Mt. Jileba vs Mt. Parmesra on 11 May, 1950

Equivalent citations: AIR1950ALL700, AIR 1950 ALLAHABAD 700

JUDGMENT

Desai, J.

1.This is a defendant's appeal from a decree passed by a Civil Judge in a suit for possession over zamindari property. The property was admittedly owned by one Faqir Chand, a Jaiswal Kalwar of village Gaura, whose relationship with parties would be clear from the following genealogical table :

JALEBA defendant(2nd wife) = _ Ram Das | (D. 1929) | = | Thakuri __ _ 1.Ram Lakha | (first wife) | (D.1936) Faquir chand -| (dead) | = |_ Bhirgun | Parmashra (D.1927) | Plaintiff | |_ 2.Murta Gungara |_ 3.Surta

2. On the death of Faqir Chand, the property in dispute devolved upon his sons and on the death of one of them Ram Das and Ram Lakhan became the owners. When Ram Das died, Ram Lakhan became the sole survivor of the joint family. It is not contended that Jaleba inherited any right from Ram Das and was entitled to anything more the n maintenance. Ram Lakhan married Parmeshra, daughter of Umrao of village Seori which is about twenty miles from village Gaura, in 1936. Within twenty days of the marriage Ram Lakhan died leaving Parmeshra, a young widow of thirteen years of age. Disputes arose between Parmeshra and Jaleba about mutation in respect of the property in dispute standing in Ram Lakhan's name, but they were compromised in the mutation Court. Parmeshra, being a minor, was represented by Umrao as her guardian-ad litem and it was he who arrived at a compromise with Jaleba. Though it is stated in the written statement that the compromise was with permission of the mutation Court, the fact seems to be that no permission was obtained. At least none has been produced in the case and the mere fact that Jaleba applied for a copy of an application for permission does not prove that such an application existed. The compromise was that Jaleba should have her name entered in the Khewat against one-fourth share in each village, and that Parmeshra should get her name entered against the remaining three-fourth share. Mutation was accordingly ordered in the Khewats. Trouble broke out between the two women again in 1942, Jaleba alleging that Parmeshra had remarried Kishore and forfeited her right to the property of Ram Lakhan. Proceedings under Section 145, Criminal P. C., were started and ended in an order of the criminal Court declaring Jaleba to be, and entitled to remain, until evicted in due course of law, in possession of the property in dispute. Hence the present suit was instituted by Parmeshra to recover possession over the entire property. She denied having remarried Kishore and pleaded, in the alternative, that, even if she had, she had not forfeited her right to Ram Lakhan's estate because widow remarriage was recognised in the community of Kalwars. She made a counter-allegation against Jaleba to the effect that she herself had remarried Debi Prasad, originally of village Imiliya in Azamgarh district and now residing in Gaura itself or Barhaj which is adjacent to it. This Debi Prasad is admittedly the husband of Jaleba's sister Gulaichi who is admittedly alive

and has children through him, Parmeshra attacked the compromise arrived at in 1936 in the mutation case on the grounds that it was procured by undue influence and without permission of the mutation Court, that Jaleba had no right of any kind to the property secured to her under the compromise, that the document containing the compromise was not registered, that the compromise is greatly prejudicial to her interests, and that there was no dispute between the parties in the mutation Court regarding Ram Lakhan's estate and consequently no occasion for its coming into existence. The suit was contested by Jaleba. She denied her alleged remarriage with Debi Prasad and asserted Parmeshra's remarriage with Kishore of village Dhillai, which is about two miles from village Seori. She pleaded that among the Kalwars there was no custom of sagai form of widow remarriage, and that if any widow did remarry or was kept as a concubine by a man she lost the estate inherited from her husband. She contended that there was no defect in the compromise which had taken effect as a family arrangement.

3. The parties led oral and documentary evidence. Both parties examined witnesses to prove the alleged remarriages and the custom of widow remarriage among Kalwars or the absence of it. The learned Civil Judge found that neither of the women had remarried, that there was a very old custom of remarriage of widows among Kalwars, that even it Parmeshra had remarried she would not forfeit the estate inherited from Ram Lakhan, and that the compromise was null and void because the document containing its terms was not registered and no permission of the Court was obtained by Umrao to enter into a compromise with Jaleba. Accordingly he decreed the suit for the entire property. Through this appeal Jaleba claims a decree for the entire property and not merely one-fourth share given to her under the compromise. [After discussing the evidence with regard to remarriage of Jaleba and Parmeshra, his Lordship found that Jaleba had not remarried but that Parmeshra had remarried and that widow remarriage was recognised among Kalwars. The judgment then proceeds :]

4. The question is whether a Kalwar widow is divested of her previous husband's estate on remarriage. The law is that if the remarriage is done under an ancient and immemorable custom existing from before 1856 when the Hindu Widows' Remarriage Act was enacted, the question whether she is divested or not depends upon that custom and that custom alone, whereas if the remarriage is done under the Hindu Widows' Remarriage Act, the widow is divested. See Bhola Umar v. Mt. Kausilla, 55 ALL. 24 : (A. I. R. (19) 1932 ALL. 617 F. B.); Narain v. Mohan Singh, A. I. R. (24) 1937 ALL. 818 : (169 I. C. 767) and Mohammad Abdul Samad v. Girdhari Lal, A. I. R. (29) 1942 ALL. 175: (I. L. R. (1942) ALL. 259). The reason is, as stated by the Full Bench in Bhola Umar's case: (55 ALL. 24: A. I. R. (19) 1932 ALL. 617 F. B.) that a custom of remarriage does not carry with it, as a legal incident thereof, a further custom of forfeiture upon remarriage. If anybody claims that a widow on remarrying under the custom forfeits her previous husband's estate, it must be proved as a matter of custom. It is, therefore, necessary to find out whether a Kalwar widow remarries under a custom continuing from before 1856 or under a practice which has grown after the passing of the Hindu Widows' Remarriage Act. Instances of widow remarriage after 1856 may well be referred to the provisions of the Act and would not necessarily be indicative of an ancient custom existing before the passing of the Act. Unless, therefore, it be shown that the present practice is in pursuance of an ancient custom and not under the Act the marriage of a widow cannot be held to be under the custom of the caste. A widow wishing to escape the operation of Section 2 of the Act must establish

the existence of an ancient custom. See Bhola Umar v. Mt. Kausilla, 58 ALL. 1034: (A. I. R. (24) 1937 ALL. 230). In Narain Singh's case (A. I. R. (24) 1937 ALL. 343 : 169 I. C. 767) also it was stated that some evidence ought to be forthcoming to prove that the custom was in existence before 1856. It was necessary for Parmeshra to prove that she remarried under a custom existing from before 1856. It was, however, not necessary for her to prove that the custom is ancient in the English technical sense. As stated in Mt. Subhani v. Nawab, A. I. R. (28) 1941 P. C. 21 : (I. L. R. (1941) Kar. P. C. 22):

> "what is necessary to be proved is that the usage has been anted 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 governing rule of the particular district."

All that Parmeshra's witnesses have deposed is that the custom is "very old". But the instances that they have given of widow remarriage-are of the last 15-20 years. Nobody has given an instance of a time prior to 1856. Not one witness-has stated that the custom existed prior to 1856. The statement of Parmeshra that the custom came into existence along with the community cannot be accepted. The evidence about the custom being very old must be read in the light of what authorities on caste system in India have said. The evidence of Bhagwan Das that there-are seven sub sects among Kalwars and that two of them are Byahut and Jaiswal is supported by Crooke's Tribes and Castes, vol. III, p. 108. It is true that Byahuts are of the highest social status followed by Jaiswals. It is stated by Crooke on p. 110 :

> "Except in the Byahut sub-caste, widow marriage and the levirate are allowed : but the levirate is not compulsory on the widow. The only rite in widow marriage is that the man goes to the house of the widow with a suit of clothes and ornaments for her. He eats and drinks there and remains for the night. Next morning he brings his wife home and gives a dinner, by which his marriage is recognised."

Jaleba has admitted that a Brahmin would not drink water touched by a Kalwar. Kalwar caste is described in Bhattacharya's Hindu Castes and Sects, 1896, p. 254 as one of the several unclean castes connected with the manufacture of spirituous liquors. He writes that Kalwars occupy a very low position in the Hindu Caste System, though a great many of them have in recent times become very wealthy. that is why some of the witnesses of Jaleba have claimed to be Rajputs. He further writes on p. 258, that out of the sects of Kalwars only Byahuts do not allow widow remarriage. According to Hutton's Castes in India, 1946, p. 30:

> "the Kalwar who distils spirit from molasses or from the flowers of the mahua tree has status as low as the Bhar, not because he represents a conquered and dispossessed tribe, but on account of his occupation ; an occupation again is also in part at any rate the reason for the low standing of the Pasi who taps the toddy palm for liquor."

Among Shudras and other lower castes widow remarriage has been allowed by custom though it is held to be somewhat inferior to the marriage of a maiden; see Steele's Law and Custom of Hindu

Castes, pp. 26, 163 and 169. Kalwars are Shudras; therefore widow remarriage is permitted among them by custom independently of the Hindu Widows' Remarriage Act. I, therefore, find that widow remarriage is allowed among Kalwars of Jaiswal sect by pre-Mutiny custom. Even when widow remarriage is permitted by custom, it is not considered with favour and that explains why some respectable members of the community have stated that widow remarriage is not permitted and that if a widow remarries she and her new husband are excommunicated.

5. There is no evidence that under the custom existing from before 1856, a Kalwar widow on remarriage forfeits her previous husband's estate. The evidence given by Jaleba's witnesses, who denied the existence of the custom it. self, must be read as referring to the practice said to have grown since the passing of the Act. As far as that practice is concerned, Section 2 of the Act itself is clear and it is statutory law and not practice which governs the question whether a remarrying widow is divested of her previous husband's estate. When Jaleba denied the existence of the custom itself, she could not have very well led evidence to prove that the custom exists but together with another custom of forfeiture of the previous husband's estate on re-marriage. As there is no evidence of a custom of forfeiture, Parmeshra did not forfeit Ram Lakhan's estate by remarrying Kishore.

6. There is no evidence worth the name to prove undue influence behind the compromise. Learned counsel for Parmeshra did not address us at all on this question. Jaleba denied that any undue influence was exercised upon Umrao. The learned Civil Judge was right in holding that there was no undue influence.

7. Umrao did not obtain permission from the revenue Court for entering into the compromise with Jaleba. Under Order 32, Rule 7, Civil P. C., he could not enter into a compromise without the Court's permission. The provisions of Order 32 have been applied to all proceedings under the Land Revenue Act (other the n proceedings under chap. 7 with which we are not concerned) since 4th September 1934 : vide correction slip No. 16 of 19th September 1934 to Rule 94, Revenue Court Manual, 1930. Learned counsel for Jaleba relied upon Raj Bahadur v. Mt. Jamna Kuer, A. I. R. (26) 1939 ALL. 607 : (184 I. C. 609) in which it was held that no permission of the Court is required by a guardian before entering into a compromise in a revenue Court. The above rule making the provisions of Order 32 applicable to proceedings under the Land Revenue Act was not brought to the attention of the learned Judge who decided that case and I think that case was wrongly decided. The compromise is null and void and Jaleba cannot claim even one-fourth, share under it.

8. It does not matter if Jaleba had no title under the law to any portion of Ram Lakhan's estate. There was a bona fide dispute existing, between her and Parmeshra and that dispute was settled through the compromise. The compromise, therefore, operates as a family arrangement. Jaleba had certainly a claim to maintenance as a widow of the family. She got one-fourth share in the property in lieu of this maintenance. She gave up her right to the maintenance and the dispute between her and Parmeshra came to an end; this was sufficient consideration in the eye of law to support the: family arrangement.

9. There is on record an application presented before the mutation Court and containing the terms of the compromise. It is not registered and it remains to be seen whether it ought to have been

registered. If it ought to have been registered but was not registered, the Registration Act would bar its being used in evidence and Section 92, Evidence Act, would bar oral evidence being given to prove the terms of the compromise. A family arrangement can be arrived at orally also ; the law does not insist upon a document. If family arrangement is arrived at orally and information of its terms is given in writing to a Court, that writing would not be deemed to be a deed of family arrangement and would not require to be registered. The application presented to the mutation Court contains all the terms of the compromise and purports to be the document of compromise itself. It does recite the fact that "a compromise has thus been effected". But this would be the case with every compromise entered into in writing. The terms are settled orally and then they are reduced to writing. It depends upon the intention of the parties whether that writing is required to complete the compromise or not. If the intention is that the compromise would not be complete unless reduced to writing, the writing must be deemed to be the actual compromise and not the oral settlement of the terms. The law is the same as in a case of ordinary contract, it depending upon the intention of the parties whether a written contract is necessary to complete the contract or not. The application for compromise does not contain any prayer; it contains only the terms. Further it contains terms which have nothing to do with the question of mutation of names. If the parties were simply giving information to the Court of the fact that such and such a compromise has been arrived at, they would have given information of only those terms as relate to the mutation of names and would have requested the Court to order mutation in accordance with them. I am of the view that the writing was intended to be a document of compromise or family arrangement, that is, a document to have the legal effect of binding both the parties and not merely conveying information to the Court of the terms of a previously completed oral compromise or family arrangement. The document ought to have been registered and as it was not, it cannot be considered in evidence. Not only would oral evidence of the contents be barred, but also there exists no oral evidence of the contents. So, even if the document were treated as merely conveying information to the Court, there exists no evidence of the terms of the previously completed oral compromise or family arrangement. Jaleba did not say a word about the terms of the oral compromise or family arrangement and none of her witnesses was present at the time of the compromise and could 'have given such evidence. Therefore she derives no title or interest under the compromise.

10. The doctrine of part performance was invoked on behalf of Jaleba to make up for the deficiency of registration. A family arrangement does not involve transfer of property and the doctrine of part performance as contained in Section 53A, Transfer of Property Act, presupposes the existence of an instrument of transfer. Therefore Section 53A will not cure the defect of non-registration of the deed of family arrangement.

11. The result at which I arrive is that Parmeshra is not divested of her title to the property in dispute. Jaleba admittedly had no title to any part of it and the family arrangement under which she was allowed to remain in possession of one-fourth share is null and void and cannot be read in evidence at all, Jaleba has certainly the right of maintenance from the estate of Ram Lakhan, but that right is distinct from the right to be in possession o! a part of it in lieu of the maintenance, She can always assert that right against Parmeshra.

12. The decree of the lower Court must be affirmed and the appeal dismissed. As the findings on some issues are in favour of the appellant, I would let the parties bear their costs of the appeal themselves.

Mushtaq Ahmad, J.

13. I agree.

14. This appeal is dismissed but without costs.