

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 115 of 2010**

Shankar Prasad S/o Guru Prasad, Aged about 53 years, R/o Village Sulsuli (Chando), P.S. Basantpur, Tahsil Pal, Distt. Surguja, Chhattisgarh.

---Appellant/Plaintiff

Versus

1. Radheshyam S/o Devsharan, Aged about 66 years.
2. Saligram, S/o Radheshyam, Aged about 46 years.
3. Ramji Prasad, S/o Radheshyam, Aged about 43 years.
4. Pramod Kumar S/o Radheshyam, Aged about 35 years.
5. Sanjeev Prasad, S/o Radheshyam, Aged about 33 years.

All R/o Village Sulsuli, P.S. Basantpur, Tahsil Pal, Distt. Surguja, Chhattisgarh.

6. State of Chhattisgarh, Through Collector Surguja, Ambikapur, Chhattisgarh.

--- Respondents/Defendants

For Appellant :-

Mr. Shakti Raj Sinha, Advocate

For Respondents 1 – 5 :-

Mr. Anurag Dayal Shrivastava, Advocate

For Respondent 6/State :-

Mr. Ankur Kashyap, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board (Through Video Conferencing)

13/07/2021

1. This second appeal preferred by the appellant/plaintiff was admitted for hearing on 06/01/2021 by formulating the following two substantial questions of law :-

“1. Whether the first appellate Court is justified in holding that the original plaintiff Mus. Bhagmaniya Bai was not entitled to succeed the property of Devsharan in view of the fact that the trial Court has already held entitled to succeed the property of Devsharan and no appeal or cross-objection was preferred by defendant No. 1 questioning that part of finding and that has become final, by recording a finding which is perverse to the record ?

2. Whether the trial Court is justified in closing the opportunity of the plaintiff to lead evidence to prove the due execution and attestation of Will when the affidavit of Satendra Prasad – one of the attesting witnesses, has already been filed on 28-11-2005, by recording a finding which is perverse to the record ?”

[For the sake of convenience, the parties will hereinafter be referred to as per their status and ranking given in the plaint before the trial Court.]

2. Devsharan and Sahdev were two brothers. Devsharan was firstly married to Marchi and they had no issue. The other brother Sahdev was

married to Bhagmaniya Bai. Since there was no issue of Devsharan with Markhi, after the death of Sahdev, Devsharan entered into second marriage with Bhagmaniya Bai during the lifetime of Markhi.

3. It is the case of the plaintiff that after the death of Devsharan, Bhagmaniya Bai being his widow succeeded the suit property owned and held by Devsharan and thereafter executed a Will dated 21/05/1993 (Ex. P/1) in favour of plaintiff by which he has become title-holder of the suit property and is entitled for decree for declaration of title, partition and recovery of possession.
4. Resisting the suit, defendants filed their written statement stating inter alia that since Devsharan married with Bhagmaniya Bai during the lifetime of his first wife Markhi, their marriage was void and therefore, Bhagmaniya Bai would not succeed to the property of Devsharan and she would not be entitled to execute the Will (Ex. P/1) in favour of the plaintiff, as such, the suit filed by the plaintiff deserves to be dismissed.

5. Learned trial Court, upon appreciation of oral and documentary evidence on record, though dismissed the suit vide its judgment and decree dated 31/12/2005 but while answering issue No. 1 held that Bhagmaniya Bai has succeeded the suit property owned by Devsharan after his death and she is competent to execute the Will (Ex. P/1) in favour of the plaintiff but the said Will has not been proved in accordance with law. On appeal being preferred by the plaintiff, learned first appellate Court affirmed the judgment and decree of the trial Court and dismissed the appeal filed by the plaintiff vide impugned judgment and decree dated 26/11/2009 but reversed the finding recorded by the trial Court with regard to issue No. 1 and held that Devsharan married with Bhagmaniya Bai during the lifetime of his first wife Markhi, as such, their marriage is void as per the provisions contained under Section 5(i) read with Section 11 of the Hindu Marriage Act, 1955 and Bhagmaniya Bai would not succeed the suit property owned by Devsharan. Now, this second appeal has been preferred by the appellant/plaintiff under Section 100 of CPC in which two substantial questions of law have been

formulated and set out in the opening paragraph of this judgment.

6. Mr. Shakti Raj Sinha, learned counsel appearing for the appellant/plaintiff, would make the following submissions :-

(i) that, the first appellate Court fell into legal error in reversing the finding recorded by the trial Court with regard to issue No. 1 wherein it has clearly been held that Bhagmaniya Bai succeeded the property of Devsharan after his death. Such a finding could not have been reversed in absence of cross-objection filed by the defendants before the first appellate Court in the first appeal.

(ii) that, though in order to prove the Will (Ex. P/1), the affidavit/evidence of one of the attesting witnesses namely Satendra Prasad was filed on 28/11/2005, but abruptly the opportunity to lead evidence was closed and no opportunity to lead evidence was granted due to which plaintiff suffered prejudice.

As such, the instant appeal deserves to be allowed by setting aside the judgment and decree passed by both the Courts below.

7. Mr. Anurag Dayal Shrivastava, learned counsel appearing for the respondents/defendants, would make the following submissions :-

(i) that, filing of cross-objection on the part of defendants was not necessary in order to question the finding recorded by the trial Court and only in order to question the decree passed by the trial Court, filing of cross-objection would have been necessary. He would rely upon the decision rendered by the Supreme Court in the matter of Banarsi and Others v. Ram Phal¹ which has been followed by this Court in the matter of Thakumal (Dead) through LRs. Mamtabai & Others v. Chakradhar Rao Bhosle².

(ii) that, the first appellate Court has rightly reversed the finding of the trial Court with regard to issue No. 1 and held that the marriage of Bhagmaniya Bai with Devsharan was void as their marriage was solemnized during the lifetime of Devsharan's first wife Markhi, therefore, Bhagmaniya Bai, though being the widow of Devsharan, would not fall within Class I heir as prescribed in the Schedule enacted in the Hindu Succession Act, 1956 since she was not

¹ (2003) 9 SCC 606

² 2009 (1) CGLJ 150

the legally wedded wife of Devsharan. Moreover, since Bhagmaniya Bai would not succeed the property of Devsharan, she was also not entitled to execute the Will in favour of plaintiff.

As such, the judgment and decree passed by the first appellate Court requires no interference by this Court in exercise of jurisdiction under Section 100 of CPC and the instant appeal deserves to be dismissed.

8. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

9. It is not in dispute that the suit property was owned and held by Devsharan. He was firstly married with Markhi and since he had no issue out of his wedlock with Markhi, he married with his brother's widow Bhagmaniya Bai during the lifetime of Markhi. Plaintiff is the grandson of Sahdev in whose favour Bhagmaniya Bai executed Will dated 21/05/1993 (Ex. P/1) and defendant No. 1 Radheshyam is the son of Devsharan and Bhagmaniya Bai and defendants No. 2 to 5 are sons of defendant No. 1. It is also not in dispute that the marriage of Devsharan with

Bhagmaniya Bai was solemnized during the lifetime of his first wife Markhi and therefore, the first appellate Court has held that by virtue of Section 5(i) read with Section 11 of the Act of 1955, their marriage is void as Section 5(i) enunciates that a marriage may be solemnized between any two Hindus if neither party has a spouse living at the time of the marriage and the consequence of a marriage in violation of Section 5(i) of the Act of 1955 has been provided under Section 11 of the Act of 1955 which clearly provides that any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, 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.

10. Section 5(i) of the Act of 1955 introduces monogamy which is essentially the voluntary union for life of one man with one woman to the exclusion of all others. It enacts that neither party must have a spouse living at the time of marriage. The expression "spouse" employed herein means lawfully wedded husband or wife.

Before a valid marriage can be solemnized, both parties to such marriage must be either single or divorced or a widow or widower and only then they are competent to enter into valid marriage. Section 11 of the Act of 1955 declares that a marriage solemnized after commencement of the Act of 1955, in contravention of any of the conditions specified in clauses (I), (iv) and (v) of Section 5 of the Act of 1955 shall be null and void in respect of such marriages, it is provided that application for declaration of nullity can be filed.

11. The Supreme Court in the matter of **Smt. Lila Gupta v. Laxmi Narayan and Others**³ held that Section 5(i) of the Act of 1955 ensures monogamy and any marriage solemnized after the commencement of the Act of 1955 shall be null and void by virtue of Section 11 of the Act and may, on a petition presented by either party thereto be so declared by decree of nullity if it contravenes any of the conditions specified in Clause (I), (iv) and (v) of Section 5 of the Act of 1955.

³ (1978) 3 SCC 258

12. Similarly, in the matter of Smt. Yamunabai Anantrao Adhav v. Ranantrao Shivram Adhav⁴ Their Lordships of the Supreme Court have held that a marriage in contravention of Section 5(i) of the Act of 1955 is null and void. It was further held that marriages covered by Section 11 are void ipso-jure, that is, void from the very inception and have to be ignored as not existing in law at all and when such question arises, although Section permits a final declaration to be made on presentation of a petition. It is not essential to obtain in advance such a final declaration from a Court in a proceeding specifically commenced for the purpose. Similar is the proposition laid down by the Supreme Court in A. Subash Babu v. State of Andhra Pradesh and Anr.⁵ and M.M. Malhotra v. Union of India and Others⁶.

13. Reverting to the facts of the instant case in light of the aforesaid legal analysis, it is quite vivid that since Devsharan did not have any issue with his first wife Markhi, he married with Bhagmaniya Bai during the lifetime of Markhi which is in violation of Section 5(1)(i)

4 AIR 1988 SC 644

5 (2011) 7 SCC 616

6 (2005) 8 SCC 351

of the Act of 1955 and by virtue of Section 11 of the Act of 1955, their marriage would be null and void and since the marriage of Devsharan with Bhagmaniya Bai was void, Bhagmaniya Bai would not succeed to the property of Devsharan after his death by virtue of the Schedule enacted under Section 8 of the Hindu Succession Act, 1956. A widow is also Class I heir and the widow of a male Hindu inherits simultaneously with the son, daughter and others specified in Class I of the Schedule, but the "widow" mentioned among Class I heirs is a lady who was validly married under the provisions of the Hindu Marriage Act, 1955 and who has acquired the status of widow by virtue of death of her husband. If her marriage with the person is void under law, on his death she would not get status of widow under Class I of the Schedule of Hindu Succession Act, 1956. In the instant case, it has already been held the marriage of Devsharan with Bhagmaniya Bai was void, therefore, after the death of Devsharan, Bhagmaniya Bai cannot be conferred with the status of widow and she cannot be declared as Class I heir within the meaning of Section 8 of the Hindu Succession Act, 1956, as such, she would not succeed to the

property of Devsharan. Consequently, the first appellate Court has rightly held that Bhagmaniya Bai was not entitled to succeed the property of her husband Devsharan as their marriage was void by virtue of Section 5(i) read with Section 11 of the Act of 1955.

14. Now, the question is whether the first appellate Court was justified in reversing the finding recorded by the trial Court with regard to issue No. 1, as according to learned counsel for the appellant/plaintiff, the said finding was not an issue before the first appellate Court and since defendants did not file any cross-objection, the finding recorded by the trial Court had become final and it was not open for the first appellate Court to reach to a different conclusion other than what has been recorded by the trial Court.

15. In order to answer this question, it would be appropriate to notice Order 41 Rule 22 of CPC, which states as under :-

"ORDER XLI

APPEALS FROM ORIGINAL DECREES

22. Upon hearing respondent may object to decree as if he had preferred separate appeal. - (1) Any respondent, through he may not have appealed from any part of the

decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) **Form of objection and provisions applicable thereto.**— Such cross-objection shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) [* * *]

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule."

16. Their Lordships of the Supreme Court in the matter of Banarsi (supra) have explained the need of filing cross-objection and cross-appeal and held as under in paragraphs 10 and 11 :-

"10. The CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1)

makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule

(4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent. "

17. Similar issue came up for consideration before this Court in the matter of **Thakumal** (supra) wherein the following substantial question of law was framed in paragraph 6(C) :-

"(C) Whether in the absence of a cross-objection having been filed by the respondent/plaintiff, the lower appellate Court was justified in reversing finding recorded by the trial Court on issue No. 6?"

This Court, while answering the above-stated substantial question of law which is a similar issue as in this appeal, held in paragraph 11 as under :-

"11. I shall now deal with substantial question of law No. (C). In *Jhawarlal Bothara Vs. Smt. Kusumlata Agarwal (dead) through her L.Rs. I.D. Agrawal and others*⁷, this Court held as under :-

"15. A reading of Order 41, Rule 22 of the Code of Civil Procedure, 1908 leaves no room for any doubt that if the respondent, in whose favour the decree is passed, desires to support the decree, it is open to him to urge in the other parties appeal that the finding of the Court below against him on any given aspect ought to have been in his favour and it is not mandatory for the respondent to file a cross-objection

under Order 41. Rule 22 of the Code. The words "but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour" in Order 41, Rule 22 of the Code permits the respondent, who may not have appealed from any part of the decree to support the decree and state that the finding against him in the Court below in respect of any issue ought to have been in his favour. When the respondent, thus, supports the decree, he need not file any cross-objection because when the decree is in his favour, cross-objection in such a situation is inconceivable. Though the respondent is not precluded under Order 41, Rule 22 of the Code from filing a cross-objection against a finding recorded by the Court passing the decree in his favour, it is not mandatory for him to do so because the decree is in his favour and he may, during the course of arguments, agitate that the finding against him in the Court below in respect of any issue also ought to have been in his favour. A similar view has been taken in *Manoharan Chetti v. M/s. C. Coomaraswamy Naidu and Sons, Madras*, AIR 1980 Madras 212, *Naresh Ahir v. Mst. Barhiya*, AIR 1985 Patna 287 and *Jatani Dei v. Udayanath Behera*, AIR 1983 Orissa 252. Therefore, the contention of the learned counsel for the respondent/plaintiff that due to non-filing of a cross-objection under Order 41, Rule 22 of the Code by the appellant/defendant before the lower appellate Court he is precluded from doing so in second appeal is liable to rejection.

"

The above decision rendered by this Court applies with full force to the question of law under consideration. Question of law No. (C) is accordingly decided in the affirmative."

18. In view of the aforesaid principle of law laid down by the Supreme Court in *Banarsi* (supra) and by this Court in *Thakumal* (supra), I am of the opinion that the defendants were not required to

file any cross-objection in the first appeal against the finding recorded by the trial Court while answering issue No. 1. In that view of the matter since Bhagmaniya Bai had not succeeded the property of Devsharan, she was not empowered to execute the Will (Ex. P/1) in favour of the plaintiff which is said to have not been proved by the two Courts below.

19. As a fallout and consequence of the aforesaid discussion, the substantial question of law No. 1 is answered in favour of defendants and against the plaintiff and substantial question of law No. 2 need not be looked into in view of non-entitlement of Bhagmaniya Bai to execute the Will in favour of plaintiff.

20. The second appeal, being devoid of merits, deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

21. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge