

CASE NO.:
Appeal (civil) 2781-84 of 2004

PETITIONER:
Virendra Kumar Tripathy

RESPONDENT:
Nirmala Devi and Ors.

DATE OF JUDGMENT: 23/02/2006

BENCH:
B.P. Singh & Altamas Kabir

JUDGMENT:
JUDGMENT

B.P. Singh, J.

These appeals by special leave are directed against the order of the High Court of Judicature at Patna in L.P.A. Nos. 304 and 310 of 2002 dated 22.1.2003 whereby the High Court dismissed the L.P.A. preferred by the appellant herein on the ground that in view of the provisions of Section 100-A of the Code of Civil Procedure inserted by an amendment in the year 2002, no LPA lay.

It was urged before us by the appellant that the High Court was clearly in error in not entertaining the LPA because it had been filed before the amendment came into force, and in his submission LPAs pending as on the date of the amendment were not affected by the amendment incorporating Section 100A in the C.P.C.

However, rather than going into the question of the maintainability of LPA, we have treated the special leave petitions as against the judgment and order of the High Court in Misc. Appeal Nos. 462 and 463 of 1997. We have heard learned counsel for the parties at length both on questions of law and fact. We have been taken through the entire evidence as also the judgment of the courts below.

The facts, insofar as they are relevant for the disposal of the appeal, may be noticed. The case of the appellant is that his father Ram Briksh Sharma was married to Buch Kumari Devi and they had five issues which included the appellant and his brother Mahendra Narayan Sharma and three sisters, namely, Shyam Sunderi Devi, Kusum Devi and Kishori Devi. His brother Mahendra Narayan Sharma was born on 1.1.1916. There is some dispute as to the year of his death but that is not very material. According to the appellant he died in the year 1937 whereas according to the respondents he died in the year 1942. After his death his wife Brij Kishori Devi succeeded to his estate who also died on 4.9.92. An application for grant of succession certificate was filed by the appellant Virendra Kumar Tripathy claiming that he being the real brother of Mahendra Narayan Sharma, the husband of the deceased, was entitled to the grant of succession certificate to the estate of Brij Kishori Devi. This Succession case was numbered as Succession Certificate Case No. 66/93 in the Court of 11th Additional District Judge Patna. In the said Succession case the respondent Nirmala Devi objected and filed a reply. Later in the year 1995 she also filed a Succession Certificate Case No. 138 of 1995 claiming a Succession Certificate in respect of the estate of the late Brij Kishori Devi. Her case was that Ram Briksh Sharma had two wives. His first wife was one Mostt. Ramdaso Devi from whom he had two issues, namely, the appellant and Mahendra Narayan Sharma the husband of the late Brij Kishori Devi. The second wife of Ram Briksh Sharma was Buch Kumari Devi who gave birth to a son, the appellant herein, and three daughters. She, therefore, claimed that the husband of late Brij Kishori Devi was her full brother and

therefore she was entitled to the grant of succession certificate in preference to the appellant Virendra Kumar Tripathy who was only a step brother of Mahendra Narayan Sharma.

The facts which are not in dispute are that Ram Briksh Sharma died in the year 1964 while Buch Kumari Devi died in the year 1936 and Ramdaso Devi in the year 1944. Mahendra Narayan Sharma, the husband of late Brij Kishori Devi was born on 1.1.1916 while the appellant Virendra Kumar Tripathy was born in the year 1929. Nirmala Devi the respondent herein claimed to be 21 years younger to Mahendra Narayan Sharma which means that she was born in or about the year 1937.

Thus the appellant claimed to be the real brother of the husband of the deceased Brij Kishori Devi both being the sons of Ram Briksh Sharma and Buch Kumari Devi while respondent claimed to be the real sister of Mahendra Narayan Sharma both being the issues of Ram Briksh Sharma and Ramdaso Devi, the first wife of Ram Briksh Sharma.

The question, therefore which arises for consideration is whether Ram Briksh Sharma was married only once to Buch Kumari Devi or whether he married twice and his first wife, namely, Ramdaso Devi gave birth to the respondent herein and Mahendra Narayan Sharma. The parties led evidence before the trial court. Since it was pleaded by the respondent herein that Ram Briksh Sharma was married twice, the burden was upon her to prove this fact. The trial court accepted the evidence adduced by the appellant herein and issued succession certificate in his favour while rejecting the succession certificate case filed by the respondent herein. It found that the witnesses who deposed at the trial on behalf of the respondent Nirmala Devi were unreliable and it was apparent that they were not revealing the truth.

The trial court discussed their evidence at length and came to the conclusion that O.P.W. 1, 4 and 6 were unreliable and could not be believed. The appellant had also examined witnesses to prove the fact that Ram Briksh Sharma had married only once and in this regard the evidence of A.P.W. 1, 2 and 3 was reliable.

The respondent preferred Misc.Appeal Nos. 462 and 463 of 1997 before the High Court of judicature at Patna impugning the judgment and order of the 11th Additional District Judge Patna dated 18.9.97. The High Court on consideration of the evidence on record upset the findings recorded by the trial court while allowing the miscellaneous appeals and granted succession certificate in favour of the respondent herein holding that the evidence on record established the fact that Ram Briksh Sharma had married twice, his first wife being Ramdaso Devi, and that the respondent herein and Mahendra Narayan Sharma were born to said Ramdaso Devi.

We have heard the learned counsel for the parties at length and they have taken us through the evidence on record. So far as the evidence of O.P.W. 1, 6 and 4 is concerned the trial court gave cogent reasons to doubt their testimony. It found that P.W. 1 who was 60 years old was born in the year 1937. He claimed to have witnessed the marriage of Ram Briksh Sharma with Buch Kumari Devi. This appeared to be false because admittedly the appellant, namely, Virendra Kumar Tripathy was born in the year 1929. Two sisters of Virendra Kumar Tripathy were even older than him. So the marriage of Ram Briksh Sharma and Buch Kumari must have taken place many years before 1937 in which year this witness was born. He also stated Ramdaso Devi was only two years older to him and therefore, according to him Ramdaso Devi was born in the year 1935. This also appears to be blatantly false because Mahendra Narayan Sharma said to be the son of Ramdaso Devi was born on 1.1.1916, and therefore Ramdaso Devi could never be the mother of Mahendra Narayan Sharma who was 19 years older than her. The High Court has dealt with the evidence of this witness in a rather cryptic manner observing that this witness was disbelieved because he failed to name the son of Ramdaso Devi, although he claimed to be one of

the grand sons of Deolal Pandey, the father of Ramdaso Devi. As we have noticed earlier the trial court recorded reasons for rejecting the evidence of O.P.W. 1 which have not even been adverted to by the High Court. The next witness O.P.W. 2 claimed to be 37 years old on the date he was deposing. Therefore, it could be deduced that he was born in the year 1960. He had no personal knowledge about the marriage of Buch Kumari Devi with Ram Briksh Sharma, nor did he know anything about the family of Ramdaso Devi. He claimed to have acquired some knowledge from his parents. Obviously, this type of evidence was not very helpful to the respondent herein. O.P.W. 3 is another witness whose evidence was considered by the trial court. His evidence has been rejected after adequate consideration. His evidence has not even been adverted to by the High Court because the respondents did not rely on it. We have carefully perused the findings recorded by the High Court and we find that the rejection of his evidence is fully justified. O.P.W. 4 is Nirmala Devi herself.

O.P.W. 6 a Mukhia of the village was examined to prove the certificate issued by him. Though the certificate purports to have been issued after full enquiry, it appears from the deposition of this witness that in fact no enquiry was made could be made in the absence of any documentary evidence in possession of the Panchayat. He admitted that there was no family record maintained by the Panchayat. He did not know whether the name of any member of the family of the appellant was recorded in the voters list. We have perused the evidence and we do not consider this witness to be an independent witness or a reliable witness because he has gone out of the way to issue a certificate unsupported by any material before him. This only shows that he was inclined in favour of the respondent. What is more important is the fact that even if we accept his deposition before the court as it is, it does not prove that Ram Briksh Sharma was married to Ramdaso Devi and that the respondent Nirmala Devi and Mahendra Narayan Sharma were the issues through Ramdaso Devi. All that he has stated is that Ram Briksh Sharma had married twice. Beyond that nothing is there in his statement to the effect that it was Ramdaso Devi who was married to Ram Briksh Sharma, or that Mahendra Narayan Sharma and Nirmala Devi the respondent herein were the son and daughter of Ram Briksh Sharma and said Ramdaso Devi. The evidence of O.P.W. 6 only goes to this extent that Ram Briksh Sharma had married twice.

A surprising feature about the judgment of the High Court is that it has not at all considered the evidence led by the appellant in support of his case which was accepted by the trial court. The evidence of A.P.W. 1, 2 and 3 are relevant and they fully support the case of the appellant.

Having regard to the oral evidence on record we are satisfied that the trial court having considered the evidence at length came to the correct conclusion that the witnesses examined by the respondent did not appear to be truthful and could not be relied upon.

We then come to the documentary evidence on record relied upon by the respondent. In this connection it was emphasised that there was letters written by the appellant to the sons of Nirmala Devi in the years 1981 and 1993. It was stated that in the said letters the appellant was described as Mama, and he referred to the sons of Nirmala Devi as Bhagina (sister's son). From this it was sought to be inferred that Nirmala Devi must have been the sister of the appellant. On the basis of these letters alone we are not prepared to draw this inference. There is evidence on record to show that Nirmala Devi was also distantly related to the appellant. In any event, the two families were on visiting terms and it cannot be denied that the appellant and the respondent were known to each other. The assertion of the appellant that he came to know Nirmala Devi only after objections were filed in his succession case cannot be accepted. But even so, we cannot jump to the conclusion that since he described himself as the Mama it must be held that he was the brother of Nirmala Devi the respondent herein. Very often because of closeness of families even distant relatives are addressed as uncle, and sometimes even persons unrelated are referred to as uncle

i.e. Chacha or Mama etc. We expected some more evidence to be examined to support the plea that the appellant was the brother of the respondent.

The logic of the judgment of the High Court is that these letters proved that the appellant was the brother of Nirmala Devi. Since it is the admitted case of the parties that the appellant is not the real brother of Nirmala Devi he must be her step brother. Since in one of the rejoinders filed by the appellant it was stated that Ramdaso Devi was the daughter of one Deolal Pandey and Nirmala Devi was her daughter, the High Court connected these two facts and came to the conclusion that Ramdaso Devi was married to Ram Briksh Sharma. We do not subscribe to this logic because there is no evidence to show that Ramdaso Devi was ever married to Ram Briksh Sharma. We, therefore, come to the conclusion that the High Court was not justified in setting aside the findings of the trial court. These appeals must be allowed and we accordingly allow these appeals, set aside the impugned judgment and order of the High Court, and restore that of the trial court. There shall be no order as to costs.