

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.93 of 2009Judgment reserved on: 17-8-2020Judgment delivered on: 28-8-2020

Anirudh Prasad Kamal Sen, S/o Shri Rikhiram Kamal Sen, aged about 50 years, R/o Village Bharvideeh, Tahsil and District Bilaspur (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Smt. Dashmat Bai Suryavanshi, D/o Jaitram Suryavanshi, 50 years,
2. Shri Jagdish Prasad Kashyap, S/o Shri Dhelaauram Kashyap, aged about 66 years,
3. Shri Shyamta Prasad Kamal Sen, S/o Shri Konda, aged about 35 yrs,
4. Shri Lallu Prasad Kamal Sen, S/o Shri Konda, aged about 30 yrs,
5. Shri Kamta Prasad Kamal Sen, S/o Shri Konda, aged about 25 yrs,

Res. No.1 to 5 R/o Village Bharvideeh, Tahsil and District Bilaspur (C.G.)

6. State of Chhattisgarh, Through the Collector, Bilaspur (C.G.)
- (Defendants)
---- Respondents

For Appellant / Plaintiff: -

Mr. Prafull N. Bharat, Advocate.

For Respondents No.1 & 2 / Defendants No.1 & 2: -

Mr. Manoj Paranjpe and Mr. Anand Kumar Gupta, Advocates.

For Respondents No.3 to 5 / Defendants No.3 to 5: -

Mr. Jitendra Shrivastava, Advocate.

For Respondent No.6 / State: -

Mr. Ravi Kumar Bhagat, Deputy Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. Proceedings of this matter have been taken-up for final hearing through video conferencing.

2. This second appeal preferred by the plaintiff was admitted for final hearing on 20-3-2009 by formulating the following substantial question of law: -

"Whether the lower appellate Court has erred in holding that the agreement to sale dated 12.7.2004 is valid?"

On 24-2-2020, after hearing learned counsel for the plaintiff / appellant, the substantial question of law so framed on 20-3-2009 was recast which states as under: -

"Whether the lower appellate Court has erred in holding that the sale deed 12-7-2004 (Ex.P-1) is valid?"

Thereafter, on 1-7-2020, the following additional substantial question of law was framed and the respondents were noticed: -

"Whether the first appellate Court is justified in holding that Dashmat Bai was wife of Sukhdev and therefore entitled to alienate the suit property in favour of defendant No.2 by recording a finding which is perverse to the record?"

(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.)

3. The dispute relates to the property left by Sukhdev. He and his married wife Shanti Bai died issue-less. The plaintiff claimed that he is brother of Sukhdev and after death of Sukhdev, he inherited the property left by Sukhdev and Shanti Bai, whereas defendant No.1 – Dashmat Bai alternatively claimed that she had married Sukhdev in Chudi form and became his wife and thereafter, got her name mutated in the revenue record. Apart from this pleading, the plaintiff has pleaded that defendant No.1 has no relationship with the family of Sukhdev and she has illegally got her name mutated in the revenue records by order dated 12-5-2004 and thereafter, taking advantage of mutation, got the suit land alienated in favour of defendant No.2 on 12-7-2004 vide Ex.D-5, therefore, decree

for declaration of title and sale deed is null and void be granted and appropriate decree be also granted in his favour. Resisting the claim of the plaintiff, defendants No.1 & 2 filed joint written statement opposing the plaintiff averments and pleaded that Dashmat Bai was wife of Sukhdev, therefore she has inherited the property and rightly sold the suit property in favour of defendant No.2, as such, the suit be dismissed with costs.

4. The trial Court upon appreciation of oral and documentary evidence brought out by the parties, decreed the suit holding that the suit property was joint family property of Sukhdev and Anirudh Prasad Kamal Sen – plaintiff and defendant No.1 is not wife of Sukhdev and therefore the alienation made by defendant No.1 – Dashmat Bai in favour of defendant No.2 is null and void. On appeal being preferred before the first appellate Court by defendants No.1 & 2 being dissatisfied with the judgment & decree of the trial Court, the first appellate Court allowed the appeal and set aside the judgment & decree of the trial Court and eventually dismissed the suit feeling aggrieved against which this second appeal has been preferred by the plaintiff under Section 100 of the CPC in which substantial questions of law have been framed which have been set-out in the opening paragraph of this judgment for the sake of completeness.
5. Mr. Prafull N. Bharat, learned counsel appearing for the plaintiff / appellant herein, would submit that the first appellate Court has grossly erred in holding that defendant No.1 was married wife of Sukhdev ignoring the fact that defendant No.1 never entered into the witness-box and did not offer herself for cross-examination and therefore adverse inference ought to have been drawn in the light of the decision of the

Supreme Court in the matter of Vidhyadhar v. Manikrao and another¹ followed by the Supreme Court in the matter of Man Kaur (Dead) by LRs. v. Hartar Singh Sangha². He would further submit that by Exs.P-9 and D-6, fact of marriage between Sukhdev and Dashmat Bai cannot be held to be proved, as Jaitram (DW-1) – father of Dashmat Bai, who has been examined as DW-1 has clearly stated that he was not present at the time of marriage of Dashmat Bai with Sukhdev and as per the decision of the Supreme Court in the matter of Dolgobinda Paricha v. Nimai Charan Misra and others³ and the decision of this Court in S.A.No.389/2002 (Sanmet Bai v. Mu. Rasekeliya Bai and others), decided on 28-3-2019, the impugned judgment & decree of the first appellate Court deserve to be set aside and that of the trial Court be restored.

6. Mr. Manoj Paranjpe, learned counsel appearing on behalf of defendants No.1 & 2 / respondents No.1 & 2 herein, replying to the submissions of Mr. Bharat, learned counsel for the plaintiff, would submit that the plaintiff has failed to discharge his initial burden of proving that Dashmat Bai was not the legally wedded wife of Sukhdev and the trial Court has shifted the burden upon defendant No.1 which the first appellate Court has corrected in its appellate jurisdiction and further, in the light of Exs.P-9 and D-6 – copies of voter list, relationship of husband & wife between defendant No.1 and Sukhdev is established, as such, the appeal deserves to be dismissed and the judgment & decree of the first appellate Court deserve to be maintained. He would rely upon the decision of the Supreme Court in the matter of Rathnamma and others v. Sujathamma

1 (1999) 3 SCC 573

2 (2010) 10 SCC 512

3 AIR 1959 SC 914

and others⁴ to buttress his submission.

7. Mr. Jitendra Shrivastava, learned counsel appearing for defendants No.3 to 5 / respondents No.3 to 5 herein, would support the case of the plaintiff / appellant herein.
8. 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.
9. Before advertng to the facts of the case, at this stage, it would be appropriate to notice the legal position with regard to marriage.
10. As per Hindu law, among Hindus, marriage is always considered to be a sacrament and divorce was not recognised as a means to put an end to marriage, it was only an exception where it is recognised by custom. The Hindu Marriage Act, 1955 (for short, 'the Act of 1955') came into force on 18-5-1955. Section 5 of the Act of 1955 lays down conditions for a Hindu marriage and Section 7 lays down ceremonies for a Hindu marriage by providing that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Sub-section (2) of Section 7 provides that where such rites and ceremonies include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. Section 11 of the Act of 1955 provides that any marriage solemnised after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified

in clauses (i), (iv) and (v) of Section 5. Likewise, marriage can be dissolved between them on any of the grounds specified in Section 13 of the Act of 1955. Section 29 of the Act of 1955 saves the rights recognised by custom or conferred by special enactment to obtain the dissolution of marriage, whether solemnised before or after commencement of the Act. Section 29(2) of the Act 1955 states as under: -

“(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.”

11. Clause (a) of Section 3 of the Act of 1955, which defines the expressions

“custom” and “usage”, reads as under: -

“(a) the expressions “custom” and “usage” signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;”

12. Thus, the custom must have been observed for a long time and must be ancient. In pages 49 and 50 of the Mayne's Hindu Law & Usage, it is observed that,

“The beginnings of law were in Customs. Law and usage act, and react upon each other. A brief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and an uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage has moulded the life, and regulated the dealings, of a particular class of community, it becomes a custom, which is a part of their personal law.”

13. Customs will have to be always strictly proved and in relation to matrimonial matters particularly to existence of customs. In this connection, the decision of the Supreme Court rendered in the matter of Gurdit Singh v. Mst. Angrez Kaur and others⁵ is more relevant and in that case, there was an entry recorded in riwaj-i-am which had entered custom of divorce amongst Hindu Jats of Jullundur District. The Court, while holding dissolution of marriage by custom was still valid and the divorced wife was entitled to enter into a second marriage, held that riwaj-i-am was not reliable to prove custom of divorce. The Supreme Court held so, even in a situation where there was an entry regarding a so-called divorce.

14. In the matter of Gokal Chand v. Parvin Kumari⁶, the Supreme Court laid down the principles to be kept in view in dealing with questions of customary law which state as under: -

“1. It should be recognized that many of the agricultural tribes in the Punjab are governed by a variety of customs, which depart from the ordinary rules of Hindu and Muhammadan law, in regard to inheritance and other matters mentioned in Section 5 of the Punjab Laws Act, 1872.

2. In spite of the above fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove the existence of the custom set up by him. See 'DAYA RAM v. SOHEL SINGH', 110 P.R. 1906 p. 390 at 410; 'ABDUL HUSSEIN KHAN v. BIBI SONA DERO', 45 Ind App 10 (PC).

3. A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established

5 AIR 1968 SC 142

6 AIR 1952 SC 231

governing rule of a particular locality. See MT. SUBHANI v. NAWAB', AIR 1941 PC 21 at 32."

15. The Supreme Court in the matter of Yamanaji H. Jadhav v. Nirmala⁷ has held that custom being an exception, the general rule of divorce ought to have been specifically pleaded and established by leading cogent evidence by the person propounding such custom and observed as under: -

"[T]he courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable to divorce in the community to which the parties belong. As per the Hindu law administered by courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such a custom since the said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleading by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court."

16. The principle of law laid down in Yamanaji H. Jadhav (supra) was followed with approval by the Supreme Court in the matter of Subramani and others v. M. Chandralekha⁸ by holding that as per Hindu law, divorce was not recognised as a means to put an end to marriage which was always considered to be a sacrament, only exception being where it was recognised by custom. It was further held that for getting customary divorce in the community, it must be specifically pleaded and established

⁷ (2002) 2 SCC 637

⁸ (2005) 9 SCC 407

by the person propounding such custom. Paragraphs 10 and 14 of the report state as follows: -

“10. It is well established by a long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom. The High Court came to the conclusion that the appellants failed to either plead the existence of a custom in their community to dissolve the marriage by mutual consent or to prove the same by leading cogent evidence.

14. From a perusal of the above averments in the pleadings, it is clear that the defendant-appellants did not plead that in their community, marriage could be dissolved under custom. They even failed to respond to the averments made in the plaint that no custom was prevalent in their community to dissolve the marriage under custom. In the absence of such pleadings the trial Court rightly did not frame an issue as to whether the marriage in the community to which the parties belong could be dissolved under the custom prevalent in their community.”

17. In Gokal Chand (supra), the Supreme Court has also held that continuous cohabitation of a man and a woman as husband and wife may raise the presumption of marriage. It was further held that 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 and observed in para 10 as under: -

“(10)... It seems to us that the question as to how far the evidence of those particular witnesses is relevant under S. 50 is academic, because it is well-settled that continuous cohabitation for a number of years may raise the presumption of marriage. In the present case, it seems clear that the plaintiff and Ram Piari lived and were treated as husband and wife for a number of years, and, in the absence of any material pointing to the contrary conclusion, a presumption might have been drawn that they were lawfully married. 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. We agree with the learned Judges of the High Court that in the present case, such circumstances are not wanting and their cumulative effect warrants the conclusion that the plaintiff has failed to prove the factum of his marriage with Ram Piari. ...”

18. The principle of law laid down in Gokal Chand (supra) was followed with approval recently by the Supreme Court in the matter of Dhannulal and others v. Ganeshram and another⁹.

19. Reverting to the facts of the present case in the light of the aforesaid principles of law, it is quite vivid that in the instant case, the dispute is with regard to the property left by Sukhdev who is brother of the plaintiff. Defendant No.1 Dashmat Bai claiming to be wife of Sukhdev in Chudi form, alienated the suit property to defendant No.2 which has been questioned in the suit. It is the case of the plaintiff that defendant No.1 was never married to Sukhdev as Shanti Bai was the legally wedded wife of Sukhdev. Smt. Shanti Bai died and Sukhdev never married Dashmat Bai – defendant No.1. It is the further case of the plaintiff that Dashmat Bai was already married to Kunjilal and therefore the question of marriage of Dashmat Bai with Sukhdev does not arise. During the cross-examination of the plaintiff, counsel for defendants No.1 & 2 put a question to the plaintiff that after marriage with Kunjilal, defendant No.1 Dashmat Bai was married with Latel in Chudi form. It is the case of defendant No.1 that she left Latel and thereafter entered into marriage with Sukhdev. On behalf of defendant No.1, her father Jaitram has been examined as DW-1 and in paragraph 19 of his cross-examination, he has clearly stated that his daughter Dashmat Bai was firstly married to Kunjilal, but thereafter, she married Latel in Chudi form, but after staying with Latel for one year, she left the house of Latel and started living with him and thereafter, after 2-3 years, Sukhdev came to him with one person Ramprasad and he gave his daughter to Sukhdev and she married Sukhdev at Village Bharvidih in Chudi form, but he was not present at that time, however, he was

informed by Sukhdev that she (defendant No.1) has married Sukhdev in Chudi form in presence of Ramprasad, Mukud, Kevra Bai and Chaiti Bai. Not only this, another witness Jagdish Prasad (DW-2) also in paragraph 23 of his cross-examination has clearly stated that he was not present at the time Dashmat Bai married Sukhdev in Chudi form, he was informed by Jaitram (DW-1) and Kunjilal. Furthermore, other witness Latelram (DW-3), who is ex-husband of Dashmat Bai, has also informed that he had heard that Dashmat Bai has married Sukhdev in Chudi form. Bisahu (DW-4), who is office-bearer (Panch) of Suryavanshi Samaj, Village Nawapara, has stated that he was present at the time when Dashmat Bai married Sukhdev in Chudi form.

20. The fact remains that there is no evidence on record to hold that defendant No.1 Dashmat Bai admittedly, firstly married Kunjilal, but there is no evidence on record to hold that whether he or she divorced each other and marriage between Kunjilal and Dashmat Bai had ever been validly dissolved. Similarly, it is the further admitted position on record that Dashmat Bai entered into marriage with Latel, but there is no evidence that divorce ever took place between them and thirdly, the alleged third marriage of Dashmat Bai with Sukhdev i.e. she has lastly married Sukhdev in Chudi form. Father of defendant No.1 Dashmat Bai namely, Jaitram (DW-1) has categorically stated that he was not present at the time when Dashmat Bai allegedly entered into marriage in Chudi form with Sukhdev. It is quite unnatural that father will not remain present at the time of such an important ceremony i.e. marriage of his daughter with a person namely Sukhdev. Similarly, Dashmat Bai herself could have entered into the witness-box and offered herself for cross-examination in

absence of which adverse inference could be drawn against her.

21. The Supreme Court in Vidhyadhar (supra) has clearly held that where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. This decision has further been followed by their Lordships of the Supreme Court in Man Kaur (supra).

22. Thus, in view of the aforesaid fact it is quite evident that the fact of divorce by Dashmat Bai with her first husband Kunjilal and thereafter, with Latel – her second husband, is not proved. Similarly, the fact of marriage of Dashmat Bai with Sukhdev in Chudi form is also not at all established. There is no iota of evidence of marriage having been taken place between Dashmat Bai and Sukhdev in view of the testimony of her father Jaitram (DW-1) and other witness Jagdish Prasad (DW-2), as they were not present in the said alleged marriage and in view of the fact that defendant No.1 Dashmat Bai did not offer herself for cross-examination, adverse inference against her has to be drawn. Statement of Bisahu (DW-4), office-bearer of the Samaj, that he was present in the marriage that took place between Dashmat Bai and Sukhdev in Chudi form, cannot be accepted.

23. The Supreme Court in Dolgobinda Paricha (supra) outlined the scope and applicability of opinion evidence of relationship under Section 50 of the Evidence Act, 1872 and held as under: -

“(6) ... On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by

conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are – (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; (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; in other words, the person must fulfill the condition laid down in the latter part of the section. If the person fulfills that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the "belief" or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant & may, therefore, be proved. ...”

24. Reliance placed on the copy of voter list Ex.D-6, by defendant No.1 to establish the relationship of husband and wife between Sukhdev and herself is of no use to defendant No.1, as so far as this document is concerned, it is of the year 2005 whereas, Sukhdev had already died prior to that. In view of the fact that marriage between defendant No.1 – Dashmat Bai and Sukhdev has not been established by defendant No.1 by leading appropriate evidence, merely by Exs.P-9 & D-6, relationship between them and the fact of their marriage cannot be established when the fact of marriage between Sukhdev and defendant No.1 is in serious dispute and evidence is available on record to hold that they were not married and as such, no such relationship of husband & wife existed between defendant No.1 & Sukhdev.

25. Now, the question would be, whether by the alienation made by defendant No.1, title was conveyed to defendant No.2?

26. The Supreme Court in the matter of Prahlad Pradhan and others v. Sonu Kumhar and others¹⁰ with dealing with the question of competency of person to transfer property and transfer of property by person without rights held as under: -

“7. Since Mangal Kumhar did not have an exclusive right, title or interest in the suit property, his widow Etwari Kumharin was not legally competent to sell the suit property to the appellants, purporting to be the sole owner of the property. Reliance is placed on *Eureka Builders v. Gulabchand*¹¹ wherein this Court held: (SCC pp. 75-76, paras 35-36)

“35. It is a settled principle of law that a person can only transfer to other person a right, title or interest in any tangible property which he is possessed of to transfer it for consideration or otherwise. In other words, whatever interest a person is possessed of in any tangible property, he can transfer only that interest to the other person and no other interest, which he himself does not possess in the tangible property.

36. So, once it is proved that on the date of transfer of any tangible property, the seller of the property did not have any subsisting right, title or interest over it, then a buyer of such property would not get any right, title and interest in the property purchased by him for consideration or otherwise. Such transfer would be an illegal and void transfer.”

(emphasis supplied)

27. As such, the alienation made by defendant No.1 in favour of defendant No.2, holding her to be the wife of Sukhdev as the property was originally owned by Sukhdev, is clearly void.

28. In view of the aforesaid legal position, the first appellate Court is absolutely unjustified in reversing the judgment & decree of the trial Court

10 (2019) 10 SCC 259

11 (2018) 8 SCC 67

granting decree in favour of the plaintiff. Accordingly, the judgment & decree of the first appellate Court are set aside and that of the trial Court are restored. The substantial questions of law are answered accordingly and the second appeal is allowed to the extent indicated herein-above. No order as to cost(s).

29. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma