

Thunthi and ors. Vs. Dhani Ram

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Court : Himachal Pradesh

Decided On : Dec-24-1952

Reported in : AIR1953HP66

Judge : Chowdhry, J.C.

Acts : Hindu Law; ;Evidence Act - Sections 48 and 114

Appeal No. : Second Appeal No. 4 of 1952

Appellant : Thunthi and ors.

Respondent : Dhani Ram

Advocate for Def. : Kirti Ram, Adv.

Advocate for Pet/Ap. : Hira Lal, Adv.

Disposition : Appeal allowed

Judgement :

Chowdhry, J.C.

1. This is a second appeal by the defendants Thunthi, Tulsia and Dhani Ram against the judgment and decree of the learned District Judge of Mandi, dated 21-9-1.951.

2. One Zalim died on 14-5-1949, and thereupon his property was mutated in the names of the present parties as his sons. The defendants-appellants' mother was Mt. Basanto, and Mt. Begamu is the mother of the plaintiff-respondent. The plaintiff filed the present, suit on 13-5-1950 for a declaration that the defendants are not the sons of Zalim but the plaintiff alone is the son and successor to the estate of Zalim, and for possession of the entire property. The plaintiff's case was that the defendants were not the legitimate sons of Zalim, and in fact could not be his legitimate sons, because their mother Mt. Basanto was not married to him in the jhanjharara form. The defendants traversed this allegation and pleaded that they were entitled to succeed to the property of Zalim as his sons.

3. The trial Court took a number of circumstances into consideration, especially that of Zalim and Mt. Basanto having lived as husband and wife for about 30 years, and held that the latter was the legally wedded wife of the former. It also held that Mt. Basanto was the widow of a cousin of Zalim, and that the plaintiff had failed to prove that jhanjharara or any other-rites were essential for espousing a cousin's widow. In the result, it dismissed the suit.

4. On the plaintiff's appeal the District Judge accepted as correct the finding of the trial Court that Mt. Basanto & the depts had lived for about 30 years with Zalim & Zalim had performed marriages of his two daughters by Mt. Basanto, but he was of the opinion that these and other circumstances relied upon by the trial Court were not sufficient to justify the view that Mt. Basanto had acquired the status of a legally wedded wife of Zalim. He was further of the opinion that even if a presumption of marriage arose from the aforesaid circumstances, it had been rebutted, by the admitted fact that no jhanjharara of Mt. Basanto was performed with Zalim, his view being that performance of this ceremony was essential to give validity to one's marriage with a cousin's widow. The plaintiff's appeal was allowed by the learned District Judge and his suit was decreed. The defendants have now come up in second appeal, and they are entitled under para 32 of the Himachal Pradesh (Courts) Order, 1948, to treat it to all intents and purposes as a first appeal.

5. The following facts, which have been established on behalf of the defendants, are not disputed. Mt. Basanto, then a widow, began to live with Zalim about 30 years ago and continued so to live until his death. The present three appellants and two daughters were born of the union of Zalim and Mt. Basanto. Zalim performed the marriages of the two daughters. In fact, the plaintiff-respondent's mother Mt. Begamu herself admitted during the mutation proceedings on the death of Zalim that Mt. Basanto was a widow of a cousin of Zalim, and that she lived with Zalim and the latter begot children by her. It was argued by the learned counsel for the plaintiff-respondent that the certified copy of this statement on the record was not admissible in evidence since it was never put to Mt. Begamu. This argument has no force because it was filed on behalf of the plaintiff-respondent himself. The plaintiff never produced Mt. Begamu to explain it away. The plaintiff is a minor and the statement in question appears to have been made on his behalf by Mt. Begamu as his natural guardian. The statement is therefore admissible as an admission under Section 21, Evidence Act, it having been made against the interests of the plaintiff. In fact, the learned counsel for the plaintiff-respondent did not seriously challenge the above facts, as stated above. He did not further challenge the correctness of the proposition that the law presumed in favour of marriage & against concubinage when a man and a woman had cohabited continuously for a number of years. 'Mohabbat Ali v. Muhammad Ibrahim Khan', AIR 1929 P C 135 (A). What he contended was that this presumption had in the present case been rebutted by the fact that Mt. Basanto's marriage in jhanjharara form had not been performed with Zalim. The only question for determination in the present appeal therefore is whether the undoubted presumption of marriage of Mt. Basanto with Zalim had in this case been rebutted. It may incidentally be stated here that the view of the learned District Judge that Mt. Basanto could not acquire the status of a legally wedded wife of Zalim due to the existence of the said facts was against the aforesaid well-known presumption and therefore incorrect, and the learned counsel for the plaintiff-respondent has not tried to support that view.

6. The learned counsel for the plaintiff-respondent having conceded that a presumption of marriage existed in the present case, and his case being that the presumption had been rebutted, it is manifest that the onus of rebutting the

presumption lay on the plaintiff. In fact, the plaintiff undertook to discharge the onus by making the aforesaid allegation in the plaint that the defendants could not be the legitimate sons of Zalim because their mother Mt. Basanto was not married to him in the jhanjharara form. It is further well established that the, presumption of marriage arising in such circumstances can be repelled only by evidence of the clearest character, and that it would not be displaced by the mere fact of the direct evidence of marriage, if any, being unsatisfactory. 'Chandu Lal v. Bibi Khatemonnessa', AIR 1943 Cal 76 (B). The learned counsel for the plaintiff-respondent cited the ruling of the Hon'ble the Suoreme Court reported as--'Gokal Chand v. Parvin Kumari', AIR 1952 S C 231 (C). But in that case also it was held that continuous cohabitation for a number of years raises the presumption of marriage, that the presumption was a rebuttable one, and that if there be circumstances which weaken or destroy the presumption the Court cannot ignore them. It has therefore to be seen whether the admitted presumption has been rebutted in the present case.

7. The presumption of marriage arising from long and continuous cohabitation between a man and a woman may be rebutted by proving circumstances constituting an insurmountable obstacle to marriage. One such circumstance, for example, might be that the former husband of the woman in question was alive when the cohabitation commenced and was still alive when the offspring whose legitimacy was in issue was born, as was the case in-- 'Indar Singh v. Thakar Singh', AIR 1921 Lah 20 (D). The insurmountable obstacle alleged on behalf of the plaintiff-respondent in the present case was that Mt. Basanto's marriage in the jhanjharara form had not been performed with Zalim. It will appear therefore that it is im-pliedly conceded that Mt. Basanto, though a widow, was entitled to remarry according to local custom. It has however to be remembered that according to the Hindu law no religious ceremonies are necessary in the case of remarriage of a widow. In the neighbouring province of the Punjab the karewa form of marriage, which is a marriage with the brother or some other male relative of the deceased husband of the woman, is contracted without any ceremonyat all, as pointed out by Gour in para. 363 of his Hindu Code, Edn. 4, citing-- 'Authikesa-valu v. Ramanujam', 32 Mad 512 (E). It was incumbent upon the plaintiff-respondent therefore to prove not only that Mt. Basanto's marriage in the jhanjharara form was

not in fact performed with Zalim, but also that performance of marriage in that form was necessary.

8. It may be taken as established in this case that no jhanjharara of Mt. Basanto with Zalim, had in fact been performed since, besides the plaintiff's witnesses having deposed to that effect, it has been admitted by the defendants-appellants' own witness Dillu, who is Zalim deceased's own brother. But, as adverted to above, it was further incumbent upon the plaintiff-respondent to establish that in order to confer validity upon the union of Mt. Basanto and Zalim it was necessary that their marriage in the jhanjharara form should have been performed. This onus the plaintiff has, in my opinion, failed to discharge.

9. The learned counsel for the plaintiff-respondent referred to the statements of opinions as to the existence of this custom made by the plaintiff's witnesses And in this connection he cited two rulings:-- 'Ahmed Khan v. Mt. Channi Bibi', AIR 1925 P C 267 (F) and--'Mohd. Alam v. Mt. Hafizan', AIR 1934 Lah 351 (G). It was held in these cases that a tribal or family custom may be proved by general evidence as to its existence. There is no doubt that such evidence is admissible under Section 48, Evidence Act, but it must be evidence of opinion of persons, who would be likely to know of its existence if it existed. This condition was specifically mentioned in the Privy Council ruling. In the Lahore ruling the mass of oral evidence relied upon consisted of the statements of a large number of larnbardars and other residents of the locality who were certainly in a position to know of the existence of the custom. In the present case only seven witnesses were produced on behalf of the plaintiff, and of these one was a formal witness and another plaintiff's own next friend Basant Singh. There were thus only five witnesses who deposed as to the necessity of the performance of jhanjharara ceremony, and there is nothing to show that they were persons who were likely to know of the existence of the custom, if it existed. Of these one, Phuphi P. W. 2, in fact disproved the custom since he admitted in cross-examination that his own mother was a widow when taken as wife by his father, that he had succeeded to the property left by his father, but that he did not know whether jhanjharara of his mother had been performed with his father. The learned counsel for the plaintiff-respondent referred to the statements of the witnesses produced by the

defendants in this case, but these witnesses have clearly stated that performance of marriage in this form was a recent innovation in the former State of Suket to which the parties belong. According to the defence witnesses the practice was not older than 7 or 8 years. If so, it did not exist about 30 years ago when Mt. Basanto was taken as his wife by Zalim. Some support is lent to these statements of witnesses of the defendants-appellants by the circumstance that it was only about 11 years ago when on 26-6-1998 B., the Suket State issued a Robkar for registration of such marriages. The evidence of general opinion as to the existence of the alleged custom is therefore insufficient -and inconclusive.

10. The only other evidence in support of the alleged custom relied upon by the learned counsel for the plaintiff-respondent was that of certain instances cited by two of the plaintiff's witnesses, Dumnu and Basant Singh. They were instances of four men named Khundu, Jagta, Thotha and Sewadha. No reason was however assigned for not producing these persons themselves. It was also not clear as to how long ago these instances occurred. The instances are also too few to establish a custom. As held in--'Rampal Singh v. Bajrang Singh', A I & 1926 Oudh 211 (H), a party relying upon custom must prove it to be ancient, continuous, certain and reasonable, and he must prove it by satisfactory evidence of particular instances so numerous as to justify the Court in finding in favour of its existence. That being so, citation of only four instances, and those too of a dubious character, without disclosing how old those instances were, cannot be said to have proved the alleged custom in the present case. I therefore hold that the plaintiff-respondent failed to prove in this case that performance of jhanjharara ceremony was necessary. That being so, even though in point of fact no jhanjharara ceremony of Mt. Basanto with Zalim may have been performed, the presumption of marriage that clearly arises in the present case has not been rebutted by the plaintiff. In the circumstance, the trial Court was quite correct in arriving at the finding that the defendants were the legitimate sons of Zalim and in dismissing the suit. Accordingly, the appeal is allowed, the judgment and decree of the lower appellate Court are set aside and those of the trial Court dismissing the suit of the plaintiff-respondent are restored. The plaintiff will pay the costs of the defendants in all the Courts.

