

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserve Date : 22-01-2016

Date of Decision : 29- 01-2016

CORAM :

THE HON'BLE DR.JUSTICE S.TAMILVANAN
AND
THE HON'BLE MR.JUSTICE G.CHOCKALINGAM

C.M.A.No.2535 of 2015

Jerry Garman @ Geraldine @ Jayalakshmi
..... Appellant/Respondent/Petitioner

vs

A.S.Sethuraman Respondent/Petitioner/Respondent

Civil Miscellaneous Appeal filed under Section 19 of the Family Court Act, seeking to set aside the order, dated 15.04.2015 passed in I.A.No.623 of 2010 in O.P.No.2490 of 2007 on the file of the III Additional Family Court, Chennai.

For Appellant : Ms.Geetha Ramaseshan

For Respondent : Mrs.K.Bhavatharini

J U D G M E N T

(Judgment of the Court was delivered by S.TAMILVANAN, J)

This Civil Miscellaneous Appeal has been preferred under Section 19 of the Family Court Act, seeking to set aside the order, dated 15.04.2015 passed in I.A.No.623 of 2010 in O.P.No.2490 of 2007 on the file of the III Additional Family Court, Chennai.

2. The appellant herein had filed the petition in O.P.No.2940 of 2007 under Section 10 (1) (x) of the Indian Divorce Act, seeking divorce, dissolving the marriage solemnized between the appellant and the respondent herein at Chennai on 17.08.1992. Pending the said Original Petition, the appellant herein, who was the respondent in the O.P.No.2940 of 2007, filed Interlocutory Application in I.A.No.623 of 2010, under Section 151 of Civil Procedure Code to dismiss the main petition in O.P.No.2940 of 2007 filed by the respondent herein on the ground that the marriage was solemnized, as per the Hindu rites and

customs, hence, the said Original Petition under Section 10 (1) (x) of Indian Divorce Act was not legally maintainable. The III Additional Family Court, by the impugned order, dated 15.04.2015 made in I.A.No.623 of 2010 in O.P.No.2940 of 2007 allowed the said Interlocutory Application in I.A.No.623 of 2010 in favour of the respondent herein, aggrieved by which, the appellant / wife has preferred this Civil Miscellaneous Appeal.

3. Ms.Geetha Ramaseshan, learned counsel appearing for the appellant contended that the trial Court has erred in holding a view that the marriage between parties to the CMA was solemnized as per the Hindu Rites and Customs, though the appellant had filed Ex.R.1, which would establish that her marriage was solemnized only as per Indian Christian Marriage Act and the respondent herein changed his name as A.S.Paul and got married the appellant herein. The appellant is an Anglo Indian, by birth she is a born Christian throughout in her life. However, the respondent had deliberately mislead the trial Court by claiming the appellant's as Jayalakshmi, as if she is a Hindu. According to the learned counsel for the appellant, she is a Christian, whose name is Jerry Garman @ Geraldine. The said name has also find a place in the cause title of the Original Petition (OP), which shows her name clearly as Jerry Garman @ Geraldine.

4. It is further contended by the learned counsel for the appellants that the trial Court failed to consider the legal position that under Section 5 of the Hindu Marriage Act, both parties to the marriage should be Hindus to be governed under the Hindu Marriage Act. Here in this case, the appellant was not a Hindu and she had never converted to Hinduism and there is no legally acceptable evidence produced on the side of the respondent herein to show that she had conversion from Christianity to Hinduism, however, the Court below has taken a wrong view and decided, as if the marriage was solemnized under Hindu Marriage Act.

5. Per contra, Mrs.Bhavatharini, learned counsel appearing for the respondent submitted that the trial Court, rightly held that the petition filed by the appellant, seeking divorce was not maintainable. Challenging the said order, the appellant herein had filed C.R.P.No.3230 of 2011 before this Court and when the said matter was taken up, this Court (R.S.Ramanathan, J) passed an order, dated 04.09.2012 that the Family Court should take up the preliminary issue and decide whether the petition filed by the respondent herein could be maintainable or not. Learned counsel further submitted that from 1986 the appellant and the respondent herein were living together and as the appellant had insisted, that to have the marriage solemnized in any one of the forms, the respondent got married the appellant as per the Hindu rites and customs, in the presence of his family members and relatives.

6. In this regard, we are of the view that, it is relevant to extract Section 5 of Hindu Marriage Act, 1955, which reads as follows :

"Conditions for a Hindu marriage - A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely -

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party -

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity.

(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

7. In support of the contention, the learned counsel appearing for the appellant relied on the following decisions :

1. Jacintha Kamath v. K.Padmanabha Kamath, AIR 1992 Karnataka 372

2. S.Anbalagan v. B.Devaraja, AIR 1984 SC 411

8. In Jacintha Kamath vs. K.Padmanabha Kamath, reported in AIR 1991 Karnataka 372, the High Court of Karnataka has held as follows :

Hindu marriage if it is to be solemnised under Section 5 of the Hindu Marriage Act, both the parties to such marriage must be Hindus. As seen from sub-sec (3) of Section 2, a person though not a Hindu by religion has to be regarded as Hindu and the Act applies to him because of sub-sections (1) and (2) of Section 2 thereof. However, Hindu marriage could be solemnised in accordance with the customary rights and ceremonies of either party thereto as it envisaged in Section 7 of the Act.

9. In *Vermani v. Vermani*, reported in AIR 1943 Lah 51, a Full Bench of the Lahore High Court following the decision of this Court, reported in AIR 1940 Mad 513, held that it was not necessary for a Hindu convert to Christianity to undergo any expiatory ceremonies before he could revert to his original religion. His conduct and the circumstance that he was received by his community, were sufficient to establish his reversion to Hinduism.

10. In *Perumal Nadar v. Ponnuswami*, reported in AIR 1971 SC 2352, a question arose whether Annapazham, daughter of an Indian Christian and herself a Christian by birth could be converted to Hinduism without the performance of any expiatory ceremonies. The Hon'ble Apex Court held that formal ceremony of purification or expiation was unnecessary. It was further observed thus :

"A person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But a bonafide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion."

11. Learned counsel for the appellant further contended that merely because the parties had arranged a Hindu form of marriage as a ceremony just to satisfy the elders of the family, it would not ipso facto attract the provisions of the Hindu Marriage Act, when the appellant is not a Hindu. It is further categorically proved by public records, that her marriage was solemnized only under Christian Law, hence, Indian Divorce Act is applicable and not the provisions of Hindu Marriage Act.

12. It is made clear from the evidence that the respondent herein has admitted in his deposition that the appellant / petitioner was a Christian, even during her marriage with the respondent herein. The respondent in his cross-examination has further admitted that she had not converted from Christianity to Hinduism. A small album containing 8 photos produced by the respondent do not indicate the date on which the Hindu marriage ceremony was performed and further, the negatives of the photos were not produced by the respondent.

13. Ms.Geetha Ramaseshan, learned counsel appearing for the appellant drew the attention of this court to the deposition of the respondent, who was examined as R.W.1 before the Court below, on 06.01.2015 in O.P.No.2940 of 2007. As per the deposition recorded by the learned Family Judge, he has stated that the petitioner in the O.P, who is the appellant herein was only a Christian, on the date of the marriage and she had not converted to Hinduism.

14. According to the respondent, the marriage between himself and the appellant had taken place on 17.08.1992. Document No.1 is the copy of the Certificate of Marriage. As per this document, the marriage was solemnized between the appellant and the respondent on 17.08.1992 at the Tamil Nadu Christian Marriage Registrar Office, Tambaram, Madras-45. The original certificate issued by the Government of Tamil Nadu, Registration Department in S.No.350 / 2011, M.No.65/1992 shows that the marriage had taken place on 17.08.1992. The name of the parties is stated as A.S.Paul and Jerry Garmen, Christian, and the surname of A.S.Paul is Sethuraman. It is an authenticated certificate issued by the Government of Tamil Nadu, Registration Department, whereby the marriage has been solemnized at Christian Marriage Registration Office, Tambaram, Madras-45. The album containing 8 photos relating to the alleged marriage ceremony, said to have been taken place between the appellant and the respondent, was produced by the respondent, however, the said photos were not marked through the photographer, who took the photos along with negatives. It is well settled that unless the photos are marked with negatives through a competent witness, the same could not be taken for consideration and further, the said photos would not be an acceptable proof for the date of marriage. The respondent herein, who was examined as R.W.1 himself has admitted in his deposition recorded on 06.01.2015, that the appellant was only a Christian, even on the date of marriage and she had not converted to Hinduism and further, the original marriage certificate issued by the Government of Tamil Nadu shows that on 17.08.1992 the marriage between the appellant and the respondent was solemnized only under the Christian Marriage Act. The aforesaid factum cannot be impeached by producing certain photos or album, showing the ceremony of marriage as per Hindu rites and customs.

15. It is argued by Mrs.K.Bhavatharani, learned counsel appearing for the respondent that the appellant herself filed an affidavit on 12.02.1996, stating that her marriage was celebrated with the respondent, according to Hindu Rites and Customs. We are of the considered view that the affidavit would not nullify the documentary evidence of the original marriage registration certificate issued by the Government of Tamil Nadu, as the defence raised by the appellant is that the same was signed by her only at the instance of the respondent, being her husband.

16. In view of the admission of the respondent that the appellant was a Christian, even on the date of marriage and she had not converted to Hinduism in the deposition made by him, he is estopped from raising a plea, which is contrary to his deposition. However, the Court below has not considered the said vital aspect. When there is a dispute, based on a question of fact, the Court below should not have mechanically held that the original petition filed by the appellant herein was maintainable.

17. In the instant case, apart from the vital document, Marriage Certificate issued by the Government and the admission made by the respondent as R.W.1, by way of his deposition, it has been made clear that the appellant was only a Christian, on the date of their marriage. It is not the case of the respondent that the respondent could marry a Christian under the Hindu Marriage Act, hence, Mrs.K.Bhavatharani, learned counsel appearing for the respondent has not raised such a plea. The marriage could not have been taken place between the respondent and the appellant, who is a Christian, without conversion to Hinduism, to be solemnized, as per Section 5 of the Hindu Marriage Act. On the other hand, such a marriage could be possible, if one party is a Christian, as per the provisions of Christian Marriage Act.

18. It is clear that the marriage took place as per Christian Marriage Act and hence, it could not be dissolved as per provisions of Section 5 of Hindu Marriages Act. It is crystal clear that for the marriage to be solemnized as per Hindu Marriage Act, both should be Hindus. In this case, it is clear that the appellant is a Christian and she has not converted to Hinduism. On the aforesaid circumstances, it is legally clear that the marriage was solemnized only under Christian Marriage Act. But, without considering it properly the Court below has passed the impugned order, which is against law and accordingly, the order of the trial Court, dated 15.04.2015 passed in I.A.No.623 of 2010 in O.P.No.2940 of 2007 is liable to be set aside.

In the result, this Civil Miscellaneous Appeal is allowed and the order, dated 15.04.2015 made in I.A.No.623 of 2010 in O.P.No.2940 of 2007 on the file of the III Additional Family Court, Chennai is set aside. The Court below is directed to restore the O.P.No.2940 of 2007 on file and the dispose the same at an early date, preferably within a period of six months from the date of receipt of a copy of this order.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

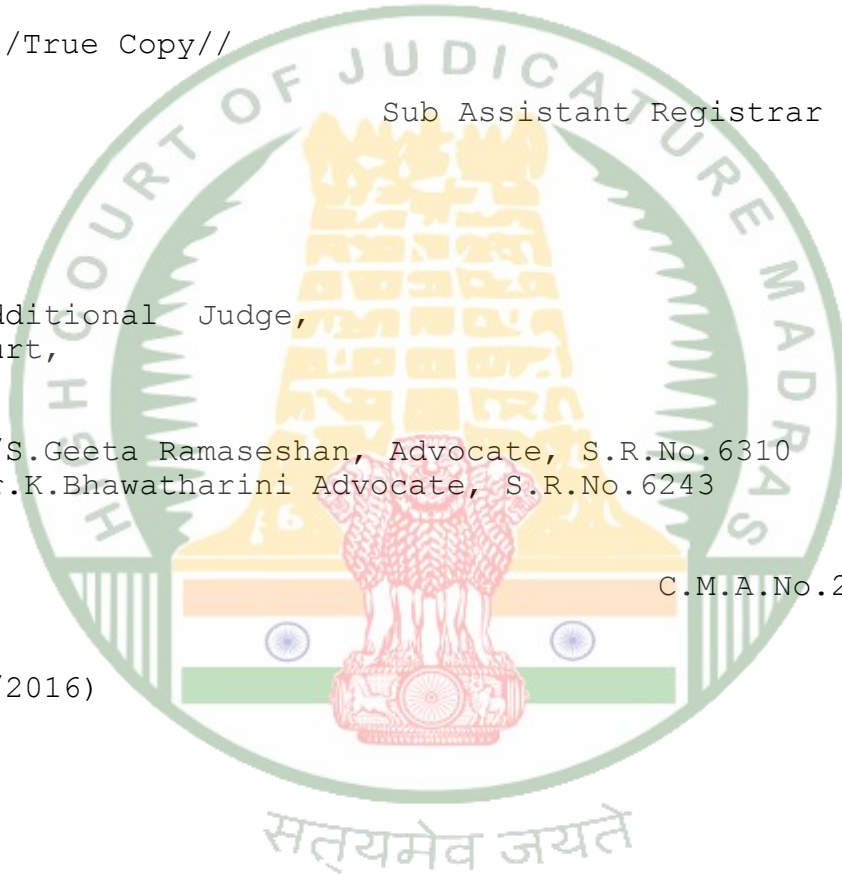
The III Additional Judge,
Family Court,
Chennai.

+1cc to M/S.Geeta Ramaseshan, Advocate, S.R.No.6310

+1cc to Mr.K.Bhawatharini Advocate, S.R.No.6243

C.M.A.No.2535 of 2015

svi(CO)
srg(27/02/2016)



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