

PETITIONER:
SHANTINATH RAMU DANOLE & ANR.

Vs.

RESPONDENT:
JAMBU RAMU DANOLE & ORS.

DATE OF JUDGMENT: 05/11/1996

BENCH:
N.P. SINGH, FAIZAN UDDIN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Faizan Uddin, J.

1. This appeal by the plaintiffs has been directed against the judgment of the High Court of Bombay affirming the judgment and decree passed by the first appellate Court reversing the judgment and decree passed by the Trial Court whereby the plaintiff's suit for partition and separate possession of their 2/3rd share was decreed.

2. The appellant Shantinath Ramu Danole and his mother Housabai (since deceased) filed the suit against the defendant-respondent for separate possession of their 2/3rd share in the suit property by partition. The plaintiff No. 1 Shantinath Ramu Danole claimed to be the son of deceased Ramubabu Danole and plaintiff No. 2 (mother of plaintiff No. 1) deceased Housabai claimed to be his widow. The defendant-respondent is the son of deceased Ramubabu from his first wife Rajubai. The plaintiffs pleaded that the suit properties were ancestral properties of deceased Ramubabu Danole who died on December 20, 1973, his first wife having died earlier when the defendant-respondent was aged about one year only. After the death of his first wife Rajubai, deceased Ramubabu Danole married Smt. Housabai, the mother of the appellant about 35 to 40 years ago from the date of filing the Suit. It was alleged that when Housabai was pregnant she was turned out of his house by Ramubabu Danole and she was forced to live with her parents at Upalai. The plaintiffs claimed that they had 2/3rd share in the ancestral property left behind by the deceased Ramubabu Danole. It was alleged that since the defendant-respondent No. 1 claimed to be the exclusive heir of deceased Ramubabu and denied any share to the plaintiffs in the suit property they filed the suit for possession of their 2/3rd share in the same by partition. The plaintiffs also alleged that during the pendency of the suit the respondent had sold the land bearing Gat No. 461 to the defendant/respondent No. 2 on 7.1.1977 which is not binding on them. It was also alleged by the plaintiffs that the defendant No. 1 also created some incumbrance of defendant/respondent No.3 on the property for which the respondent No. 1 alone was liable. The defendant No. 1 resisted the suit filed by the

plaintiffs by pleading that the plaintiff-appellant No. 1 was not the son of deceased Ramubabu nor the plaintiff No. 2 Housabai (since deceased) was the wife of deceased Ramubabu as he had never married Housabai. The defendant No. 1 claimed to be the only son of deceased Ramubabu to be the exclusive owner of the suit property. The defendant No. 1 admitted that he had sold Gat No. 461 to defendant No. 2 for the purpose of repaying the debts of his father and that the deceased Ramubabu had also taken loan from the Bank-defendant No.3 for construction of a Well which had to be repaid. He also took the plea that out of the consideration received from the defendant No.2 he had repaid the debts of his father. The defendant No. 2 he had repaid the debts of his father. The defendant No. 2 in his separate written statement took the plea that the defendant No. 1 is the exclusive owner of the suit property and that he was purchaser from him for value without any knowledge about the pendency of this suit. The defendant No. 3 in its written statement took the plea that the deceased Ramubabu had taken loan of Rs. 5000/- from the Loan Development Bank after mortgaging his said Gat Nos. 655 and 659 as security for repayment of the loan.

3. On evaluation of the oral and documentary evidence on record the Trial Court recorded the finding that the plaintiffs have proved the factum of marriage of deceased Housabai, plaintiff No. 2 with deceased Ramubabu Danole and the plaintiff-appellant No. 1 was born out of the said wedlock. The Trial Court also recorded the finding that it was not established that the defendant No. 2 was a bonafide purchaser of the said Bat No. 461 and that the said sale was not binding on the plaintiffs. It was also held that since the lands bearing Gat Nos. 655 and 639 were mortgaged by the deceased Ramubabu Danole himself to the defendant No. 3 and obtained a loan of Rs. 5000/- for digging the well, the plaintiffs should bear the proportionate share for repayment of the loan amount due to the defendant No. 3. The Trial Court having found the said property as the ancestral property in which the plaintiffs had 2/3rd share and, therefore, on the aforesaid findings passed a decree in favour of the plaintiffs for possession of 2/3rd share by partition against the defendant No. 1. However, on appeal by the defendant-respondent No.1. the first appellate Court set aside the judgment and decree passed by the Trial Court holding that it was not established that the deceased plaintiff No. 2 Smt. Housabai was wedded to the deceased Ramubabu Danole and that the plaintiff No. 1 was born out of that wedlock. This judgment of the first appellate Court was upheld by the High Court in Second Appeal by dismissing the same in limina against which this appeal by special leave has been directed.

4. Learned counsel appearing for the plaintiffs strenuously urged that the first appellate Court and the High Court gravely erred in setting aside a well considered judgment and findings recorded by the Trial Court. It was submitted that the appellate Court misappreciated the documentary as well as oral evidence with regard to factum of marriage of Smt. Housabai with the deceased Ramubabu Danole. Learned counsel urged that the evidence on record sufficiently established the marriage of Smt. Housabai with Ramubabu Danole but the appellate Court not only fell into error in rejecting the oral evidence as interested evidence but also failed to take into consideration the presumption of valid marriage of deceased Housabai with deceased Ramubabu in the facts and circumstances of the present case. Having heard the learned counsel for parties at length and

on perusal of the oral and documentary evidence on record, we find that there is merit in the aforementioned submissions made by the learned counsel for the appellants.

5. The plaintiffs had examined five witnesses to prove the marriage of Housabai with Ramu Danole. Rangnath, PW 1 is the brother of deceased Housabai who deposed that the marriage of Housabai with Ramu Danole took place 40 years before. He was examined as a witness and that the plaintiff No. 1 Shantinath was the son of plaintiff No. 2 born from Ramu Danole. He stated that the marriage was performed in his presence at Jainwadi in Pandharpur Taluka which was attended to by his father and 4-5 other persons of the village. He stated that Adinath Khamgaonkar, PW 2 was also present at the time of said marriage. He further deposed that about 1-1/2 year after the marriage there was dispute between Housabai and her husband Ramubabu where after his deceased sister Housabai lived with him. He also stated that at that time Housabai was pregnant when she came to his house and two months thereafter plaintiff-appellant No. 1 was born at Barshi. Adnath Khamgaonkar, PW 2 is also a relative of the plaintiffs. He deposed that plaintiff No. 2 Housabai was married to Ramu Danole at Jainwadi 40 years back and that he had attended the said marriage. He stated that Housabai lived with her husband Ramu for about 1-1/2 years and thereafter she came to her parents house when she was pregnant. He also stated that the plaintiff No. 1 is the son of Housabai from her husband Ramu Danole. Nothing could be elicited from these witnesses in cross-examination to discredit their testimony. Their testimony was rightly accepted by the Trial Court but unreasonably rejected by the appellate Court merely on the ground that they were relatives. It may be pointed out that marriage is attended only by the relatives and friends. The evidence of such relative and friends could not be thrown out only because they happened to be relatives and friends unless their testimony suffers from some inherent infirmity which is not to be found in the evidence of these who witnesses.

6. Shankar, PW 3 is a co-villager of the plaintiffs. Although he is not a witness to the said marriage but he categorically expressed his opinion as to the relationship of deceased Housabai with deceased Ramu Danole on the basis of his own observations. He deposed that the plaintiff No. 1 is a son of Ramu and the plaintiff No. 2 deceased Housabai was the wife of Ramu and that defendant No. 1 is also his son. He stated that after the celebration of marriage of Housabai with Ramu about 40 to 42 years back at Jainwadi Housabai resided at Jainwadi for about 1-1/2 years in the house of deceased Ramu as his wife. He further stated that after 1-1/2 years Housabai went to her parents house when she was pregnant. In cross-examination he stated that he had also seem Housabai alongwith her child in the village but Ramu did not allow her to reside with him. Shankar, PW 3 further deposed that there is a temple in the village belonging to his community in which there is a Committee which maintains a Register in respect of birth, death and marriage of persons belonging to Jain Community. The said Register used to be in the custody of the President and the priest. The evidence of this witness has been rejected by the appellate Court on flimsy ground. The appellate Court took the view that the Register maintained by the temple which records the marriage of persons belonging to Jain Community was not produced there being absolutely no evidence to the effect that the marriage of Housabai with Ramu Danole was recorded in the said Register.

7. The evidence given by the witness Shankar, PW 3 is

relevant in view of the provisions contained in Section 50 and 51 of the Evidence Act. The said witness deposed the facts observed by him and the opinion that he had formed on the basis of such observations. The evidence of general reputation for purpose of proof or disproof of a marriage is admissible. This is apparent from the illustration given in Section 50 itself of the Evidence Act. A reference may also be made with advantage of a decision of this Court in the case of *Dolgovinda Vs. Nimai Charan* AIR 1959 SC 914 wherein it has been held that under Section 50 when the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. In the present case before us, the witness Shankar, PW 3 is a person belonging to the community to which the deceased Housabai and Ramu Danole belonged to and is also a resident of the same village where the couple lived together as husband and wife and thus had the means of special knowledge of the relationship between them.

8. Apart from the evidence discussed above, the plaintiff No. 1 Shantinath also appeared as PW 4 who deposed that Ramubabu was his father and that defendant No. 1 is his step brother. He testified the extract of Birth Register, Ext. 72 and stated that he was called Shantinath since his childhood. He stated that in the Birth Register, Ext. 72 his name was previously entered as Kantilal and the name of his grand father was entered as Babu which were incorrect and, therefore, the same were corrected. Housabai, plaintiff No. 2 was also examined as PW 5. She deposed that she was married to Ramu 40 years back at Jainwadi in the presence of her brother Rangnath, PW 1 and her father who is dead. After her marriage she lived with her husband for about 1-1/2 year and as her husband used to quarrel and developed illicit connections she was forced to leave his house and live with her parents. She also stated that she was pregnant when she left for her parents house and delivered plaintiffs also produced the Voter List for the election held in the year 1972 in which the name of the plaintiffs find place and deceased Ramubabu has been shown to be the father and husband of the respondent No. 1 and 2 respectively which was never objected to by the deceased Ramu Danole who died in 1973. From this evidence on record it is clearly established that the deceased Housabai and deceased Ramu Danole were living as husband and wife raising a strong presumption that they were so married. There were hardly any cogent reasons for the appellate Court to disturb the well reasoned findings recorded by the Trial Court. Consequently the judgments of the appellants Court and the High Court deserve to be set aside.

9. However, inspite of all this, on our suggestion learned counsel for the appellant agreed for half share instead of 2/3rd share. We find it to be a just and proper, more so when the plaintiff appellant No. 2 Smt. Housabai is also dead. We, therefore, set aside the judgment and decree passed by the first appellate Court and the High Court and restore the judgment and decree passed by the Trial Court with the modification and the defendant-respondent No. 1 Jambu Ramu Danole would be entitled to half and half share in the suit property and the plaintiff-appellant would be entitled for separation of his half share in the property by partition and that the plaintiff and respondent both would be liable proportionately for the repayment of the debts due to respondent No. 3 No order as to costs.

JUDIS