

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**45 SECOND APPEAL NO.441 OF 2021
WITH CA/9679/2021 IN SA/441/2021**

**VATSLABAI SITARAM BAVASKAR
VERSUS
CHANGO BALU BAVASKAR AND ANOTHER**

Mr.Dinkar G. Kamble, Advocate for the appellant
Mr. A. M. Gholap, Advocate for the respondent Nos. 1
and 2

CORAM : MANGESH S. PATIL, J.

DATE : 11 April 2022

P. C.

1. Heard the learned advocate for the parties.

2. The appellant is the original plaintiff who claims to be wife of one Sitaram who died long back. Sitaram had couple of brothers, Chango and Mango. Mango also died unmarried and without leaving any heir. She filed suit for partition and separate possession of her share in the suit properties stated to be ancestral and joint properties against Chango. She also assailed sale deed of one of the

suit properties executed by him in favour of Kusumbai who is respondent No.2 and original defendant No.2

3. The respondents contested the suit denying that she was legally wedded wife of Sitaram.

4. The trial court holding the appellant to be legally wedded wife of Sitaram decreed the suit. The respondents preferred the appeal before the District Court which allowed the appeal, quashed and set aside the judgment and decree passed by the trial court and dismissed the suit recording finding that there was no evidence of appellant being legally wedded wife of Sitaram.

5. The learned Advocate Mr. Kamble for the appellant vehemently submits that there was ample evidence before the trial court demonstrating that the appellant had cohabited with Sitaram for few years and thereafter they got separated. Even the respondents admitted this fact and consequently there was no error in the trial court reaching the conclusion of she being legally wedded wife of Sitaram. The learned advocate would further point

out that even Sitaram had published a notice mentioning all these facts and declaring unilateral customary divorce. This conduct of Sitaram was further considered by the trial court in reaching the conclusion. There was no perversity or arbitrariness in appreciation of all the facts, circumstances and the evidence in the judgment of the trial court which has been quashed and set aside and reversed without there being sufficient and cogent reasons. The learned Advocate further relied upon the decision in the case of Subhash Popatlal Shah Vs Smt. Lata Subhash Shah reported in AIR 1994 Bom 43. It is argued that when Sitaram and the appellant had lived together as a man and woman and the society had recognized them as husband and wife, a presumption would arise under Sections 112 and 114 read with Section 32(5) of the Evidence Act in favour of relation being legitimate one.

6. The learned Advocate for the respondents submits that though there was evidence to demonstrate that the appellant and Sitaram lived together for few years, the presumption as is being argued on behalf of the appellant would arise only if the marriage between the two was legally

possible. She has specifically admitted that Sakhubai was first wife of Sitaram and there was no evidence to demonstrate that either the marriage between the two was dissolved or that the appellant had married him after demise of Sakhubai. The marriage between appellant and Sitaram was not legally possible. Consequently no presumption under Sections 112 and 114 read with Section 32(5) of the Evidence Act would arise. That presumption presupposes that there could be a valid marriage possible between a man and a woman, in the absence of which the appellant is not entitled to take benefit of fact that she had cohabited with Sitaram for few years and even he published a notice giving a public, customary divorce.

7. I have carefully considered the rival submissions of the learned advocate of the parties. Needless to state that the appellant would be entitled to relief only if she succeeds in establishing that she is legally wedded wife. The answer in negative would make her not entitle to any claim.

8. Without indulging into scrutiny in depth of

the evidence and the circumstances, suffice for the purpose to observe that the appellant in her cross-examination specifically admitted that Sakhubai was first wife of Sitaram. Pertinently, her reply in cross-examination was not in the form of stray admissions. Without putting any suggestion it was elicited that Sitaram's first wife was resident of village Talvi and her name was Sakhubai. Meaning thereby, the appellant has been alive to the fact that Sitaram was married to Sakhubai. Though she in subsequent cross examination denied suggestion that there was no divorce between Sitaram and Sakhubai, conspicuous absence of any pleading in the plaint in spite of personal knowledge, admitting existence of such a lady who happened to be first wife of Sitaram coupled with absence of any allegations /averments mentioning that the marriage between them was dissolved either by some proceeding or by death of Sakhubai, it was highly imperative for the appellant to have led further evidence to demonstrate that the valid marriage between her and Sitaram was possible, so that by spending some time as man and woman would have been sufficient to raise a presumption under Sections 112 and 114 read with Section 32(5) of the Evidence Act.

9. All such presumptions that are available and recognized by catena of the judgments of the Supreme Court and even this court pre-suppose that a valid marriage between the couple is possible and only then that presumption as to the marriage came drawn.

10. If such was the scenario, when the appellant was expected to lead evidence to demonstrate that the marriage between her and Sitaram was legally possible but had failed to do so, no exception can be taken to the observations and the conclusion of the lower Appellate Court in refusing to recognize her as his widow and consequently holding her not entitled to any claim to the suit properties.

11. The trial court was apparently got swayed away by the fact that even the respondent admitted that the appellant was residing with Sitaram for few years and that she had filed maintenance proceeding against him and also that he had also published a notice in a news-paper giving customary divorce to her. It is important to note that in the plaint as

also in the evidence the appellant had come with a case about her marriage with Sitaram being Gandharva marriage and even latter in the public notice asserted the same thing. The conspicuous absence of any declaration by both of them that they were legally married, so called admissions of the respondents cannot be taken as admissions of the fact that the appellant is legally wedded wife of Sitaram.

12. No substantial question of law arises in the second appeal and the appeal is dismissed. No costs.

13. In view of the dismissal of the appeal, all the civil applications do not survive and disposed of.

[MANGESH S. PATIL, J.]