

(1995) 04 MP CK 0021
Madhya Pradesh High Court
Case No: S.A. No. 498 of 1986

Nera Bai Sahu and Others

APPELLANT

Vs

Pusia Bai Sahu

RESPONDENT

Date of Decision: April 21, 1995

Acts Referred:

- Hindu Marriage Act, 1955 - Section 16, 16(1)
- Hindu Succession Act, 1956 - Section 8

Citation: (1996) 41 MPLJ 87 : (1996) MPLJ 87

Hon'ble Judges: Ramesh Surajmal Garg, J

Bench: Single Bench

Advocate: B.M. Dwivedi, for the Appellant; Rakesh Pandey, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Garg, J.

The appellants/plaintiffs being aggrieved by the judgment and decree dated 22-9-1986 passed in Civil Regular Appeal No. 12A/83 by the learned Additional District Judge, Durg, reversing the judgment and decree dated 9-3-1983 passed in Civil Suit No. 15A/81 by the learned Civil Judge, Class I, have preferred this appeal.

The plaintiffs filed the suit alleging that the agricultural lands ad measuring 1.386 hectares of village Ghoghapuri and 1.222 hectares of village Chaneli were belonging to deceased Hinchharam and he was recorded Bhumiswami of the said lands in the revenue papers. Plaintiffs 1 to 3 are the grand-daughters of Hinchharam and plaintiff No. 4 is the widow and plaintiff No. 5 is the daughter of Hinchharam. It was submitted that defendant Pusiabai claiming to be daughter of deceased,- Hinchharam filed an application before the revenue authorities for declaring her rights in the property and mutation over it. The plaintiffs contended that defendant Pusiabai in collusion with the Village Patwari and the revenue inspector got her

name mutated in the revenue papers alleging that her mother Puttubai was legally wedded wife of Hinchharam. The plaintiffs further contended that Puttubai was widow of Vednath Sahu who was the elder brother of deceased Hinchharam, as she developed illicit relation with Hinchharam, she ultimately delivered a child who is the defendant in the suit. It was further submitted that a village Panchayat was called in relation to pregnancy of Puttubai wherein Hinchharam denied the relationship and immediately thereafter Puttubai left the village and started living in house of one Dhanan Sahu of village Bhardar. It was also alleged that Hinchharam kept the defendant in his house under the pressure of the village people and got her married but in any case she does not have any right in the property left by Hinchharam

The defendant in her written statement contended that Hinchharam married with Puttubai after performing "Churi ceremony" which is necessary when a person marries a widow and also submitted that such marriage is kept legally recognized. It was also submitted that after such marriage defendant Pusiabai was born. Therefore, she in fact is the daughter of deceased Hinchharam and has rights in the property.

The learned trial Court came to the conclusion that defendant Pusiabai was not the daughter of deceased Hinchharam and she got her name mutated in the revenue records in collusion with the Patwari. It also held that as she is not the daughter of deceased Hinchharam she cannot succeed to the property. On face of these findings the learned trial Court decreed the suit.

Being aggrieved by the said findings the defendant Pusiabai preferred the appeal which is allowed by the first appellate court holding that Pusiabai was the daughter of deceased Hinchharam. Puttubai alias Phoolbai was married to Hinchharam and thereafter not only Hinchharam but everybody treated Pusiabai to be the daughter of Hinchharam. Therefore she being the daughter would be entitled to succeed to the property.

The plaintiffs being aggrieved by the said judgment and decree have preferred this second appeal which has been admitted on the following substantial question of law :

"Whether under the facts and circumstances of the case, the first appellate court was justified in reversing the judgment and decree passed by the trial Court, whereas without obtaining a decree of divorce from the first living wife the second marriage was performed, and the child born from the second wife, could she be treated as legitimate child?"

It was contended by Shri B. M. Dwivedi that there is no legal evidence on record that before Puttubai conceived she was legally married and further without obtaining a divorce from the first living wife, the second marriage was performed. Therefore, the child born from the second wife cannot be treated to be legitimate child.

The suit was filled on 4-5-1981 and the age of the defendant is shown to be 38 years. On a simple calculation it would appear that according to the plaintiffs the defendant was born somewhere in the year 1943 or 1944. The restriction on the second marriage was imposed for the first time against Hindus by the Hindu Marriage Act, 1956. Therefore, if Hinchharam did not obtain a divorce from the first living wife, marriage with another woman during the subsistence of the first marriage, there was no legal impediment and therefore, the second part of the question framed by this court in the instant case does not arise. It would not be out of place to mention that if the second marriage was performed during the subsistence of the first marriage after coming into force of Hindu Marriage Act, 1956, then only the question of divorce from the first wife would arise. The first part of the question is that the first appellate court was not justified in reversing the judgment and decree passed by the trial Court, but the first part of the question is dependent on the second part of the question. In view of the rejection of argument on the second part of the question, the consideration of the first part does not arise. During the course of arguments it was submitted that an illegitimate child would not succeed to the property of the father because under the provisions of Section 8 of Hindu Succession Act, 1956 (Act No. 30 of 1956) only the legitimate children or the relations would succeed to the property. True it is that Section 8 provides that the property of male Hindu dying intestate shall devolve according to the provisions of Chapter V of Hindu Succession Act. It cannot be lost sight of that in the year 1976 by the Marriage Laws (Amendment) Act, 1976, Hindu Marriage Act was drastically amended. Section 16(1) of the Hindu Marriage Act as it stands today reads as under :-

"16(1) Notwithstanding that a marriage is null and void u/s 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Whether a decree of nullity is granted in respect of a voidable marriage u/s 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity u/s 12, any rights into the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possession or acquiring any such rights by reason of his not being the legitimate child of his parents."

According to Section 16 notwithstanding that a marriage is null and void u/s 11 any child of such marriage who would have been legitimate after the marriage if married, shall be legitimate..... under this Act. Now if child is deemed to be legitimate under the provisions of Section 16 of the Hindu Marriage Act, 1955, then Section 16(1) would have overriding effect for the purposes of deciding legitimacy. If a child who is otherwise illegitimate is deemed to be legitimate, then the question of legitimacy would not arise while considering the provisions of Section 8 of the Hindu Succession Act. Section 8 of the Hindu Succession Act merely says that the property of the male Hindu dying intestate shall devolve according to the provisions of Chapter II. The different courts have considered that the heirs in Class I when they are referred to as son or daughter should be the legitimate children. Once under the provisions of Section 16(1) it is held that the child is legitimate, no further inquiry would be needed under the provisions of Section 8 of the Hindu Succession Act. Section 8 of the Hindu Succession Act would not give a further scope to the parties to contest in relation to the legitimacy or otherwise, but in view of the deeming provisions under the provisions of Section 16(1) of the Hindu Marriage Act child for all practical purposes would be deemed to be legitimate. In view of this, the challenge put forth by the appellant that the child being illegitimate cannot succeed to the property under the provisions of Section 8 of the Hindu Succession Act, does not stand. It is to be noted further that Hinchharam not only accepted Puttubai as his wife after performing the Churi Ceremony but even accepted defendant Pusiabai as his legitimate daughter. Not only the girl was got up by deceased Hinchharam but she was got married by Hinchharam as father. The principles of *factum valet* would be applicable to such a case on the proved facts of continuous long cohabitation of Hinchharam with Puttubai as husband and wife and their treatment as such for certain years would certainly raise a presumption of lawful marriage. In the instant case it is not only the acceptance of marriage by Hinchharam but the child born from such long cohabitation was treated as a child of Hinchharam and Puttubai in the community. For this reason also it is to be held that there was legal and proper marriage between Hinchharam and Puttubai.

Apart from this, the question regarding interpretation of Section 16 came up for consideration before this court in the case of *Manila Mathurobai v. Ramwati* 1990 MPLJ 475. This court held, "that while enacting the provisions of Section 16, the Legislature has considered it advisable to uphold the legitimacy of paternity of a child born out of void marriage and the status be conferred on such child for interest of property of their parents. The law leans in favour of legitimacy and frowns upon bastardity. Section 16 of the Act assures right of such children in the property of their parents. In the instant case it is not in dispute that churi ceremony was performed and Puttubai was accepted to be legally wedded wife of deceased Hinchharam and under these circumstances it cannot be held that there was no legal marriage. Even if it is assumed that there was no legal marriage, then too in view of the provisions of Section 16 of the Hindu Marriage Act such a child who

otherwise was illegitimate, has been given status of legitimate child and would certainly succeed to the property of her parents.

In view of the above findings and the legal position, no fault can be found with the findings of the first appellate court. The suit was rightly dismissed.

The appeal is liable to be dismissed and is accordingly dismissed. But there shall be no order as to costs.