

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.535 of 2006Judgment reserved on: 5-12-2019Judgment delivered on: 10-12-2019

Jal Singh (Dead) Through LRs

(Defendant)

- a) Pili Bai, W/o Late Jal Singh, aged about 55 years,
- b) Samluram, S/o Late Jal Singh, aged about 39 years,
- c) Dammulal, S/o Late Jal Singh, aged about 36 years,
- d) Ludhesh, S/o Late Jal Singh, aged about 32 years,

All residents of Village Post Sonabal, Tahsil Kondagaon, District
Kondagaon (C.G.)

---- Appellants

Versus

- 1. Kamli Bai, W/o Chedu Ram, aged about 50 years,
- 2. Sundar Lal, S/o Late Chedu Ram, aged about 12 years
- 3. Phulmati, S/o Late Chedu Ram, aged about 10 years

Respondents No.2 and 3 minor through their guardian Smt. Kamli
Bai

All caste Gond and R/o Sonabaaal, Tehsil Kondagaon, Distt. Bastar
(C.G.)

(Plaintiffs)

- 4. State of Chhattisgarh, through Collector, Jagdalpur (C.G.)

---- Respondents

For Appellants: Mrs. Renu Kochar, Advocate.

For Respondents No.1 to 3: -

Mr. Malay Jain, Advocate.

For Respondent No.4 / State:

Mr. Anshuman Rabra, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Judgment

1. This second appeal preferred by the appellants / LR's of defendant No.1 was admitted for hearing by formulating the following substantial questions of law: -

“Whether learned first appellate Court is justified in declaring the sale deed dated 27/07/1998 executed by Heera Dai in favour of defendant No. 1 – Jai Singh to be null and void, without producing the sale deed on record and without exhibiting the said sale deed?”

Additional substantial question of law: -

“Whether the first appellate Court is justified in reversing the finding that Heera Dai was duly wedded wife of Suku?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.)

2. The suit property was originally held by Suku and Mahadev. The plaintiff was son of Mahadev. He filed suit that the sale deed dated 27-7-1998 executed by Heera Dai claiming to be the wife of Suku has not conveyed any title in favour of defendant No.1, therefore, it be declared null and void in which defendant No.1 setup a plea that Heera Dai being the legally wedded wife of Suku had right and title over the property and was empowered to alienate the suit land in favour of defendant No.1. On full-fledged trial, the trial Court dismissed the suit holding that Heera Dai was concubine of Suku, but she has acquired the status of wife and therefore she was empowered to alienate the suit property in favour of defendant No.1 and as such, the alienation made in his favour is proper and the sale deed is valid which the first appellate Court has reversed and decreed the suit holding the sale to be null and void against which this second appeal has been preferred in which two substantial

questions of law have been framed which have been set-out in the opening paragraph of this judgment.

3. Mrs. Renu Kochar, learned counsel appearing for the appellants herein / LRs of original defendant No.1, would submit that the decree granted by the first appellate Court in favour of the plaintiffs despite non-production of sale deed and non-exhibiting of sale deed though it has been said to be illegal, cannot be sustained. She would further submit that the suit property has already been divided between the parties, as per the evidence of the plaintiff. The finding of the first appellate Court that Heera Dai was not the wife of Suku is a perverse finding and as such, the judgment and decree of the first appellate Court deserve to be set-aside and the suit deserves to be dismissed.
4. Mr. Malay Jain, learned counsel appearing for respondents No.1 to 3 herein / LRs of the original plaintiff, would support the judgment & decree of the first appellate Court and would submit that the fact of sale is not in dispute, rather it is admitted fact and admitted fact need not be proved by virtue of the provisions contained in Section 58 of the Evidence Act, 1872. He would further submit that the sale deed was not required to be exhibited, as contents of sale deed are not in dispute and once the sale is void ab initio, Heera Dai was not competent to alienate the suit property and the sale deed would be void automatically and impliedly. He would also submit that Heera Dai being the concubine of Suku had no right and title to transfer the property and as such, the appeal deserves to be dismissed. He relied upon a judgment of the Kerala High Court in the matter of Raman Pillai Krishna Pillai and others v. Kumaran

Parameswaran and others¹ to buttress his submission.

5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
6. For the sake of convenience, additional substantial question of law (No.2) is taken first.

Answer to additional substantial question of law (No.2):-

7. It is the case of the plaintiff that Heera Dai was not the legally wedded wife of Suku for which issue No.2 was struck by the trial Court. It is also the case of the plaintiff that she was concubine / mistress of Suku, as Suku never married her.
8. The trial Court held that the relationship of Heera Dai with Suku as concubine is established, but since the fact of concubine is established between both of them and Suku kept her as wife and they are living as husband & wife and she was maintained by Suku during his lifetime and living for fairly long time as husband & wife and maintaining her as wife, it would raise the presumption that Suku has accepted her as wife and the plaintiff also has accepted her as his aunt which goes to show that there was relationship of husband & wife between Suku & Heera Dai and as such, Heera Dai was entitled to alienate the suit property, which the first appellate Court reversed holding that there was no marriage between Heera Dai & Suku and merely because they were living as husband & wife and the plaintiff has allegedly accepted her as his aunt, no presumption of marriage can be drawn. The first appellate further held that the plaintiff has established that Heera Dai was the

¹ AIR 2002 Kerala 133

concubine of Suku, but she was not his wife, as such, there was no relationship of husband & wife between them and merely because there is mutation in the property held by Suku, it would not give rise to presume that there was valid marriage between Heera Dai & Suku and as such, reversed the said finding recorded by the trial Court. The trial Court while answering issue No.2 has clearly recorded a finding that the plaintiff has established that the relationship between his uncle Suku & Heera Dai was that of concubine, thus, it is established that Suku had kept her as his wife and their relationship was that of a husband & wife and since Suku was maintaining her and the plaintiff has also accepted her as aunt and since she was residing in Suku's house, there is presumption that they are husband & wife and thereby the trial Court has dismissed the suit holding the alienation made by Heera Dai in favour of Jal Singh as proper. That finding of the trial Court had become final, as against that finding, no appeal was preferred. The first appellate Court has also held that Heera Dai was concubine of Suku and therefore she was not entitled to alienate the property of Suku.

9. In the matter of Gokal Chand v. Parvin Kumari², the Supreme Court has held that continuous cohabitation of woman as husband and wife and their treatment as such 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 and destroy that presumption, the Court cannot ignore them. Similar proposition of law has been laid

² AIR 1952 SC 231

by the Supreme Court in the matters of Badri Prasad v. Dy. Director of Consolidation and others³, M. Yogendra and others v. Leelamma N. and others⁴, Tulsa and others v. Durghatiya and others⁵, Challamma v. Tilaga and others⁶ and Chanmuniya v. Virendra Kumar Singh Kushwaha and another⁷.

10. There is uncontroverted evidence on record, as held by the trial Court and the first appellate Court also, to hold that Heera Dai was not the legally wedded wife of Suku and she was his concubine. Though presumption was available that long relationship or living together for long time, marriage between them may be presumed, but it is a rebuttable presumption and in that case it has been held that the plaintiff has clearly proved that Heera Dai was only concubine of Suku and not legally wedded wife of said Suku and there is no evidence on record to hold that they lived together as husband & wife and they were treated by one and all and also by the society as husband & wife. In absence of that piece of evidence, both the Courts are justified in not holding so.
11. The Supreme Court in the matter of D. Velusamy v. D. Patchaiamma⁸ while dealing with the meaning of the word 'wife' under Section 125(1) of the Code of Criminal Procedure, 1973, has held that 'wife' means lawfully married wife, there is no scope to include a woman not lawfully married within the expression of 'wife'.
12. Accordingly, by virtue of Section 8(a) of the Hindu Succession Act, 1956 read with the Schedule, only the property of a male Hindu

3 AIR 1978 SC 1557

4 (2009) 15 SCC 184

5 AIR 2008 SC 1193

6 (2009) 9 SCC 299

7 (2011) 1 SCC 141

8 2011(1) M.P.H.T. 228 (SC)

dying intestate shall devolve upon the heirs, being the relatives specified in Class I of the Schedule which includes widow, but it does not include a mistress or a concubine or concubine / mistress cannot take place the status of widow.

13. Therefore, Heera Dai would not succeed the property of Suku and as such, the alienation made by her has rightly been annulled by the first appellate Court which is neither perverse nor contrary to record. The additional substantial question of law (No.2) is answered accordingly.

Answer to substantial question of law (No.1): -

14. Now, the next question would be, what is the effect of non-marking the sale deed dated 27-7-1998 as an exhibit?

15. Admittedly, certified copy of the sale deed dated 27-7-1998 was produced before the Court, but it was not marked as exhibit and the plaintiff has questioned the sale deed that Heera Dai was not competent to alienate the suit land in favour of defendant No.1 and defendant No.1 has claimed that she has validly transferred the suit land by sale deed dated 27-7-1998. But the fact remains that the fact of sale by Heera Dai in favour of defendant No.1 is an admitted fact and by virtue of Section 58 of the Evidence Act, 1872, admitted facts need not be proved, rather it is an undisputed fact, as the contents of the sale were not under dispute and the question would be, what would be the effect of non-marking the sale deed as exhibit, as the fact of sale by Heera Dai in favour of defendant No.1 is not in dispute?

16. Order 13 Rule 4 of the Code of Civil Procedure, 1908 deals with

endorsements on documents admitted in evidence. Rule 4 of Order 13 of the CPC states as under: -

“4. Endorsements on documents admitted in evidence.—(1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely : -

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.”

17. The Travancore-Cochin High Court in the matter of Kannu Asan v. Trav. Forward Bank Ltd.⁹ relying upon the decision of the Privy Council in the matter of Sadik Hussain v. Hashim¹⁰ held that the documents should be admitted in evidence by complying with the provisions of Order 13, Rule 4 of the CPC. The said decisions have been followed by the Kerala High Court in the matter of Raman Pillai Krishna Pillai and others v. Kumaran Parameswaran and others¹¹.

18. In Sadik Hussain (supra), their Lordships of the Privy Council strongly deprecated the failure of presiding Judge to observe the provisions of Order 13 Rule 4 of the CPC to endorse with his own hand a statement that a document proved or admitted in evidence,

⁹ 1956 KLT 203

¹⁰ AIR 1916 Privy Council 27

¹¹ AIR 2002 Kerala 133

was proved against or admitted by the person against whom it was used and stated, and their Lordships further held that they would refuse to read or permit to be read or used any document not endorsed in the manner required.

19. In the matter of **Ratanlal v. Dauda**¹², **Sadik Hussain** (supra) was considered by the Rajasthan High Court and it was held as under: -

“These observations of their Lordships of the Privy Council certainly show the great importance to be attached to the endorsement required by Order 13 Rule 4, because it avoids all complications at a later stage as to whether a particular document has been admitted in evidence or not.”

20. In the matter of **Mukhi Ram v. Kamta Prasad Balam Das**¹³, the Patna High Court has followed the principle of law laid down by the Privy Council in **Sadik Hussain** (supra).

21. In the matter of **Jadibai v. Harsingh**¹⁴, the M.P. High Court followed the principle of law laid down in **Sadik Hussain** (supra) and held that when documents are duly produced – the failure of Courts to make endorsement, documents would not be inadmissible by observing as under: -

“15. It is thus clear that their Lordships of Privy Council in deprecating non-observance of the Rule and in giving a warning of the character referred to above had in their mind the situation in which controversy had legitimately arisen whether certain documents had been properly produced and admitted in evidence or not. It is in connection with such a matter that the non-observance of the Rule should be considered fatal. But where the documents are duly produced without objection and being certified copies of public documents can be taken to be proved and where after such production the opposite party had fair opportunity to rebut that material it cannot be said that the documents should be left out of consideration on account of non-compliance with what may be called a mere formality of making an

12 AIR 1954 Rajasthan 173

13 AIR 1937 Patna 222

14 1963 JLJ 842 (CN 183)

endorsement as to their admission. Evidently the plaintiffs had no control over the presiding officer and in the entire context such non-compliance should not in any way prevent this Court from referring to those documents.”

It was further held by His Lordship that the irregularity regarding non-compliance with Order 13 Rule 4 of the CPC does not affect the merits of the case; and decree cannot be reversed in appeal. It was observed as under: -

“16. The irregularity regarding non-compliance with Order 13, Rule 4 C.P.C. is one in a proceeding in the suit and section 99 C.P.C. fully justifies the view that for such irregularity which does neither affect the merits of the case or the jurisdiction of the Court the decree of the Court below need not be set aside.”

22. The Supreme Court in the matter of Vimla Devi and others v.

National Insurance Company Limited and another¹⁵ has clearly held that despite the documents having been referred by the claimants at the time of recording evidence, if the Court did not exhibit those documents, then in such an event, the claimants cannot be denied of their right to claim compensation on such ground, as non-exhibiting of documents is only a procedural lapse and that cannot be made basis to reject the claim petition, particularly when the claimants (therein) adduced oral and documentary evidence on record to prove their case.

23. Reverting to the facts of the present case in the light of the principles of law laid down in the above-stated judgments (supra), in this case, the fact of sale by Heera Dai in favour of defendant No.1 is not in dispute, rather the fact of sale by Heera Dai in favour of defendant No.1 is an admitted fact and admitted fact need not be proved by virtue of Section 58 of the Evidence Act, 1872.

¹⁵ (2019) 2 SCC 186

Therefore, non-marking of document – sale deed dated 27-7-1998 as exhibit though produced before the trial Court remains an irregularity, as it neither affected the merits of the case nor the jurisdiction of the Court which has passed the decree, and would not go to the route of the matter once the fact of sale is admitted between the parties and that is not in dispute. As such, non-marking of sale deed would be an irregularity not affecting the merits of the matter, though it could have been marked by the trial Court strictly as observed by the Privy Council in Sadik Hussain (supra) and no prejudice has been caused to the appellants / defendant by non-marking the said document as exhibit, as it is admitted position on record and the defendant has not disputed the said document. In that view of the matter, the substantial question of law (No.1) is answered against the defendant and in favour of the plaintiff.

24. Accordingly, I do not find any merit in the second appeal. The second appeal deserves to be and is accordingly dismissed. No order as to cost(s).
25. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge