

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on: 07.08.2019****Judgment delivered on: 16.08.2019****Second Appeal No. 401 of 2004**

1. Smt.Bandhiya Devi Wd/o late Mahdeo Sao, aged about 60 years
2. Rameshwar Prasad S/o. Late Mahdeo Sao, aged about 45 years
3. Santosh Kumar, S/o Late Mahdeo Sao, aged about 32 years
4. Pratosh Kumar, S/o Late Mahdeo Sao, aged about 22 years

No.1 to 4, resident of Village Belkurta Tahsil Pal, District Surguja (CG)

5. Smt. Geeta Devi D/o. Late Mahdeo Sao W/o. Naresh Prasad Gupta, aged about 38 years, Resident of Ramanujganj, District Balrampur (CG)
6. Smt. Sheela Devi, D/o. Late Mahdeo Sao, W/o. Dinesh Prasad, aged about 36 years, Resident of Village Belkurta, Tahsil Pal, District Surguja (CG)
7. Smt. Leela Devi, D/o. Late Mahdeo Sao, W/o Padum Lal, aged about 34 years, R/o. Ghordas, Distt. Garwha, Jharkhand
8. Smt.Usha Devi, D/o. Late Mahdeo Sao, W/o. Dinesh Kumar aged about 32 years, R/o Birsa Chowk, Ranchi, Jharkhand
9. Smt. Chandrawati D/o. Late Mahdeo Sao W/o. Ramchandra Prasad, aged about 20 years, R/o. Kalapara, Ambikapur, District Surguja (CG)
10. Smt.Vimladevi D/o. Late Mahdeo Sao, W/o Kanta Sao, aged about 47 years, R/o Indrawantipur, Barmuhi, Sanawal, District Balrampur (CG)

----Appellants/Plaintiff**Versus**

1. Smt.Reeta Devi w/o Shri Nandlal Gupta, aged about 28 years, Caste-Kalwar
- 2.a Smt. Malti W/o Jokhan Prasad Gupta, aged about 45 years, R/o Khamahariya, Tahsil Ambikapur, District Sarguja (CG)
- 2.b. Smt. Kalavati W/o Vinod Gupta, aged about 42 years, R/o

Khamahariya, Tahsil Ambikapur, District Surguja (CG)

2.c Smt. Sona W/o Laxman Prasad Gupta, aged about 40 years, R/o village-Rainda, District Sonbhadra (U.P.)

2.d Smt. Shanti Devi W/o Chandrika Sao, aged about 60 years, R/o village Rewti, P.S. Ramkola, District Surguja (CG)

3. The State of M.P. (Now C.G.) through Collector, Surguja, Ambikapur (CG)

----- Respondents

For Appellants/Plaintiff	: Mr.B.P. Sharma and Mr.A.K.Prasad, Advocates
For Res.No.1	: Mr. Ashok Kumar Shukla, Advocate
For Respondents No.2(a) to 2(d)	: None present
For Respondent No.3	: Ms Shivali Dubey, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the plaintiff are as under: -

“1. Whether the lower appellate court has committed any error of law in passing the decree in favour of the defendants by allowing a counter claim on behalf of the defendants when there was no appeal preferred against the rejection of the counter claim by the trial Court ?

2. Whether the 1st appellate court was justified in conferring a right/share in the suit premises to Shanti Devi when she was not a party to the suit at all ?

3. Whether the plaintiffs could have been denied the declaration of the title over the entire suit property particularly when the finding of the trial court in respect of the sale deed executed by defendant No.2 in favour of defendant No.1 was nullified ? ”

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the plaint before the trial Court.)

2. The suit property was originally held by two brothers namely

Tapeshwar Sao and Mahadeo Sao. Tapeshwar Sao who was elder brother of Mahadeo Sao died in the year 1945-46 leaving her widow Domni Devi, defendant No.2 herein and daughter Shanti Devi. It is the case of the plaintiff that since Tapeshwar Sao died in the year 1945-46 and before coming into force of the Hindu Succession Act, 1956 on 17th June, 1956, therefore, Domni has limited interest in the suit property and after 5 years of death of Tapeshwar Sao, the plaintiff remarried with Domni Devi and started leaving as husband and wife and they were blessed with four daughters. Since after death of Tapeshwar Sao, Domni Devi remarried with the plaintiff, as such, the plaintiff has succeeded the entire property including the property of Tapeshwar Sao and has become title-holder of entire land and sale made by Domni, wife of Tapeshwar Sao, on 8.12.98 in favour of her daughter defendant No.1-Reeta Devi is null & void and inoperative and defendant No.1 be restrained from interfering with his peaceful possession with respect to the property shown in Schedule 'B' annexed with the plaint.

3. Defendants No.1 and 2 filed their joint written statement opposing the plaint allegations and denied the fact of remarriage and further pleaded that despite opposition by Domini Devi and during lifetime of the plaintiff's first wife, the plaintiff made physical relationship with her (defendant No.2) and thereafter remarried with Domni Devi after five years of death of Tapeshwar Sao in the year 1951-52, as such, the plaintiff has no title over the suit land and the plaintiff's suit deserves to be dismissed.

4. The trial Court framed as many as 13 issues as defendant No.2 has also made counter claim with regard to partition and claimed partition and possession over the suit land. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 8.8.2000, partly allowed the suit and held that the plaintiff is title and possession holder of half share in the suit land and dismissed the counter-claim. In appeal preferred by the plaintiff, the first appellate Court partly allowed the appeal holding that Domni' daughter Shanti Devi (daughter of Tapeswar Sao) has no right over the suit land and also allowed the counter claim holding that defendant No.2 is entitled for half share in the suit property on payment of court fee. Questioning that judgment and decree, this second appeal under Section 100 of the CPC has been preferred by the appellants/plaintiff, in which substantial questions of law have been formulated and set-out in the opening paragraph of this judgment.
5. Mr.B.P.Sharma, learned counsel for the appellants/plaintiff, would submit that as under:-

(i) Defendant No.2 did not prefer any cross-appeal or cross-objection against the judgment and decree of the trial Court, therefore, counter-claim of defendant No.2 ought not to have decreed by the first appellate Court and since Shanti Devi was not party in suit or in appeal, therefore, right of Shanti Devi could not have been decided.

(ii) Since the plaintiff entered into second marriage with Domni Devi after death of Tapeswar in the year 1951-52, therefore,

by virtue of the provisions contained in Section 2 of the Hindu Widow's Remarriage Act, 1856 (hereinafter called as 'the Act of 1856'), defendant No.2-Domni Devi has lost her rights in the suit property and therefore, she has no right to alienate the suit property in favour of defendant No.1.

(iii) Both the Courts below have committed illegality by not granting the decree in full, which deserves to be set aside.

6. Mr.Ashok Kumar Shukla, learned counsel for respondent No.1/defendant No.1, would submit that fact of remarriage as provided under Section 2 of the Act of 1956 has not been proved strictly in accordance with law, therefore, both the Courts below have rightly held that defendant No.2-Domni Devi had right to alienate the suit property in favour of defendant No.1, as such, the appeal deserves to be dismissed.
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

Answer to substantial questions of law Nos.1 and 2:-

8. The plaintiff's suit was partly decreed by the trial Court holding that the plaintiff has 1/2 share in the suit property. Feeling aggrieved against the judgment and decree of the trial Court, the plaintiff alone preferred appeal, however, defendant No.2 did not prefer any cross-appeal or cross-objection before the first appellate Court dismissing her counter-claim. In that appeal, the first appellate Court granted counter-claim preferred by defendant No.2, subject to payment of court fee of ₹298/-. Likewise, the first appellate Court

has held that Shanti Devi has no right in the suit property. Since, defendant No.2 did not prefer any cross-appeal or cross-objection before the first appellate Court questioning the judgment and decree of the trial Court rejecting her counter-claim, therefore, no decree could have been granted in her favour granting her counter-claim in absence of cross-appeal/cross-objection.

Answer to substantial question of law No.3:-

9. Admittedly, in the suit property, Tapeswar Sao had 1/2 share, who died in the year 1945-46 leaving her widow defendant No.2-Domini Devi. It is the case of the plaintiff that his brother died in the year 1945-46 and after five years of death of his brother, he remarried with Domini Devi and thereby she has lost her interest (if any) in the suit property as out of his wedlock with Domini, they were blessed with four daughters and he has succeeded the suit property in toto including the share of Tapeswar Sao as by virtue of Section 2 of the Act of 1856, she has lost her limited right on account of remarriage with plaintiff Mahadev Sao.
10. The first question for consideration would be, what is the effect of alleged remarriage of Domini Devi in the light of Section 2 of the Act of 1856?
11. Section 2 of the Act of 1856 provides as under: -

“2. Rights of widow in deceased husband's property to cease on her remarriage.—All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her remarriage cease and determine as

if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.”

[The Hindu Widow's Remarriage Act, 1856 was repealed by the Hindu Widows' Re-marriage (Repeal) Act, 1983 with effect from 31.8.1983.]

12. A focused glance of the aforesaid provision would show that the said provision has taken away the right of the widow in the event of remarriage and the provision is very specific to the effect that the widow on remarriage would be deemed to be otherwise dead and in the event of remarriage, one loses the rights of even limited interest in such property. This position continued till the Hindu Succession Act, 1956 came into operation with effect from 18-5-1956. Section 4 of the of the Hindu Succession Act, 1956 has an overriding effect. The provisions of the 1956 Act, thus, shall prevail over the text of any Hindu law or the provisions of the 1856 Act and Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Sections 4 and 24 thereof. (See Cherotte Sugathan (Dead) Through LRs. and others v. Cherotte Bharathi and others¹.)

13. Section 6 of the Act of 1856 states about ceremonies required for remarriage as under: -

“6. Ceremonies constituting valid marriage to have same effect on widows marriage—Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage shall have the same effect if spoken, performed or made on the marriage of a Hindu widow;

¹ (2008) 2 SCC 610

and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.”

14. Thus, according to Section 6 of the Act of 1856, in case of remarriage, all the formalities for marriage are required to be proved. Section 6 of the Act contemplates the performance of almost the same ceremonies, which are required in the case of the marriage of Hindu female. In order to prove the remarriage, performance of all the ceremonies will have to be performed in her remarriage. There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies. The performance of ceremonies, therefore, is necessary for the completion of the marriage. The effect of the valid remarriage is the widow losing her right in the property inherited from the previous husband. Therefore, where remarriage is set up as defence, it has to be strictly proved looking to devastating consequence to be befallen upon widow in shape of depriving her right to property.

15. The Supreme Court in the matter of Raghubar Singh and others v. Gulab Singh and others² while holding that marriage between two Hindus is a sacrament observed as under: -

“14. According to the old *Shastric Hindu law*, marriage between two Hindus is a sacrament — a religious ceremony which results in a sacred and a holy union of man and wife by virtue of which the wife becomes a *part and parcel* of the body of the husband. She is, therefore, called *ardhangani*. It is on account of this status of a Hindu wife, under the *Shastric Hindu law*, that a husband was held to be under a personal obligation to maintain his wife and where he dies, possessed of properties, then his widow was entitled, as

² (1998) 6 SCC 314

of right, to be maintained out of those properties. The right of a Hindu widow to be maintained out of the properties of her deceased husband is, thus, a spiritual and moral right, which flows from the spiritual and temporal relationship of husband and wife, though the right is available only so long as the wife continues to remain chaste and does not remarry.”

16. The Supreme Court in the matter of Velamuri Venkata Sivaprasad (Dead) by LRs. v. Kothuri Venkateswarlu (Dead) by LRs. and others³ while considering the effect of remarriage prior to the Act of 1956 had formulated the following question for determination: -

“... firstly, whether remarriage of a widow prior to the Hindu Succession Act, 1956 would divest her of even the limited ownership of her deceased husband's property, having due regard to the provisions of Section 2 of the Hindu Widow's Remarriage Act, 1856 ...”

17. Their Lordships of the Supreme Court while considering the effect of Section 2 of the Hindu Widow's Remarriage Act, 1856 have held that in the event of a remarriage, the widow loses the rights of even the limited interest in the property and after remarriage the next heirs of her deceased husband shall thereupon succeed to the same and further holding it to be a statutory recognition of a well-reasoned pre-existing Shastric law observed as under: -

“17. **Section 2** of the Act 1856, therefore, has taken away the right of widow in the event of remarriage and the statute is very specific to the effect that the widow on remarriage would be deemed to be otherwise dead. The words "*as if she had then died*" (emphasis supplied) are rather significant. The legislature intended therefore that in the event of a remarriage, one loses the rights of even the limited interest in such property and after remarriage the next heirs of her deceased husband shall thereupon succeed to the same. It is thus a statutory recognition of

³ (2000) 2 SCC 139

a well-reasoned pre-existing Shastric law.”

18. Reverting to the facts of the present case in light of principle of law laid down by the Supreme Court in above-stated judgments (supra), it is quite vivid that it is the case of the plaintiff that his brother Tapeswar Sao died in the year 1945-46 leaving his widow Domini Devi, defendant No.2 and daughter Shanti. Domini Devi was limited owner and the plaintiff has remarried with his brother's wife before coming into force of the Act of 1956 on 17th June, 1956 and therefore, Domini Devi has lost her interest over the suit property (her husband's share). The plaintiff was required to prove the fact of remarriage in accordance with the Hindu law applicable at the time when Domini Devi allegedly remarried with the plaintiff.
19. Defendant No.2-Domini was examined before the trial Court. She has clearly denied the fact of remarriage with the plaintiff. In written statement, she has clearly stated that the plaintiff during subsistence of first marriage and during lifetime of first wife made forcible relationship with her and as such, no marriage was ever performed with the plaintiff and she gave birth to children and thereafter again the plaintiff entered into illicit relationship with Bandhiya Devi. The first appellate Court has examined and scanned the statement of the plaintiff in great detail and disbelieved his statement clearly holding that the plaintiff has entered into first marriage with Surajman and he has two daughters out of his wedlock with Surajman and after death of Surajman, the plaintiff entered into marriage with Bandiya in the year 1972. The first appellate Court has also held that the plaintiff has not proved the

fact of marriage with defendant No.2 except saying he was engaged only with Domini Devi, defendant No.2. In para 8 of his statement, he has stated that he has not taken 7th steps with Domini before sacred fire. Plaintiff's witness Ramkrut Yadav (PW-2) has also clearly stated that at the time of engagement ceremonies of marriage which are usually performed for marriage were not performed. Likewise, Sukhan Prasad (PW-4) has also admitted that at the time of alleged engagement with Domini, the plaintiff's wife was alive. The plaintiff though has stated that engagement is form of marriage which is a custom prevalent among them, but custom has to be proved strictly which the plaintiff has failed to prove. The first appellate Court has clearly held that the plaintiff has made forcible physical relationship with defendant No.2-Domini and taking advantage of her being an illiterate and young widow he got his name mutated in revenue records and now claiming 1/2 share in the suit property which defendant No.2 has right and title, as such, the fact of re-marriage has not been strictly proved by the plaintiff.

20. A careful perusal of statement of the witnesses clearly shows that there is no clearcut admissible evidence of clinching nature about the fact of re-marriage of Domini Devi with the plaintiff is available on record as it has already been held that the effect of remarriage would be, widow loses her right in the property inherited from previous husband, therefore, unless the fact of remarriage is strictly proved after observing the ceremonies required as per Section 6 of the Act of 1856, the fact of remarriage cannot be said

to be established by which the right to property, which is a constitutional right, is lost that too by a widow (defendant No.2). Therefore, the finding of the first appellate Court that defendant No.2-Domini had never performed remarriage with the plaintiff is a finding of fact based on evidence available on record. I affirm a finding so recorded by the first appellate Court.

21. In result, the judgment and decree of the first appellate Court is hereby affirmed subject to modification that the first appellate Court ought not to have granted counter-claim filed by defendant No.2.

22. The second appeal is dismissed with the aforesaid modification leaving the parties to bear their own cost(s). Decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-