

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT / CASE

DISTRICT : SONITPUR

COURT OF THE MUNSIFF NO. 1, TEZPUR, SONITPUR

PRESENT : Smt. G. Rabha

Mon Day, the 24th day of October / 2011

TITLE SUIT NO. 18 / 2007

1. Miss Rita Mushahary

Plaintiff(s) / Petitioner(s)

- VERSUS -

1. The Central Bank of India

2. Smt. Rinti Mushahary

Defendant(s) / Opp. Party

3. Sri Rimun Sagar Mushahary

This Suit coming on for final hearing on

(1) Give date or dates 21-06-2008, 21-02-2009, 14-09-2009, 18-12-2009, 27-07-2010 in the presence of

Sri J. Sundi

Plaintiff(s) / Petitioner(s)

Sri. D. Bose

Defendant(s) / Opp. Party

and having stood for consideration to this day the Court delivered the following Judgment :-

TITLE SUIT NO. 18/2007

JUDGMENT

I. In modern human relation it is a topic of debate as to whether “Marriage” is a civil contract or a purely religious contract or is it an association of the law of nature. The debate gets further complicated and intricated as, “Marriage” with the progress of time has evolved itself to an institution which consists of not only the two individuals but two families and society as well. The facts of this instant case depicts the turmoil where the lives of two families were jumbled up and entangled on the dispute of status of marriage

II. In this case the plaintiffs Rinti Mushahary had filed this suit for mandatory and permanent injunction against Central Bank of India and Rita Mushahary who are arrayed as defendants no.1 and 2.

III. The facts of the case as per plaint of the plaintiff:

1. The plaintiff pleaded in her pleadings that, the deceased Ripul Mushahary is her legally wedded husband and they had begotten a child from their wedlock. The plaintiff further stated that her husband Ripul Mushahary, expired on 19-1-03, in an accident at Kolomi bridge near Khelmati on the NH-52 under Chariduar outpost, Rangapara. The plaintiff further stated that at the time of his death he had left her and their son Rimun Sagar Musharay as his legal heirs. The plaintiff alleged that the family member of her husband wanted them to get convert to Catholic Christian and remarry as Catholic Christian, but they have refused to get convert and due to which the defendant is trying to deny her legal status as wife of Late Ripul Mushahary as revengeful exercise for not obliging with their demand to convert themselves to catholic Christians. Hence, she filed this suit praying for declaration for mandatory and permanent injunction against Central Bank of India and Rita

Mushahary restraining them from settling all the benefit of all the post-death benefits of Late Ripul Mushahary.

2. all the plaintiffs namely Nemshry Mushahary (mother), Rahila Mushahary, Sulekha Mushahary, Kamala Mushahary and Nila Mushahary had executed power of attorney in favour of Rita Mushahary, to do all that is necessary in the matter of rights after the death of deceased Ripul Mushahary. The plaintiff stated that the deceased Ripul Mushahary was their only brother, who was an employee of Central Bank of India, he expired on 18-1-03, in an accident at Kolomi bridge near Khelmati on the NH-52 under Chariduar outpost, Rangapara. The plaintiff further stated that at the time of his death he had left the above named plaintiff as his legal heirs and they were legally entitled for all the post-death benefits of Ripul Mushahary. The plaintiff submitted that during their correspondence with the head office of defendant no.1, they came to know that defendant no. 2 Rinti Mushahary, claims to be widow of deceased Ripul Mushahary and mother of one male child. That they had also applied for all the post- death benefits of Ripul Mushahary including job on compassionate ground. Aggrieved by the claims of the defendants, the plaintiff had filed this suit praying for the following reliefs.

- a. Declaration that the plaintiffs are the legal heirs and successors of the deceased Ripul Mushahary.
- b. Declaration that the plaintiff and her mother and the unwedded sister are entitled to a decree for final settlement of dues accrued at the death of Ripul Mushahary @ Moshahary.
- c. Permanent injunction
- d. Other reliefs.

IV. Defendant's case as per his written statement:

3). The defendant appeared and raised objection by filling written statement inter alia stating that this suit is not maintainable in its present form. The defendant stated that the averments made in the plaint are totally false and baseless. That the defendant no-2 and 3 had already instituted Title Suit no 28/2006 against the plaintiff where the matter is directly and substantially in issue between the same parties. Hence this suit is barred under Sec 10 of the code of Civil Procedure. The defendant had further stated that all the plaintiff did not put their signature in the plaint as per procedure laid down in the Code and hence it is not maintainable in its present form. The defendant had put up their case that The defendant denied the allegation alleged in the plaint and submitted that this suit is liable to be dismissed with cost.

V. Considering the pleading of both sides this Court has framed the issues:

- 1. Whether the suit is maintainable?*
- 2. Whether the plaintiffs are the only legal heirs of the deceased Ripul Mushahary?*
- 3. Whether defendant no.2 is the legally married wife of the deceased Ripul Mushahary and the defendant no. 3 is the legitimate child of the deceased of Ripul Mushahary?*
- 4. Whether the plaintiffs are entitled to all the service benefits of late Ripul Mushahary?*
- 5. Whether the plaintiff is entitle for a decree as prayed for?*

VI. Plaintiff had examined two witnesses named PW.1 Rita Mushahari and PW-2 Kamala Mushahary, and exhibited the following documents.

Exhibit no.1 Photocopy of receipt of Rs. 71, 469/- issued by

Central Bank of India dated 12/12/02.

Exhibits no. 2 Photocopy of certificate issued by Circle Officer
Bongaigaon dated 22/08/03.

Exhibits no. 3 Photocopy of Succession certificate issued by
Smti. Nemshri Mushahary dated 16-6-04.

Exhibits no. 4 Photocopy of death certificate of Ripul Mushahary

Exhibits no. 5 Photocopy of letter sent to Nemshri Mushahary
issued by Central Bank of India dated 21-01-04

Exhibits no. 6 Photocopy of General Power of Attorney

VII. The defendant had examined herself as DW.1 Rinti Mushahary.
The defendant had submitted the following documents

Exhibits no. A Marriage certificate issued by Shri. Shri Kalia
Gukahai, Lakra .

Exhibits no. B Receipt issued by Shri. Shri Kalia Gukahai,
Lakra .

Exhibits no. C Marriage certificate issued by gaon burha and
Panchayat.

Exhibits no. D signature of guest who attended the marriage.

Exhibits no. E Letter written by plaintiff to Late Ripul
Mushahary.

Exhibits no. F Succession certificate issued by Gaon Burha .

Exhibits no. G Death certificate of Ripul Mushahary..

Exhibits H: Succession certificate issued by Hon'ble
Session Judge.

Exhibits no. I Death Certificate issued by Central Bank,
Lokhra Branch.

Exhibits no. J Joint Account pass book A/C no: 4815.

Exhibits no. K Birth certificate of her son issued by EMM
Hospital.

Exhibits no. L Rita Mushahary OBC certificate.

Exhibits no. M Forwarding letter of LTC written by Central
Bank, Lokhra, permitting Late Ripul Mushahary
for LTC.

Exhibits no. N Identity card of Ripul Mushahary.

VIII. DECISION, DISCUSSION AND REASONS THEREOF:

1. Taking into consideration of the pleadings and the averments of both parties, let us now discuss the issues accordingly.

Issue no.1 *whether the suit is maintainable in its present form?*

2. Three issues were raised challenging the maintainability of this suit.
 - a. Res Sub Judice
 - b. Jurisdiction
 - c. Power of Attorney.

Res Sub Judice

3. The defendant had pleaded in his written statement as well as in deposition that the suit is barred by Sec 10 of Code of Civil Procedure and submitted that they had already instituted Title Suit no 28/2006 against the plaintiff where the matter in issue is directly and substantially in issue between the same parties.
4. The object of Sec 10 (res sub judice) is to avoid the frivolous litigation and thus save the judicial system from the wastage of time and money of the State and of the litigant. It is a salutary provision and whenever applicable must be enforced. With such view when I went through the record of Title suit no: 28/ 2006 and the instant suit bearing number Title suit: 18/2007 , I have found that initially the defendants had filed their claim through counter claim in Title suit: 18/2007, but the then learned Munsiff no.1, Tezpur vide order dated 24-1 -2007 had opined that the counter claimant had added four new defendants, who were not parties in the main suit, hence he excluded

the counter claim from the written statement and suggested that a separate suit be filed. On the basis of the said order dated 24-1-2007, the plaintiff had filed this instant suit. This order has not been challenged before the revisional or appellate courts and has thus attained finality. This suit arises out of the above mentioned order passed by a court of law. Hence I am of considered opinion that the principle of res sub judice would not apply and I conclude that this suit is not barred by the principle embodied in Section 10 CPC.

Jurisdiction

5. The question of jurisdiction of this Court is definitely an important issue, since this Munsiff Court does not have appear to have the Jurisdiction for trial to declare a **marriage dissolved**, for the Family Court Act 1984 confers jurisdiction exclusively to the Family Court to adjudicate such dispute. Where Family Courts have not been established, the District Judge is conferred the jurisdiction. Similar is the mandate of the Indian Divorce Act and the Hindu Marriage Act. The more important point that needs to be noted is that there is a subtle but distinct difference between declaration that the marriage stands dissolved and declaration that marriage is nullity and void ab initio. In the instant suit, the plaintiff prayed for declaration that marriage is a nullity i.e. it never existed. I have minutely read and re-read Section 9 CPC and Section 34 Specific Relief Act and I hold that the instant suit is of “civil nature”. I must remind here that civil court would presume that it has jurisdiction and the burden is upon the defendant to show that the suit is either expressly or impliedly barred. The defendants have not shown anything material on this point. I therefore hold that there is no express or implied bar on taking of cognizance of the instant suit. Hence I find no reason to hold that the suit is not maintainable

Power of Attorney

6. Under Order III Rule 2 (a) of the Code of Civil Procedure , any person holding power of attorney , authorizing her to make and do such appearance, application and act on behalf of such parties , is legally accepted and recognized. The law has been settled by Hon'ble Supreme Court in Indusind Bhojwani case. In this instant case the plaintiff Rita Mushahary is not only authorised by power of attorney but she had also personal knowledge about the facts of the case. Hence, this case does not suffer from any legal infirmity.

Issue no. 2 and 3 Whether the plaintiffs are the only legal heirs of the deceased Ripul Mushahary? Whether defendant no.2 is the legally married wife of the deceased Ripul Mushahary and the defendant no. 3 is the legitimate child of the deceased of Ripul Mushahary?

7. Both these two issues are analogous and inter related, so they are taken up together for convenient of discussion.
8. The plaintiffs in her deposition as PW1 stated that the defendant no 2 Rinti Mushahary is not legally married wife of deceased Ripul Mushahary. She had challenged the legal validity of marriage on three ground, namely:
1. Deceased Ripul Mushahary was a Christian and he must perform the marriage with Rinti Mushahary or any other woman as per Indian Christian Marriage Act, 1872.
 2. The defendant no.2 belongs from Ahom community and she must have performed the marriage as per her customary rules or as per Sections 5 & 7 of Hindu Marriage Act.
 3. The deceased Ripul Mushahary had never converted himself to Hindu more so Satriya customs , so his marriage as per Namghar rule is not valid.
9. It is important to now read the deposition of the defendant. The defendant no.2 Rinti Mushahary had pleaded that she is the widow of

deceased Ripul Mushahary. She had deposed in her averment that Ripul Mushahary had got converted into Hindu and then they had solemnized their marriage on 6-3-2000 as per Satriya rites known as Namgharia . She had exhibited the Exhibits no. A which is marriage certificate issued by Shri. Shri Kalia Gukahai, Lakra . Exhibits no. B Receipt issued by Shri. Shri Kalia Gukahai, Lakra and Exhibits no. C Marriage certificate issued by gaon burha and Panchayat and Exhibits no. D signature of guest who attended the marriage have also been made part of her deposition in order to prove the marriage.

10. Considering the submission of both sides and evidence on record, I am of opinion that indeed Ext. A, B, C and D established the fact that there was ceremonial performance of namghar rules , but the question arise is whether the mere observation of certain ceremonial performance will give sanctity to a marriage. The answer is a emphatic “No”.
11. It has been strongly argued by learned counsel of plaintiff that the deceased Ripul Mushahary was Protestant Christian, so it was mandatory for him to solemnize his marriage as per Indian Christian Marriage Act.
12. Now even if for argument sake , we accept the marriage ceremony of Ripul Musharahay and Rinti Mushahary was duly performed in Namghar, the moot law point will arise , whether the ceremonial performance of marriage in Namghar is legally valid? To seek answer to this question, I have turned to Hindu Marriage Act. The expression “Hindu” in the Hindu Marriage Act 1955, also includes Shrimanta Shankar Dev Vaishnav religion by virtue of explanation contained in it. We know that the vaishnavism is one of the form of Hindu religion, so the marriage in Namghar will be registered under Hindu Marriage Act.
13. It is important to point out that Section 5 of Hindu Marriage Act, codified that at the time of solemnization of marriage both the parties should be Hindu. The language of Section 5 of the Act is very clear that it is mandatory that both the parties must be Hindu. Sec 5 of the Act which is enacted as,

“ A marriage may be solemnized between any two Hindus.....”

14. Thus it is mandatory under the Hindu marriage Act that both the parties should be Hindu at the time of solemnization of their marriage. There is no proof that Ripul had got converted to Hindu. So the fact remains that at the time of solemnization of the marriage between them, Ripul Mushahary continued to be Christian and Rinti Mushahary remained Hindu and continue to be Hindu.
15. The deceased Ripul Mushahary was Christian by birth and during his life time he remained a Christian and after his death his body was cremated as per Christian ceremony. DW-1 Rinti Mushahari had admitted in her cross examination that the last rites of deceased Ripul Mushahary was performed as per Christian religion, thus the claim of DW-1 that deceased Ripul Mushahary had got converted into Hindu has no force. Further DW-1 did not adduce any evidence to prove that deceased Ripul Mushahary had ever got converted into Hindu.
16. There is no dispute that except the Namghar rituals other forms of ceremonial performance were observed and/or followed to solemnize the marriage. Further it was also agreed that there was no representative of family members from either sides except the guest. Exhibits no. D signature of guest who attended the marriage, does not shows the presence of family member of both sides. The Rinti Mushahary is Hindu and she bound by her own customary marriage of Ahom community, but she did not explained why she did not follow her customary ceremony and opted for Shatriya ceremony. As discussed above and reiterated as per Hindu Marriage Act the marriage solemnized in the Namghar is not valid in the eye of law, since Ripul Mushahary was non-hindu.
17. Now, let us look at the marriage from the plaintiff side, I have perused Section 4 of the Act wherein it is laid down that it is mandatory to solemnize the marriage in accordance with the Indian Christian Act. According to the statute when one party is Christian and other party is non-Christian, the marriage must conform to the

provisions of Indian Christian Act. For purpose of clarity, Section 4 is re-produced here under:

Sec 4 Marriages to be solemnized according to Act.

Every marriage between persons, one or both of whom is [or are] a Christian or non Christians, shall be solemnized in accordance with the provisions of the Indian Christian Marriage Act, and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

18. What is thus crystal clear is that the mere observation of ceremonial performance will not give sanctity and legal recognition of marriage between two persons following different religions. In such circumstance, the marriage is to be ordinarily performed under the Special Marriage Act. When one of the party is a Christian, the parties can solemnize the marriage as per Indian Christian Act or under Special Marriage Act. Any other form of marriage would not be lawful.

19. Thus it is concluded that the marriage of Rinti Mushahary and deceased Ripul Mushahary is neither valid under Hindu Marriage Act nor under Indian Christian Marriage Act. It has also been noted that Rinti Mushahary and deceased Ripul Mushahary did not registered their marriage under Special Marriage Act 1954. Hence I conclude that in the eye of law Srimati Rinti Mushahray is not the legally wedded wife of Ripul Mushahary.

Entitlement of the child to the property of his father.

20. The last but surely not the least important matter involved is regarding the legitimacy and entitlement of the minor child Master Rimun Sagar Mushahary over the property of his deceased father. We have already concluded that the marriage of Rinti Mushahary and Ripul Mushahary is not lawful. It is however un-disputed that the minor child named above was born out of the long cohabitation of the deceased with the plaintiff. In that background, the issue of legitimacy or otherwise of the

child from the said long and continuous cohabitation require further discussion.

21. As we have already discussed that defendant no.2 Rinti Mushahary , mother of Master Rimun Sagar Mushahary is a Hindu. Now let us go through the relevant provision of the Hindu Marriage Act, 1955. The Hindu Marriage Act, 1955 is a beneficent legislation and, therefore, it has to be interpreted in such a manner as advances the object of the legislation. The Act intends to bring about social reforms. Conferment of social status of legitimacy on a group of innocent children, who are otherwise treated as bastards,

22. In the instant case we must remind ourselves that the mother of the minor child was a born Hindu and remains a Hindu. The father was born as a Christian and after his death he was cremated as per Christian Religion. There were pleadings that the father converted to Hinduism but the pleadings could not be substantiated by means of cogent evidence. What thus follows is that the minor child has a Hindu mother and a Christian father. So situated, the Hindu Marriage Act, the Hindu Succession Act and the Indian Succession Act have to be harmoniously construed while deciding the right or otherwise of the minor child. In that view of the matter, apposite it is to begin by reading Sub-sections (1) & (2) of Section 16 of the H.M Act which makes it clear that a child which is born out of a marriage which is null and void, is conferred with the status of legitimate child, though in normal circumstances such child would have been considered as an illegitimate child. Sub-section (1) of Section 16 of the Act, by means of a legal fiction thus makes a child, who is born out of a wed lock, which is null and void in law, as legitimate child. Once such a child is given the status of legitimacy, in Court's view, for all purposes including property rights, such a child should be considered on par with the child which is born out a wed lock which is valid in law and is not affected by any stigma. So is the spirit of Section 27 & 42 of the Indian Succession Act. The Hindu Succession Act also protects the rights over self earned property of the deceased father of such a child. Here I would be failing in my duty if I do not point out that the Constitution of India is the supreme law and it shall prevail over any other statute. The Constitution

guarantees equality to persons similarly situated. When the legislative enactments are read in the light of the Constitutional guarantee under Article 14, I become convinced that the minor child cannot be divested of his right to property for no fault of his own. He is not at fault for his parents not performing the marriage in accordance with law and he cannot be faulted for the act of his parents.

23. Therefore in any view of the matter, Master Rimun Mushahry is entitled to share in the self earned properties including pension rights of deceased Ripul Mushahry.

24. *Issue no. 4 and 5*

Whether the plaintiffs are entitled to all the service benefits of late Ripul Mushahary? Whether the plaintiff is entitled for a decree as prayed for?

In view of the detailed discussion in the issue no.1, 2 and 3 it is concluded that in the eye of law Srimati Rinti Mushahray is not the legally wedded wife of Ripul Mushahary. The minor child born out of long and continuous cohabitation is however entitled to rights over the self earned property of his father including share in the family pension. The defendant No.1 is directed to take into consideration the decision of this Court of law while disbursing the pension and other benefits. I clarify that defendant No.1 shall be governed by the relevant Pension Rules and must take into consideration the conclusions arrived at by this Court.

ORDER

1. The suit is decreed on contest without cost. No cost is being imposed because the plaintiff is a widow without any independent source of income.
2. The plaintiff is entitled to following reliefs.

- a. Declaration that Nemshry Mushahary (mother), Rita Mushahary, Rahila Mushahary, Sulekha Mushahary, Kamala Mushahary and Nila Mushahary (all are sisters of deceased Ripul Mushahary) and Rimun Sagar Mushahary are entitled to a decree for final settlement of dues accrued at the death of Ripul Mushahary @ Moshahary, Ex-Clerk under the branch Manager, Central Bank of India, Lokhra Branch, Balipara, district- Sonitpur, Assam.
 - i. Provident fund money.
 - ii. Leave salary
 - iii. Family pensionary benefit.
- b. Permanent injunction against Rinti Mushahary restraining her for getting any death benefit of Ripul Mushahary .
- c. Defendant no.1 is directed to settle all post death benefit of deceased Ripul Mushahary in favour of Nemshry Mushahary (mother), Rita Mushahary, Rahila Mushahary, Sulekha Mushahary, Kamala Mushahary and Nila Mushahary (all are sisters of deceased Ripul Mushahary) and Master Rimun Sagar Mushahary (son).

3. Prepare the decree

4. This Judgment and Order is given under the hand and seal of this Court on 24th Oct'2011.

Gitali Rabha,

Munsiff no.1