

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.64 of 2004

1. Rajmuni, W/o Ramchandra, aged about 36 years,
2. Kumari Sushil, D/o Buluram, aged about 20 years,

Both are R/o Village Civil Dag, Caste Chikawa, P.S. and Tah. Kushmi, District Surguja (C.G.)

(Defendants)
---- Appellants

Versus

Ramchandra, S/o Chamaru, aged about 42 years, Occupation Service in the R.T.O. Colony, R/o Bishrampur, P.S. and Tah. Surajpur, District Surguja (C.G.)

(Plaintiff)
---- Respondent

For Appellants: Mr. Sushil Dubey, Advocate.
For Respondent: Mr. R.V.R. Rajwade, Advocate.
Amicus Curiae: Mr. Rakesh Pandey, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

28/02/2019

1. This second appeal by the defendants / appellants was admitted for hearing on the following substantial question of law: -

“Whether the finding that defendant/appellant No.2 Kumari Sushila is not the daughter of plaintiff/respondent Ramchandra is perverse and the said finding has been arrived at by misreading of evidence?”

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

2. The dispute relates to matrimonial status of the plaintiff with defendant No.1 – his wife Rajmuni and defendant No.2 Kum. Sushila whom the plaintiff claimed that she is not his daughter.

Plaintiff Ramchandra filed suit for bare declaration that parties are Scheduled Caste and as such they are governed by the prevalent custom and it was further pleaded that marriage of the plaintiff was solemnized with defendant No.1 in 1980 and immediately thereafter, in 1981 they took divorce according to the prevalent custom i.e. *chod chutti* and defendant No.1 started living in her parental home where she married Buluram in Dhuku form and out of their wedlock, defendant No.2 was born on 12-6-1984. It was also pleaded that maintenance granted by the Judicial Magistrate First Class, Ambikapur on 24-9-1987 to the defendants is null and void and it be declared void and inoperative.

3. The defendants filed their written statement and denied the plaint allegations and they have claimed to be wife and daughter of the plaintiff and refuted the allegation of marriage of defendant No.1 with Buluram. The trial Court dismissed the suit finding no merit in the suit, whereas the first appellate Court partly granted the appeal holding that though defendant No.1 is wife of the plaintiff, but defendant No.2 is not the daughter born out of the plaintiff's wedlock with defendant No.1. Now, the defendants have questioned legality, validity and correctness of the judgment & decree of the first appellate Court by filing second appeal in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.
4. Mr. Sushil Dubey, learned counsel appearing for the appellants / defendants, would submit that the first appellate Court is absolutely unjustified in holding that defendant No.2 is not the daughter of the plaintiff out of his wedlock with defendant No.1 as such, by

recording a perverse finding, such a decree has been passed.

5. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the record with utmost circumspection.
6. The undisputed fact which the trial Court has recorded is that in the application filed under Section 6 of the Guardianship Act vide Ex.C-1 filed by the plaintiff, he himself has stated that his marriage was solemnized with defendant No.1 in the year 1977 and in the year 1986 he had gone to the parental house of defendant No.1, at that time, she refused to come and stay with the plaintiff. It was also recorded as admitted fact that on 16-2-2001, suit for dissolution of marriage by decree of divorce filed by the plaintiff herein under Section 13 of the Hindu Marriage Act, 1955, was decreed and decree of divorce has already been granted in favour of the plaintiff by the jurisdictional Court and maintenance has also been granted in favour of defendant No.1 in the proceeding under Section 125 of the Code of Criminal Procedure, 1973 on 24-9-1987, which has been sought to be declared void in the instant civil suit.
7. In Ex.C-1, the plaintiff himself has admitted that his marriage was solemnized with defendant No.1 in the year 1977, whereas in the plaint his marriage is said to be held in the year 1980 and in the same document Ex.C-1 it has also been admitted that in the year 1986, he had gone to the parental house of defendant No.1 and defendant No.1 refused to come with him. As such, it is established that till 1986 there is admission of the plaintiff that the relationship of husband & wife existed between the plaintiff & defendant No.1 which ultimately got dissolved by decree of divorce vide Ex.C-2 on

16-2-2001 by matrimonial court which also establishes the fact that there was no divorce by customary form in shape of *chod chutti* prior to divorce by the competent court on 16-2-2001 between the plaintiff and defendant No.1 as alleged by the plaintiff.

8. Now, the question is, whether the first appellate Court is justified in decreeing the suit holding that though defendant No.1 is legally wedded wife of the plaintiff which is correct also in view of the fact that marriage having been dissolved by decree of court dated 16-2-2001, but granted decree holding that defendant No.2 is not the daughter of the plaintiff. The trial Court has pressed into service Section 112 of the Indian Evidence Act, 1872 which states as under:-

“112. Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

9. Under Section 112 of the Indian Evidence Act, 1872 there is presumption about legitimacy of children born out of wedlock, though it is rebuttable by strong and conclusive evidence as to non-access, is however, absolutely necessary. The Supreme Court in the matter of Shyam Lal alias Kuldeep v. Sanjeev Kumar and others¹ has held with regard to presumption about legitimacy of children born out of wedlock as under : -

“According to the legislative intention and spirit behind Section 112 of the Indian Evidence Act, 1872, it is abundantly clear that once the validity of marriage is proved then there is strong presumption about the

¹ AIR 2009 SC 3115

legitimacy of children born out of that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. It is well settled principle of law that *Odiosa et inkonesta non sunt in lege prae sumenda* (nothing odious or dishonourable will be presumed by the law). The law presumes against vice and immorality. In a civilized society it is imperative to presume legitimacy of a child born during continuation of a valid marriage and whose parents had “access” to each other. It is undesirable to enquire into paternity of a child whose parents “have access” to each other. Section 112 is based on presumption of public morality and public policy.”

10. Reverting to the facts of the present case in the light of the provision contained Section 112 of the Indian Evidence Act, 1872 and the principles of law laid down by the Supreme Court in **Shyam Lal alias Kuldeep** (supra), it is admitted position on record as noticed herein-above, that divorce as per the Hindu Marriage Act, 1955 took place between the parties only on 16-2-2001 vide Ex.C-2 and till then the parties i.e. the plaintiff and defendant No.1 remained as husband and wife. Therefore, as per the law laid down by the Supreme Court in **Shyam Lal alias Kuldeep** (supra), the validity of marriage is proved and admittedly, defendant No.2 was born on 12-6-1984 during the subsistence of valid marriage between the parties, therefore, once validity of marriage is established, then there is strong presumption about the legitimacy of defendant No.2 born out of their wedlock (plaintiff and defendant No.1). The presumption could have been rebutted by the plaintiff by leading strong, clear and appropriate legal evidence which he has not led for the reasons best known to him. Even otherwise, according to the plaint allegations, the plaintiff and defendant No.1 remained in contact till 1986 as per Ex.C-1, as it is stated that in the

year 1986, she refused to come to her matrimonial home and further refused to perform her matrimonial obligation by coming to the plaintiff's house. As such, it is admitted fact on record that the plaintiff and defendant No.1 remained as husband and wife till the decree of divorce is granted on 16-2-2001 by Ex.C-1 and in between, on 12-6-1984, the birth of defendant No.2 out the wedlock of the plaintiff and defendant No.1 took place. Therefore, the plaintiff has failed to rebut the rebuttable presumption available under Section 112 of the Indian Evidence Act, 1872. However, the first appellate Court has recorded a finding that defendant No.1 had made admission in her statement that defendant No.2 is not the daughter out of her wedlock with the plaintiff. If the plaint allegations are seen, it is quite vivid that it is the plaintiff's own case that defendant No.2 was born out of the adulterous relationship of defendant No.1 with one Buluram.

11. The statement made by defendant No.1 about the status / legitimacy of defendant No.2 that she is not the daughter of the plaintiff is inadmissible, as admission made by defendant No.1 is not binding on the co-defendant i.e. defendant No.2, as interest of both the defendants in the suit was not common and joint as according to the plaintiff's own case, the relationship of the plaintiff and defendant No.1 is admitted while filing suit, whereas it is the case of the plaintiff that defendant No.2 has born not out of his wedlock with defendant No.1, but due to adulterous relationship of defendant No.1 with one Buluram. Even if she has made a statement about the legitimacy, even otherwise, of defendant No.1, it would not bind defendant No.2 which has clearly been explained

by the trial Court in paragraph 27 of its judgment which states as under: -

“27. जैसा की यह तथ्य निर्विवादित है प्रतिवादी क्र. 1 राजमुनी और भगवंती दोनो बहनों की पुत्रिया हम उम्र है, दोनो का नाम पूर्व में सुशीला रहा है, बाद में राजमुनी की पुत्री का नाम सुमित्रा हो जाना बताया गया है। सिर्फ इसी तथ्य के कारण कुछ उलझने बढ़ गई प्रतीत हो रही थी, किंतु प्रकरण की मुख्य धारा से हटकर इन उलझनों में पड़ने की कोई आवश्यकता नज़र नहीं आ रही है, मुख्य विवाद यह है कि प्रति. क्र. 1 राजमुनी जिस लड़की को वादी रामचंद्र की पुत्री बता रही है, वह रामचंद्र की पुत्री है अथवा नहीं, अब उसका नाम चाहे सुशीला हो या सुमित्रा, अभिलेख से इतना स्पष्ट है कि बुलुराम और भगवंती की एक पुत्री सुशीला है, और यह भी निर्विवाद है की वर्ष 84 में या उसके आसपास प्रतिवादी क्र. 1 राजमुनी ने भी एक पुत्री को जन्म दिया था, इस तरह विवाद को इस नज़र से देखने की भी कोई आवश्यकता नहीं है कि प्रतिवादी क्र. 1 राजमुनी की कोई पुत्री है ही नहीं और वह अपनी बहन की पुत्री को वादी की पुत्री बतलाकर अनुचित रूप से भरण पोषण ले रही है। यदि विवाद उक्त प्रकृति का होता तब उपरोक्त उलझनों को सुलझाने की आवश्यकता पड़ती, किंतु यहाँ ऐसा कुछ भी नहीं है।”

12. Section 18 of the Indian Evidence Act, 1872 states as under: -

“18. Admission by party to proceeding or his agent.
—Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character.—Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

(1) party interested in subject-matter.—persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) person from whom interest derived.—persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.”

13. Section 18 of the Indian Evidence Act, 1872 would be applicable only when the statement is made by a party to the proceeding, or

by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, that would only be the admission. Here, the plaintiff has not come out with a case that at any point of time, defendant No.2 has ever authorized defendant No.1 to make admission that she is not the daughter of the plaintiff out of the wedlock with defendant No.1.

14. The Supreme Court in the matter of Sri Chand Gupta v. Gulzar Singh and another², where the landlord of a building filed a petition for eviction on the ground that tenant B sub-let the premises to his brother A, A had filed an affidavit and his brother has filed an affidavit before the Income-tax Authorities that he is the sole tenant of the demised premises, it was held that this statement could not be used against the tenant as admission that by sub-letting the premises to his brother, as brother cannot be said to have any pecuniary interest or any joint interest in demised premises with the original tenant within the meaning of Section 18 of the Indian Evidence Act, 1872.
15. As such, the first appellate Court has clearly committed illegality in holding that defendant No.2 is not the daughter of the plaintiff out of his wedlock with defendant No.1. Therefore, the finding recorded by the first appellate Court deserves to be set aside.
16. Now, the first appellate Court apart from declaring the status that defendant No.2 is not the daughter of the plaintiff out of his wedlock with defendant No.1, also declared the order of maintenance dated 24-9-1987 granted by the Judicial Magistrate First Class,

² AIR 1992 SC 123

Ambikapur in Misc. Criminal Case 14/1987 (Smt. Rajmani and another v. Ramchandar), is inoperative. It is pertinent to mention that the order dated 24-9-1987 passed in Misc. Criminal Case No.14/1987 was challenged by the plaintiff herein by way of Criminal Revision No.139/1987 (Ramchandra v. Smt. Rajmani and another) and the said criminal revision was dismissed by the Sessions Judge, Ambikapur on 29-9-1988 and thereafter, the defendants filed an application for enhancement of the amount of maintenance which has been granted on 11-3-2002 and the amount of maintenance has been enhanced. But the first appellate Court without taking note of the fact that the order of maintenance passed in miscellaneous criminal case granting maintenance though has not been marked and exhibited, yet declared the same as inoperative ignoring the fact that the order granting maintenance has already merged into the revisional order on 29-9-1988 passed by the Sessions Judge and thereafter, the quantum of maintenance has also been enhanced by the criminal court and that has not been questioned by the plaintiff. The first appellate Court ought to have seen that unless the order confirming the order of maintenance is challenged and set-aside, the original order of maintenance passed in favour of defendants No.1 & 2 could not have been set aside further ignoring the fact that by the order granting maintenance both the defendants were granted maintenance. It is not the case that only defendant No.2 was granted maintenance in the said proceeding which has simply been ignored by the first appellate Court. By examining the matter from any of the angles, the order declaring the order of maintenance

inoperative also cannot be sustained and it is set aside accordingly.

17. In the result, judgment & decree passed by the first appellate Court is set-aside restoring judgment & decree of the trial Court, meaning thereby, the suit of the plaintiff would stand dismissed. The defendants shall be entitled to claim the arrears amount of maintenance as directed and affirmed in criminal revision, as from the date of impugned judgments they are not getting the said amount. The substantial question of law is answered accordingly and the second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

18. Decree be drawn-up accordingly.

19. Before parting with, this Court expresses gratitude for the valuable assistance rendered by Mr. Rakesh Pandey, Advocate, on short notice.

Sd/-
(Sanjay K. Agrawal)
Judge