, when in the Gazetteer it is recognised as a form of marriage as per the custom.

7. To find out as to whether the evidence produced by the plaintiff was sufficient enough to warrant a conclusion of there being a customary marriage in Jhanjrara form and whether the lower appellate Court misread the evidence or did not consider the material evidence, it would be necessary to refer to oral and documentary evidence PW-1 is plaintiff herself. According to her she gave birth to eight children out of her marital tie with Hira. Out of whom six were alive. Hira died about 18/19 years ago. After one year of his death, talks of her remarriage with Swaran deceased started and about 14/15 years ago, marriage in the customary

form took place. Ceremonies were got performed by Pandit Hari Ram. Kumbh Dia was lighted and she was adorned with Bandha ornament. Her brother, Mutlabi, besides, other persons, namely, Bande, Khazan Singh and Chuhru were also present. After the marriage she brought her four daughters to the house of deceased where she had been residing as his wife. The deceased performed the marriage of Naro with defendant and that of Leela with one Partapo. After the death of deceased (Swaran) she took his ashes to Haridwar for immersion accompanied by Purohit Jai Dayal. Hari Ram Purohit, who is alleged to have performed the marriage, appeared as PW2. He proved the ceremonies performed at the time of Jhanjrara form of marriage, as stated by plaintiff, and he has also corroborated the plaintiff's version. PW 4 is Mutlabi, the brother of plaintiff. According to him, he got performed the remarriage of his sister with Swaran deceased in Jhanjrara form after performing necessary ceremonies. He further stated that after the marriage in this form. plaintiff had been residing in the house of deceased as his wife. It may be noticed that despite the fact that Opportunity was afforded to the defendant to cross-examine this witness, not even a single question was put to him. His entire statement remained unchallenged. Defendant examined himself as DW-1. He admitted that plaintiff had been staying in the house of Swaran but has tried to explain such a stay by stating that she used to visit her daughter, namely, his wife and as he was staying with his maternal uncle, therefore, she used to stay for longer durations along with her two other daughters but this explanation cannot be accepted to be reasonable and plausible in view of the other admissions which he had made in his cross-examination. It was admitted by him that marriage of Leela was performed by the deceased and even Kanyadan was done by him. Defendant also admitted that marriage of Naro was performed by Swaran with him but stated that he spent the entire amount of marriage. Jai Dayal was the purohit at the time of marriage of Naro. In case plaintiff was not residing with her daughters with Swaran along with Naro, there was no occasion for Swaran to perform Naro's marriage with defendant. It could have been possible only had plaintiff been residing with Swaran prior to defendant's marriage with Naro- Hira was not related to defendant. Even according to defendant the plaintiff went to, Haridwar along with Jai Dayal taking ashes of deceased Swaran for immersion. Jai Dayal Purohit appeared as PW 2

and admitted the fact that plaintiff after the death of her previous husband had been residing with Swaran in his house who performed the marriages of Leela and Naro. Both Swaran and defendant shared the expenses of the marriages and plaintiff carried the ashes of Swaran to Haridwar. This witness has also detailed the ceremonies required to be performed at the time of Jhanjrara form of marriage. Persons from the side of bridegroom visited the house of bride. The bride was adorned with ornaments and other ceremonies are performed at the house of bridegroom, such as lighting of Kumbh Dia. Defendant has also produced Mussadi as DW-3. He has not disclosed his relations with the parties and cannot be said to be a relevant witness for proving the relationship.

8. As regards documentary evidence, Ex. PD is the copy of extract from birth and death register of Gram Sabha, Kandwana. In the family of Swaran, besides him, name of Dilu finds mention at S. No. 2, who has been described as his wife. Leela and Sita have been described as his daughters. According to PW-3, this entry was made in the year 1970.

9. The lower appellate Court discarded the document Ex. PD from the evidence as the same had not been proved in accordance with law and entries therein were made somewhere in the year 1973-74. There is nothing on record to warrant this conclusion. PW-3 categorically stated that the entry therein was made in the year 1970. It is not understood that how the lower appellate Court' took this entry having been made in 1973-74 and not in 1970. Ex. PD is a certified extract of the entries made in the family register, which is commonly known as Parivar Register and is maintained by the Gram Panchayat in accordance with the provision of Sub-section (3) of Section 5 of the Himachal Pradesh Panchayati Raj Act and Rule 5 of the Himachal Pradesh Gram Panchayat Rules, 1971. The register is required to be maintained in the Gram Panchayat by the Secretary of the Panchayat. As per provisions of Sub-rule(I) of Rule 6.at the close of each Calendar year, entries in the family register are required to be revised and made up-to-date. If any person has to make any objection with regard to entry in any omission, the same is required to be made as per requirement of Clause (c) of Sub-rule (3) of Rule 6. An extract of any entry from this register, which is duly certified, as provided in Sec. 76 of the Indian [Evidence Act, 1872](#) is admissible in evidence for the purpose of

proving the relation inter se the members of the family and when the extract is tendered, the same is presumed to be correct by virtue of Sec. 79 of the Evidence Act and is also relevant under Section 35 thereof. Such a document could not have been ignored from consideration. The entry in the register was made in the year 1970, during the life-time of Swaran. The name of plaintiff continued to be recorded without any objection, which implies that had there been any objection to him with regard to such an entry, the same would have been got deleted by him. Swaran having failed to object, it was not open for the defendant to challenge the status of the plaintiff. Statement of PW-4, Mutlabi, brother of the plaintiff was discarded on the ground that he was highly interested witness. These observations are also not in consonance with the provisions of law. According to Section 50 of the Evidence Act when the Court has to form an opinion as to the relationship of one person to the another, the opinion expressed by conduct as to the existence of such relationship of any person, who as a member of the family or otherwise has special means of knowledge on the subject is a relevant fact. The essential requirements of this provision of law, as held in the case of *Dolgobinda Paricha v. Nimai Charan Misra and Ors.*, AIR 1959 SC 914 are that : (1) there must be a case where the Court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; and (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship. It has further been held that the person must fulfil the conditions laid down in the later part of the Section. Mutlabi being the brother of the plaintiff, as such, was competent and the opinion expressed by him was relevant under Section 50 of the Indian Evidence Act. His statement also could not have been discarded. Both PW-2 Hari Ram and DW-3 Jai Dayal being the Purohits are also the persons having special means of knowledge.

10. The fact which has come in the evidence of parties is that the plaintiff started residing with Swaran in his house after one year of the death of her previous husband along with her daughters from the previous husband. Marriages of her daughters were also performed by the deceased considering them to be his daughters. Document Ex. PD describes the plaintiff as wife of Swaran. These

circumstances are sufficient enough to raise a presumption of marriage in view of the observations as made in para 10 of its judgment by the Supreme Court in *Gokal Chand v. Parvin Kumari*, AIR 1952 SC 231 the continuous cohabitation for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable and if there are circumstances which weaken or destroy that presumption, the Court cannot ignore them. In the instant case such a presumption, which can be drawn has not been rebutted by the defendant. A Full Bench of this Court in *Devki Singh and Anr. v. Smt. Attro*, (ILR 1981 HP 584) in para 6 of the report has also held as follows :-

'...It may be pointed out that continuous cohabitation of a man or a woman as husband and wife and their treatment as such for a number of years raises the presumption of marriage. No doubt, this presumption is rebuttable but the appellants/landowners have not been able to rebut this presumption...'

The evidence produced by the plaintiff is to the effect that she was taken in marriage by Swaran in Jhanjrara form of marriage after the death of her previous husband. The extracts quoted from the Gazetteer of Chamba do point out the ceremonies which are usually performed in various communities in Chamba, while performing this type of marriage. Both PW1 and PW2 gave details of the ceremonies which were performed. There is no evidence produced by the defendant to rebut such an evidence and it has not been pointed out that which other ceremonies, which were essential, were not performed. Statement of PW-4 that he duly performed the marriage of his sister in the Jhanjrara form with Swaran remained absolutely unchallenged by the defendant. When it is proved that in fact the marriage was performed, the further presumption which arises is that all the necessary ceremonies therein were performed. (See : observations made in para 50 of the judgment in *A.L. V.R.S.T. Veerappa Chetiar v. I.S. Michael*, (AIR 1963 SC 933). Otherwise also, the law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years. Reference may be made in his behalf to the decision of Privy Council in *Mohabbat Ali Khan v. Muhammad Ibrahim Khan and Ors.*, (AIR 1929 PC 135).

11. The evidence which has been led by the plaintiff was relevant under the provisions of Section 50 of the Evidence Act and the plaintiff, as discussed above, had rightly proved her marriage with Swaran in accordance with the customary form of marriage. Findings to the contrary arrived at by the lower appellate Court were the result of discarding relevant evidence and by misreading documentary evidence, Ex. PD, which are liable to be set aside.

12. As a result of the above discussion, the appeal is allowed. Both the questions of law are answered in the affirmative. The judgment and decree of the lower appellate Court is set aside and that of the Trial Court is restored with costs.

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