Mohan Lal And Ors. vs Mst. Bhudevi And Ors. on 17 March, 1954

Equivalent citations: AIR1954ALL588, AIR 1954 ALLAHABAD 588

JUDGMENT

Malik, C.J.

1. These two cases arise out of one suit and the two appeals have been filed by two different sets of defendants. One Kundan Lal was the owner of the property in suit. He had two sons and two daughters. The sons were Nathu Ram and Sunder Lal and the daughters, Asharfi and Bhudevi. Nathu Ram predeceased his father and on the death of Kundan Lal the entire property was inherited by Sunder Lal. The daughter Asharfi died without any issue and Bhudevi is the plaintiff. Nathu Ram died leaving two daughters, Anandi Devi and Premvati who were married respectively to Suraj Bhan and Gyan Chand. Sunder Lal also died. Imarti Devi, defendant No. 4 was his widow. On 1-7-1944, she remarried one Raj Bahadur of village Dhansari. A few months before her remarriage on 31-3-1944, Imarti Devi sold the residential house to Smt. Gomti, defendant, No. 1, for Rs. 2,500/- and on 23-6-1944, she sold the shop to Mohan Lal and Ram Charan for Rs. 4,000/-. Ram Charan is dead and his legal representatives are his widow and two sons. After the remarriage of Imarti Devi on 1-7-1944, the suit out of which these appeals have arisen, suit No. 20 of 1946, was filed by Smt. Bhudevi claiming that the two transfers made by Imarti Devi on 31-3-1944 and 23-6-1944 were without legal necessity and that on the remarriage of Imarti Devi, she (Bhudevi) had become the owner of the property as the nearest heir alive to Sunder Lal.

2. The suit was defended by Smt. Gomti, Mohan Lal and Ram Charan's widow who filed separate written statements. In Gomti's written statement, she pleaded that the transfer in her favour was for legal necessity and that she had purchased the property for value and after due enquiry. In the written statement of Mohan Lal, the plea taken was that the transfer was justified by legal necessity. In the written statement filed by Ram Piari alias Durga Devi, widow of Ram Charan, pleas were taken that the transfer was for legal necessity and that she had purchased the property in good faith and after due enquiry. A further plea was taken by Smt. Gomti in her written statement, paragraph 17, that Imarti Devi had not contracted a second marriage which fact the other two defendants had also denied and she went on to say that "If in the opinion of the Court she is found to have contracted a second marriage then on account of the fact that Mst. Imarti and her relations were the followers of Arya Samaj and they could, as such, remarry, her marriage as a widow could be performed. Second marriage among the members of her brother-hood is lawful according to custom and a widow is not deprived of her husband's property on account of her second marriage according to custom".

The learned Civil Judge, Mr. Gahlaut, on 30-11-1946 in the presence of the parties and their counsel, defendant No. 6, Imarti Devi alone being absent as she had refused to receive the summons and had

not filed her written statement, framed the following issues:

1. Were the sale deeds in suit executed for legal necessities? If so, are they binding on the plaintiff?

2. Have defendants 2 to 5 spent anything in repairs of shop? If so, how much?

3. Is the suit for the shop barred by time?

4. Has Imarti Devi remarried and when? What is its effect?

5. Is the plaintiff entitled to take possession and get the damages claimed?

One of the pleas taken by Mohan Lal was that he had spent some money over the repairs of the shop which, it is said, was in a dilapidated condition.

3. Learned counsel for the appellant has attacked the decree of the lower court both on the merits as well as on the ground that it had framed no issue as regards the custom pleaded in the written statement of Gomti or as regards bona fide enquiry.

4. It is admitted that Imarti Devi was the widow of Sunderlal and the property in suit had belonged to him. Imarti Devi had, therefore, no right to transfer the property and the transfer would be invalid unless the transferee can show that the transfer was for legal necessity.

5. The necessity recited in the sale deed dated 31-3-1944, is the building of the shop which, it was said, had become dilapidated, and about the repair of which the tenant had given a notice and to undertake a pilgrimage and perform 'pinddan' for the benefit of the soul of her husband. It was also mentioned in the sale deed that the income of the property was not sufficient for her maintenance, and that she had been ill for some time. The notice referred to in this letter is dated 27-3-1944, to the effect that the roof of the shop along with the beam had been in a very bad condition for a long time, as a result of which the shop could not be used properly, and unless it was repaired the tenant will not pay the rent.

Though the house was sold three days later on 31-3-1944, & one of the objects mentioned herein was the repair of the shop, nothing was done to effect the repair, & on 23-6-1944, the shop itself was sold for Rs. 4,000/-, and the reasons given in this sale deed are that the executant needed money to maintain herself and for performing pilgrimage and charitable act according to the religious tenets for the benefit of her husband's soul. The shop is described in the sale deed as in a dilapidated condition. The question, therefore, arises whether these statements made in these documents were true or they were merely put in for the purpose of making out a case of legal necessity.

6. From the manner in which the necessity has been set out in the two documents, and the fact that on the 27th of March, Imarti Devi received a notice that the shop needed repair and it must be repaired otherwise the tenant would not pay the rent, that three days later she sells the house for Rs.

2,400/- to get money for the repair of the shop, and three months later she sells the very shop unrepaired, for the repair of Which she had sold the house, and a week after that she remarries, it appears to us that as the lady had decided to remarry and 1-7-1944, was fixed for her re-marriage, she was probably doubtful whether she would have any right to the property after her marriage and these transfer deeds were executed to get rid of the immovable property and convert the same into cash. (After considering the evidence his Lordship held that the evidence of enquiry and of legal necessity was worthless and was rightly disbelieved by the lower court, and with the lower court which disallowed the defendant Mohan Lal's claim for the repairs.)

7. The next question that arises, however, is whether the plaintiff Bhudevi can get possession of the transferred property as Imarti has remarried, or she must wait till Imarti is dead. Learned counsel has made a grievance that though the plea of custom was raised by Gomti in her written statement, no issue was framed on the point. Paragraph 17 of the written statement of Gomti has been so defectively drafted that it is difficult to say what exactly she wanted to plead, though no doubt the word 'custom' is used at two places in that paragraph. All the defendants denied the re-marriage of Imarti, though at the trial when the witnesses were examined it became clear that Imarti had re-married Raj Bahadur, and the only question that remained was whether she had married him in the Aryasamaj form or according to Sanatandharma form -- though in our view this would not have made much difference. The plea raised in paragraph 17 is as follows -

> "The plaintiff's allegation that Mst. Imarti Kuer has contracted a second marriage is totally wrong. If in the opinion of the Court she is found to have contracted a second marriage, then on account of the fact that Mst. Imarti and her relations were the followers of Arya Samaj and they could as such remarry, her marriage as a widow could be performed. Second marriage among the members of her brotherhood is lawful according to custom. A widow is not deprived of her husband's property on account of her second marriage according to custom ...."

We have already said that the issues were framed in the presence of the parties and their counsel, and the defendants' learned counsel never asked for an issue on the point. Prom the evidence of the witnesses examined on behalf of the defendants it is clear that their case was that Imarti could re-marry as she was an Arya Samajist, and, as regards Arya Samajists since marriage is permissible, she would not forfeit her right as a Hindu widow to remain in possession of her first husband's property during her lifetime. The evidence also shows that re-marriage of widows amongst them is a recent innovation. We are not satisfied that the defendant wanted to plead any special custom by which marriage was permitted before the Hindu Widows' Re-marriage Act of 1856 came into force, and that under the custom then prevailing a widow who re-married did not lose the widow's estate.

8. As we have already said the defendants had denied the marriage but after the plaintiff had examined a large number of witnesses to prove remarriage on 1-7-1944, when the defendants led their oral evidence their witnesses also admitted the remarriage. So it is common case now of the parties that Imarti Devi remarried Raj Bahadur of Dhansari on 1-7-1944.

9. As we have already said the plaintiff's case was that she married according to the Sanatandharm form while the defendants' case was that she married in the Aryasamaj form. Though in our view the form of the marriage would hardly matter but after having carefully considered the evidence we agree with the trial Court that Imarti Devi was married in the Sanatandharm form. (After reviewing the evidence His Lordship concluded :) In this state of the evidence, we are fully satisfied that the lower Court was right in its conclusion that Imarti Devi was remarried in the Sanatandharm form and not in the Aryasamaj form. It was not pleaded that there was any ancient custom of re-marriage prevailing before the Hindu Widows' Remarriage Act came into force nor does the evidence go to prove, any such custom. As a matter of fact Ganeshi Lal admitted that the first remarriage in their community was of his niece about fortyfive years back.

10. The Hindu Widows' Re-marriage Act (Act 15 of 1856) provides that as there was some difference of opinion on the question whether a Hindu widow could under the Hindu law remarry, therefore, to remove any doubt or legal disability and for the promotion of good morals and public welfare that enactment was made. It provides that the marriage contracted by a Hindu widow will not be invalid. Section 2 of this Act provides that -

> "All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

The law is now well settled that a widow will lose a widow's estate in her first husband's estate only if the marriage could be said to have been validly performed by reason of the enabling provision of the Act. If independently of the Act there was a custom the widow could remarry and Section 2 of the Act will not apply.

11. Aryasamajists are Hindus and there was no special enactment which authorised marriage of widows in that community. The Arya Marriage Validation Act (Act 19 of 1937) only provides that marriages between Aryasamajists will not be invalid by reason of the fact that the husband and wife belong to different castes or different sub-castes of Hindus or before the marriage they belonged to any religion other than Hinduism. That Act is not helpful. The general law, therefore, which applies to a Hindu widow will also apply to an Aryasamajist that Section 2 will not apply, if the marriage can be validly performed independently of the provisions of the Act. This view was accepted in the Full Bench decision of this Court in -- 'Bhola Umar v. Mt. Kausilla', AIR 1932 All 617 (FB) (A), and by Niamatullah, J. in -- 'Narain v. Mohan Singh', AIR 1937 All 343 (B) where the Judge said:

> "If the practice of remarriage is in existence since the passing of the Hindu Widows' Remarriage Act, it cannot be considered to be a custom properly so called it is nothing but a repetition of instances of remarriages deriving their validity from the Hindu Widows Remarriage Act. To show that the custom now obtaining is not the

> result of that Act, but wholly apart from it, some evidence ought to be forthcoming to prove that the custom was in existence before the Act was passed."

Prom the evidence, as already discussed, it would appear that it is more or less admitted that remarriage is a practice of recent growth in the brotherhood the oldest instance being only forty-five years old.

12. An argument has been advanced by learned counsel on the basis of certain observations in the case of -- 'Ganga Saran Singh v. Mt, Sirtaji Kuer' AIR 1935 All 924 (C), that it is for the plaintiff to plead and prove that on a remarriage a Hindu Widow loses her first husband's estate. If a custom is established permitting marriage of a Hindu widow so that it was not necessary to have recourse to the Hindu Widows Re-marriage Act for legalising the marriage the provisions of Section 2, as we have already said, do not apply. In such a case no doubt if the plaintiff alleges that by reason of the remarriage the Hindu widow had lost the Hindu widow's estate it will be for the plaintiff to prove that that result follows either by reason of any special custom to that effect or by reason of the provisions of the Hindu Law. It it not necessary in this case to go into the question whether under the Hindu law a Hindu widow would lose the widow's estate on remarriage as the question has not arisen, the custom of remarriage not having been proved.

We may, however, with great respect to the learned Judges, who decided -- 'Ganga Saran Singh's case (C)', point out that the provisions of Hindu Law relating to chastity of a Hindu widow after her husband's death do not necessarily apply to re-marriage. By reason of unchastity, a Hindu widow does not cease to continue to be a Hindu widow; while by re-marriage she ceases to be such. She ceases to be the surviving half of her deceased husband and becomes a part of some one else. The Hindu Law, as is well recognised, can be modified to well established custom and if there is a custom recognising re-marriage it cannot be said that a widow re-marrying in accordance with such custom was leading a life of unchastity. The analogy, therefore, to our minds did not apply.

13. Learned counsel for the appellant has urged that the provisions of the Hindu Widows' Re-Marriage Act are 'ultra vires' of the Constitution being contrary to the provisions of Article 19(1)(f). They have also been challenged on the ground that Article 14 was violated, as the provisions discriminated against Hindu widows. Neither of these two points have any force. The Hindu Widows Re-Marriage Act was an enabling Act which removed disability under which Hindu widows were suffering and allowed them to remarry. They were given a right where they did not have it before. We fail to see how Article 14 or Article 19 of the Constitution have any application, Learned counsel, though he mentioned these points, did not in the course of his arguments develop the same.

14. The result, therefore, is that these appeals fail and are dismissed with costs.