A RANGANATH PARMESWAR PANDITRAO MALI AND ANR.

v.

EKNATH GAJANAN KULKARNI AND ANR.

JANUARY 12, 1996

B [K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

Constitution of India, 1950 : Article 136

Appeal—Finding of fact—Non-consideration of vital evidence—Such C *a finding can be interfered with.*

Law of inheritance:

Factum of marriage—Proof of—Suit for injunction by legal heirs—Claim for property based on inheritance from ancestors—Dispute as D *to marriage of ancestors—Fact of living together as husband and wife—Fact corroborated by admission—Held a presumption arises as to valid marriage unless rebutted—Legal heirs held entitled to succeed to property.*

The appellant-plaintiffs filed a suit seeking relief of injunction praying that the respondent-defendants be restrained from obstructing E **their peaceful possession to the suit properties. Their case was that they were sons of P who had married S and that they had inherited the suit property as a result of partition between P and the father of the defendants G. The respondents also filed a suit for injunction contending that the appellants were not the legal heirs of P as he died without** F **marrying anybody.**

The Trial Court dismissed the respondent's suit and decreed the appellant's suit by granting the injunction prayed for. Its findings were that : (i) the appellants had proved that S was wife of P and this was G **corroborated from admission made by defendant No. 1 that S was living with P; and (ii) appellants being the only legal heirs of P were entitled to property which was in their continuous possession.**

The first appellate Court reversed the findings of the Trial Court and held that (i) there was no evidence of marriage between P and S H **though both were living together; and (ii) mere residing together as**

husband and wife does not give rise to the presumption that their marriage was legal and valid; such a presumption would arise if there is evidence on record to prove the factum of marriage. In second appeal the High Court affirmed the conclusion of first appellate Court. Consequently the appellants were held not entitled to the relief prayed for.

In appeal to this Court it was contended that both the appellate Courts erred in not relying upon the presumption of valid marriage between P and S - a fact which was admitted by defendant.

On behalf of the respondents it was contended that the findings of fact arrived by two Courts below should not be interfered with under Article 136 of the Constitution.

Allowing the appeals, this Court

HELD : 1. It is no doubt true that a finding arrived at on a question of fact by the lower appellate court or the High Court is not ordinarily interfered with by this Court under Article 136 of the Constitution. But if such finding is recorded by non consideration of some vital piece of evidence or admission of the adversary, then this Court will be fully justified in interfering with the finding in question. [459-D-E]

2. In this case the consistent evidence is that P and S were living together for long years as husband and wife and plaintiff No. 1 is their son. The defendant also admitted the aforesaid fact but contended that there had been no valid marriage between P and S. A legal presumption does arise, though the presumption is rebuttable and this presumption has not been rebutted by the defendant. The High Court committed an error of law in recording a finding that the presumption would arise only if the factum of marriage is proved. If factum of marriage is proved, the question of raising a presumption does not arise. The lower appellate court on the other hand has merely entered into the arena of conjecture and surmises by interfering with the finding of the Trial Judge without considering the relevant and material evidence on the point. The findings arrived at by both these courts on the question of relationship of P and S cannot be sustained in law. Appellants having been begotten by S from P, they are the legal heirs over the property of P and would succeed to the said property. [459-E-H; 460-A-C]

A *S.P.S. Balasubramanyam* **v.** *Surutayan*, **[1994] 1 SCC 460, referred to.**

3. Instead of considering the evidence and the consequential finding of possession in favour of the appellants by the Trial Court the lower Appellate Court merely reversed the judgment once it came to the conclusion that they are not the legal heirs of P. There is no consideration of evidence of possession by the lower Appellate Court or by the High Court. Accordingly, the matter is remitted to the lower appellate Court to reconsider the evidence and the findings on the question of possession to decide the relief of injunction. [460-D-F]

C CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1651-52 of 1996.

From the Judgment and Order dated 21.7.94 of the Bombay High Court in S.A. Nos. 209 and 210 of 1994.

D S.M. Jadhav for the Appellants.

I.G. Shah, Ms. Manjula Gupta, Makarand D. Adkar, S.D. Singh and Ejaz Maqbool for the Resondents.

The Judgmnet of the Court was delivered by

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G.B. PATTANAIK, J. Leave granted.

The appellants are the plaintiffs who filed a suit seeking injunction against the respondents in the Court of Civil Judge, Junior Division in the district of Ahmednagar. The said suit was registered as Suit No. 200 of 1985. F It was alleged that the common ancestor Bhanudas had two sons Panditrao and Gajanan. Plaintiffs are the sons of Panditrao from his marriage with Shevantabai and the defendants are the sons of Gajanan. The further case of the plaintiffs was that there had been a petition between Panditrao and Gajanan and the suit property admeasuring 3.18 hectares in village Kongoni G had been allotted to the heirs of Panditrao. Panditrao died in the year 1976 leaving behind his sons the plaintiffs and the widow shevantabai. Shevantabai died in 1977 and thereafter the plaintiffs are in continuous possession of the suit property. The defendants however managed to get their names entered in the revenue record by way of mutation. Against the said order of mutation H the plaintiffs preferred an appeal and the appellate authority had set aside the

order of mutation in favour of the defendants. But still the defendants having obstructed the plaintiffs' possession, the plaintiffs filed the suit seeking relief of injunction praying that the defendants be restrained from obstructing the peaceful possession of the plaintiffs. The defendants filed written statement denying the averments made in the plaint and took the stand that the plaintiffs are not the legal heirs of Panditrao, they also took the stand that the property is not ancestral property of the plaintiffs as alleged and the plaintiffs are never in possession of the same. According to defendants they being the sons of brother of Panditrao are the only legal heirs and said Panditrao had died without marrying any body. On these pleadings the learned Trial Judge framed three issues and recorded the following findings :

> (1) Plaintiffs have established the fact that Shevantabai is the wife of Panditrao which is corroborated from the admission of defendant no. 1 that Shevantabai was living with Panditrao and she was looking after him while he was ill.
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> (2) Plaintiffs are sons of Shevantabai who are begotten from Panditrao.
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> (3) The plaintiffs are legal heirs of Panditrao and are entitled to claim the property which came to Panditrao on partition between Panditrao and father of the defendants.
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> (4) The disputed property being the separate property of Panditrao, plaintiffs are the only heirs to the same. Plaintiff No. 1 is residing in the suit land by erecting vasti and it is admitted that after death of Panditrao plaintiffs is in continuous possession of the suit land.

With these conclusions, the suit was decreed with the declaration that the suit land belongs to Panditrao, the father of the plaintiffs and plaintiffs are the legal heirs and defendants were restrained from obstructing the peaceful possession of the plaintiffs over the suit land.

The defendants in the aforesaid suit had also filed a suit for injunction which had been registered as Civil Suit No. 22 of 1985 and the said suit was accordingly dismissed. Two appeals were preferred against both the judgments which were registered as Civil Appeal No. 199/88 and Civil Appeal No. 200/88. The learned Additional District Judge reversed the findings and conclusion of the Trial judge and allowed these appeals. The Appellate Court

A came to hold that there has been no evidence of marriage between Panditrao and Shevantabai though Shevantabai was living with Panditrao and both of them were having illegitimate relationship. He further held that mere residing together as husband and wife does not *ipso facto* prove that their marriage is legal and valid and therefore Ranganath and others, plaintiffs in Regular B Civil Suit No. 200 of 1985 are not entitled to inherit the property of deceased Pandit. The lower Appellate Court further came to the conclusion that since the plaintiffs in Civil Suit No. 200 of 1995 are not entitled to succeed to the property of Panditrao, the prayer, for injunction could not have been granted. With these conclusions the judgment and decree of both C the suits having been reversed and the appeals having been allowed, the matter was carried in Second Appeal to the High Court, which were registered as second Appeal Nos. 209 of 1994 and 210 of 1994. The second Appellate Court agreed with the learned Additional District Judge and came to hold that since Shevantabai was 'Mali' by caste while Pandit was 'Brahmin' and there was no marriage between them and Shevantabai must be D held to be his concubine and the lower appellate court rightly held that the factum of marriage had not been proved. Negating the contention with regard to presumption of a valid marriage between Shevantabai and Panditrao from the fact that they have been living together as husband and wife for a continuous and long period, the second appellate court held that such E presumption would arise if there is evidence on record to prove the factum of marriage and the fact of staying together with the concubine as husband and wife but since there is no evidence of factum of marriage, question of presumption being attracted does not arise. Consequently it was held by the second appellate court that the learned Additional District Judge rightly held F that the respondents are entitled to a decree of injunction on their suit No. 22 of 1985 and ultimately confirmed, the judgment and decree of the learned Additional District Judge. It is against this judgment and decree of the second appellate court, the present appeal by special leave is directed.

G The learned counsel for the appellants contended that the lower appellate court as well as the High Court committed serious error by not relying upon the presumption of a valid marriage when admittedly Panditrao and Shevantabai lived together for long years as husband and wife and said fact was admitted by the defendants. He further contended that non-consideration of this admission by the defendant vitiate the ultimate conclu-H sion on the question of relationship between Panditrao and Shevantabai.

Accordingly he contended that the said conclusion is liable to be reversed and consequently the plaintiffs in Regular Civil Suit No. 200 of 1985 must be held to be legal heirs of Panditrao and Shevantabai. The learned counsel appearing for the respondents on the other hand contended that the lower appellate court as well as the High Court having considered and recorded that there was no valid marriage between Panditrao and Shevantabai, it would not be proper for this Court to exercise power under Article 136 of the Constitution to interfere with the conclusion arrived at by the two courts below and therefore the judgment and decree of the two courts below are immune from interference.

In view of the rival stand of the parties the first question that arises for consideration is whether merely because the factum of marriage has not been established, was it open for the lower appellate court as well as the High Court to set aside the finding of the Trial Judge, which finding was based on not only arising out of the legality of a presumption from the fact of living together as husband and wife but also the admission of defendant no. 1 that Shevantabai was residing with Pandit in the Wada in village for long years and the plaintiff no. 1 is son of Shevantabai? It is no doubt true that a finding arrived at on a question of fact by the lower appellate court or the High Court is not ordinarily interfered with by this Court under Article 136 of the Constitution. But if such finding is recorded by non consideration of some vital piece of evidence or admission of the adversary, then this Court will be fully justified in interfering with the finding in question. In the case in hand, the consistent evidence being that Panditrao and Shevantabai were living together for long years as husband and wife and plaintiff no. 1 is their son and the defendant also admitted the aforesaid fact but contended that there had been no valid marriage between Panditrao and Shevantabai, a legal presumption does arise, though the presumption is rebuttable and this presumption has not been rebutted by the defendant. It has been held by this Court in the case of *S.P.S. Balasubramanyam* v. *Surutayan*, [1994] 1 SCC 460 that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable. The High Court, committed an error of law in recording a finding that the presumption would arise only if the factum of marriage is proved. We are afraid if factum of marriage is proved, the question of raising presumption does not arise. The lower appellate court on the other hand has merely entered into the arena of

A conjecture and surmises by interfering with the finding of the Trial Judge without considering the relevant and material evidence on the point. In this view of the matter findings arrived at by the lower appellate court as well as by the High Court on the question of relationship of Panditrao and Shevantabai cannot be sustained in law. In our considered opinion a legal presumption B arises on the admitted fact that they were living together as husband and wife and the said presumption has not been rebutted. We would accordingly set aside the findings of the High Court as well as the findings of the Additional District Judge on this score and restore the finding of the Trial Judge on this score and hold that Shevantabai was the wife of Panditrao and plaintiffs C having been begotten by Shevantabai from Panditrao are the legal heirs over the property of Panditrao and would succeed to the said property.

The next question arises for consideration is whether prayer for injunction granted by the Trial Court in favour of the plaintiffs would have been reversed by the lower appellate court? We find from the judgment of the D lower appellate court that instead of considering the evidence and the consequential finding of possession in favour of the plaintiff by the Trial Court the lower Appellate Court merely reversed the judgment once coming to the conclusion that the plaintiffs are not the legal heirs of Panditrao. In fact there is no consideration of evidence of possession by the lower Appellate E Court or by the High Court. In that view of the matter it would not be proper for this Court to finally conclude the question and the other hand it would be proper to remit the matter to the lower Appellate Court. In the aforesaid circumstances the judgment and decree of the High Court as well as those of the Additional District Judge, Ahmednagar are set aside. Question of F Shevantabai being the wife of Panditrao and the plaintiffs are legal heirs of Panditrao is concluded and would not be reopened. But the lower appellate court would reconsider the evidence and the findings on the question of possession to decide the relief of injunction.

The appeals are allowed with the aforesaid directions. The two G impugned Second Appeal Nos. 209/94 and 210/94 are remitted back to the lower Appellate Court for decision of the appeals in accordance with law, bearing in mind the observations made above, after giving opportunity of hearing. Parties to bear their own costs.

T.N.A. Appeals allowed.