

HIGH COURT OF ORISSA : CUTTACK
SA NO.143 OF 1991

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree dated 02.04.1991 and 19.04.1991 respectively passed by the learned Second Additional District Judge, Berhampur in T.A. No.37 of 1990 (T.A. No.20/90 G.D.C.) in setting aside the judgment and decree dated 15.02.1990 and 01.03.1990 passed by the learned Subordinate Judge Bhanjanagar in O.S. No.3/88..

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Smt. Gouri Behera :::: Appellant.

-:: VERSUS ::-

Bansidhar @ Bansi Samal :::: Respondent.
**Advocate(s) who appeared in this case by hybrid arrangement
(virtual/physical) mode.**

For Appellant

... M/s.M. Mishra, Sr. Advocate.
A.K. Mohanty, P.K. Das,
D.S. Mohanty, U.Ch. Patnaik &
B. Misra

For Respondent

... Mr. A.K. Mishra, Advocate

**CORAM :
MR. JUSTICE D.DASH**

Date of Hearing:25.11.2022 :: Date of Judgment:23.12.2022

D.Dash,J. The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned 2nd Additional District Judge, Berhampur in Title Appeal No.37/90 (T.A. No.20/90 G.D.C.).

By the same, the Appeal filed by the present Respondent, being the aggrieved Defendant of OS No.3/88 of the Court of the learned Subordinate Judge, Bhanjanagar under section 96 of the Code, has been allowed and thereunder, the judgment and decree passed by the Trial Court in dismissing the suit have been set aside and the suit filed by the present Respondent, as the Plaintiff, has been decreed declaring that there was no marriage between the parties and as such, there is no relationship between them as husband and wife.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The Plaintiff's case is that he has never married the Defendant and there is no such relationship between them as husband and wife. It is said that the Defendant initiated a proceeding under section 125 of the Code of Criminal Procedure (for short 'Cr.P.C.') which has been numbered as Misc. Case No.70/1984 pending in the Court of the learned S.D.J.M., Bhanjanagar claiming maintenance from the Plaintiff falsely alleging therein that she is the legally married wife of the Plaintiff. It was stated therein that the Plaintiff, having kept the Defendant for about three years, neglected and drove her out of his house. The Defendant, in that proceeding, had stated that in the year 1981, she was working as a

maid servant in the house of the Plaintiff during when intimacy developed between them and in spite of that, as they are of different castes on the assurance of the Plaintiff that he would married the Defendant, the Defendant allowed the Plaintiff to have the marital relationship with her. It has been further stated in that proceeding under section 125, Cr.P.C. that in the night of 13.07.1981, when both were in the house of the Defendant and were on bed, the father of the Defendant noticed the same and took them to the local Sarpanch (D.W.4), who convened a meeting on the next day and there the Plaintiff had to admit his relationship with the Defendant and executed two documents, which have been marked Ext.1 and 2 in that Misc. Case No.70/84, the proceeding under section 125 of the Code initiated by the Defendant as against the Plaintiff claiming maintenance. It was stated that the Plaintiff had given an undertaking therein that he would marry the Defendant and keep her in their house near the threshing floor. In that night, the marriage between the two was performed at Radhakrishna Temple of the village and after marriage, they went to the outer house of the Plaintiff and stayed there as husband and wife. They led a marital life in the house for about three years when the Plaintiff left the village for Colliery. It is alleged in that proceeding by the Defendant that the Plaintiff's father, taking advantage of the absence of the Plaintiff, had attempted to outrage the modesty of the Defendant. The Defendant

when told the Plaintiff on his return about the said incident concerning his father; she was driven out of the house.

Learned S.D.J.M., Bhanjanagar in that proceeding under section 125 of the Cr.P.C., returning a finding that there was marriage between the parties has awarded maintenance a sum of Rs.250/- per month to be paid by the Plaintiff to the Defendant. The Plaintiff, having preferred revision, has finally lost.

The Plaintiff thus states to have never married the Defendant nor there was any such relationship between them as husband and wife nor their status as such has ever been accepted or recognized in the society or by the friends, relations etc.

4. The Defendant, in her written statement, has asserted all those facts as to have been pleaded in the proceeding under section 125, Cr.P.C. to be correct and as such she states that she is the legally married wife of the Plaintiff and they had married in the village Radhakrishna temple and since then they have been residing together as husband and wife till the Plaintiff left for Colliery and then again on his return, for some time, they had continued as such. But the Plaintiff being instigated by his father had driven her out of the house and the Defendant being thus neglected and refused to be maintained by the Plaintiff had filed the proceeding under section 125, Cr.P.C. wherein she shall obtained an order in her favour. It is stated that since the Plaintiff

did not accept or make the payment in terms of the same, that order being put to execution and therefore, to avoid the same, the suit has come to be filed by the Plaintiff stating all falsehood.

5. The Trial Court, on examination of evidence on record, in the backdrop of the rival pleadings, having taken up issue nos.1,2 and 6 together for decision which are interlinked, has rendered the answer in favour of the Plaintiff and against the Defendant.

Next, proceeding to the Issue no.4 which is the crucial issue, on going through the evidence and their analysis from certain angles, the answer, however, has been returned in favour of the Defendant in concluding that the Defendant is the legally married wife of the Plaintiff. Practically, this answer has led to the dismissal of the suit.

The unsuccessful Plaintiff thus having been non-suited by the Trial Court had then carried the First Appeal which has been allowed as afore-stated. Hence, the Defendant, who has suffered from the judgment and decree passed by the First Appellate Court, is now in this Second Appeal before this Court.

6. This Second Appeal has been admitted to answer the following substantial questions of law:-

“(a) Whether the evidence of D.Ws.1,2,3 and 4 have been considered in their proper prospective? and

(b) Whether effect of Exts.1 and 2 have been rightly considered by the lower Appellate Court?”

7. Learned counsel for the Appellant submitted that the First Appellate Court, without assigning any good reason and without proper appreciation of evidence on record, has unreasonably turned down the finding of the Trial Court on the crucial issue, i.e., Issue No.4 in finally saying that the Defendant is not the legally married wife of the Plaintiff. She submitted that with the evidence let in from the side of the Defendant that there was marriage in the temple and they were together living in the outer house of the Plaintiff as husband and wife; the lower Appellate Court has done wrong in holding to the contrary, which in turn, has led to nullify the effect of the order passed by the Criminal Court in the proceeding under section 125, Cr.P.C. where under the Plaintiff had been ordered to pay monthly maintenance to the Defendant as his neglected wife and as he had refused to maintain her.

8. Learned counsel for the Respondent, on the contrary, supporting the findings of the First Appellate Court, contended that the pleading of the Defendant is not at all up to the mark even by giving the relaxation as it is from the Mofussil Court. He submitted that the basic foundational facts which ought to have been pleaded have not been pleaded by the Defendant in the written statement and all have been

stated as if the pleading made in the petition filed by this Defendant in the proceeding under section 125, Cr.P.C. is admissible as the substitute of pleading in the suit, which is not the position of law. According to him, the Defendant was under legal obligation to file proper pleading in the suit pleading all those required facts so as to thwart the Plaintiff in obtaining the decree as sought for since the position of law is quite settled that a proceeding under section 125, Cr.P.C. is summary in nature and its finding does not operate as res judicata in any other subsequent suit between the parties against the said finding and, in fact, a suit challenging the finding is maintainable and in that event if the finding is otherwise in the suit as provided in law, the order passed in the proceeding under section 125, Cr.P.C. stands nullified and for that reason, the provision of section 128, Cr.P.C. is meant for.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have gone through the plaint and written statement and have perused the evidence.

10. In this particular suit, the decision on the relationship of the Plaintiff and the Defendant is the sole point of controversy; whether the Defendant is the legally married wife of the Plaintiff.

It is seen that the Defendant's plea is that they had stayed together for a period of three years in that outer house of the Plaintiff and that is said to be after the performance of the marriage between

them. In that view of the matter, the pleading as well as the evidence as to their stay for three years may not have any implication favouring the relationship unless the marriage is proved. Here, it is not a case of long period of staying together under one roof so that a presumption would arise that the man and woman remaining under the roof were so residing as husband and wife and that they had married.

With regard to the marriage, there is no such specific pleading from the side of the Defendant. The Plaintiff has simply gone to deny the marriage. Thus, it was incumbent upon the Defendant to plead that there was in fact the marriage between them. The witnesses examined from the side of the Defendant are D.W.1 to 4 and under the circumstances their evidence on detail particulars in the absence of the pleading are not to be looked into for the purpose. Be that as it may, it is seen that as per the case of the Defendant prior to the marriage between them, two documents had been executed after the matter had been reported to the village Sarpanch. The documents are as to the continuation of future relationship between the parties and it is the case of the Defendant that pursuant to those documents, the marriage was ultimately performed. The Defendant had proved these two documents the Defendant in the proceeding under section 125, Cr.P.C. which had been admitted there in the evidence and marked Ext.1 and 2. Steps have not been taken by the Defendant to prove those in the suit. In the

absence of those two documents being placed before the Court from the side of the Defendant, the Court is kept at dark on the vital aspect of the case and adverse inference is bound to be drawn that production of those documents and their proof must have presented a different picture as to the status of the parties before the Court which would have gone against the case of the Defendant for which she had withheld those documents from being seen in the civil suit. The First Appellate Court appears to have made thorough discussion of oral evidence on record and have found the same to be sufficient to arrive at a finding as to the status between the parties as claimed by the Defendant.

(A) This Court, on going through the relevant paragraph of the judgment of the First Appellate Court, finds that assigning good reasons, the oral evidence have been found to be insufficient to rule in favour of the relationship as claimed by the Defendant and there surfaces no such infirmity therein much less to say any perversity.

(B) It is also seen that the lower Appellate Court has considered the evidence of D.W.1,2,3 and 4 in their proper prospective and the effect of non-proving of the documents (Ext.1 and 2) of MC No.187/87 of the court of the learned S.D.J.M., Bhanjanagar has been rightly taken that had those two documents (Ext.1 and 2) which had been marked in that M.C. No.70/84 of the court of the learned S.D.J.M., Bhanjanagar been proved, the same would have gone against the case of the

Defendant and thus drawing adverse inference on the case of the Defendant .

The substantial questions of law are accordingly answered in favour of confirmation of the judgment and decree passed by the First Appellate Court in decreeing the suit filed by the Plaintiff.

11. In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

It be made clear that pursuant to the judgment and decree passed in OS No.3/1988 whatever benefit the Defendant has already received pursuant to the said order passed in M.C. No.70/84, which have accrued in favour of the Defendant, the same would not in any way be affected.

**(D. Dash),
Judge.**