

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.09.2016
PRONOUNCED ON : 26.10.2016

CORAM:

THE HONOURABLE MR. JUSTICE HULUVADI G. RAMESH
AND
THE HONOURABLE MR. JUSTICE S. VAIDYANATHAN

Writ Appeal No.715 of 2015

1. S.Basheria
 2. Y.Sabira Banu
 3. Ruby Fathima
 4. Y.Kalesha
- ... Appellants

vs.

1. The State of Tamil Nadu,
rep. By its Secretary,
Home Department,
Fort St. George,
Secretariat, Chennai 600 009.
2. Dr.Salahuddin Mohamed Ayub
Government Chief Kazi,
Office of the Chief Kazi
To the Government of Tamil Nadu,
Madarasa-I-Muhamadi
Dewan Sahib Garden Street,
No.323, T.T.K. Road,
Royapettah, Chennai 600 014.
3. T.C.A.Mohamed Yusuf
Beef Merchant
Mettu Street, Rajiv Gandhi Nagar,
Krumburai, Salawakkam,
Chenglepet 603 107.
4. The Commissioner of Police,
Office of the Commissioner of Police,
E.V.K. Sampath Salai,
Near Dhina Thanthi Office,
Vepery, Chennai 600 007.

5. The Assistant Commissioner of Police,
Ambattur Police Station,
Ambattur, Chennai 600 053.
6. The Inspector of Police,
Ambattur Police Station,
Ambattur, Chennai 600 053. ... Respondents/Respondents

Writ Appeal filed under Clause 15 of Letters Patent against the order dated 12.10.2012 passed by the learned Single Judge in W.P.No.3151 of 2007. to issue a writ of cartiorarified mandamus or any other appropriate writ, order, or direction in the nature of certiorarified mandamus to call for the records of the 2nd respondent in khulanama dated 9.6.2006 certified by the 2nd respondent in C.K.06 dt.27.7.2016 to quash the same and consequently direct the respondents/to 6 to pay a sure of Rs.7,00,000/- (Rupees Seven lakhs only jointly and sever ally by way of damages to the petitioners 1 to 4.

For Appellant : Mr.M.N.S.Mohamed Habeeb Raja
For R1, R4 to R6 : Mr.P.S.Sivashanmugasundaram,
Special Government Pleader
For R2 : Mr.R.Abdul Mubeen
For R3 : No appearance

J U D G M E N T

S.VAIDYANATHAN, J.

Being aggrieved by the order dated 12.10.2012 passed by the learned Single Judge in W.P.No.3151 of 2007, the writ petitioners have come up with this appeal.

2. Brief facts leading to the filing of this Appeal, are, as under:

2.1. The first appellant viz. S.Basheria is the wife of one T.C.A.Mohamed Yusuff, the 3rd respondent herein. The 2nd and 3rd appellants are her daughters and the 4th appellant is her son. The 1st appellant got married with the 3rd respondent herein, a Beef Merchant, on 20.08.1987 as per Islamic customary rites and practice and the marriage was duly recorded in the Nikkah Register of Padi Jumma Masjid. During the initial stage of her married life, she was residing with the 3rd respondent at his native place and subsequently, she shifted her matrimonial residence to Mannurpet, Chennai.

2.2. According to the 1st appellant, the 3rd respondent did not have any regular income and took to drinking. Though the father of the 1st appellant gave a sum of Rs.1,00,000/- to the 3rd respondent to commence an individual business, he did not run the business successfully. While so, the 3rd respondent expressed his desire to go to his native place at Velambur in Cheyyar Taluk to meet his parents. Though he promised to come back soon, he did not come back and the 1st appellant came to know subsequently that the 3rd respondent had married another woman at his native place and living with her separately.

2.3. Thereafter, when the 1st appellant enquired with the local people, she came to know that the 3rd respondent had obtained an authoritative verdict/Fatwa from the 2nd respondent/Government Chief Kazi, dissolving her marriage with the 3rd respondent by way of showing a Kulanama dated 09.06.2006 alleged to have been written by the 1st appellant. And, only on the basis of the same, the local Jammath people permitted the 3rd respondent to marry another Muslim woman.

2.4. According to the 1st appellant, she had not opted to get divorce from the 3rd respondent and that the letter dated 09.06.2006 alleged to have been signed by her is a forged one. Though the 1st appellant sent a representation to the 2nd respondent on 27.07.2006 asking to intervene on the same, the 2nd respondent informed that he gave his opinion based on the letter of the 3rd respondent and the Khula given by her.

3. When the appellants herein approached this Court in W.P.No.3151 of 2007 seeking to call for the records of the 2nd respondent in the Khulanama dated 09.06.2006 certified by the 2nd respondent on 27.07.2006 and for a consequential direction to respondents 1 to 6 to pay them a sum of Rs.7,00,000/- as damages, this Court dismissed the said Writ Petition, holding as under:

'19. In the present case, while the petitioner sought to challenge the 'Khula' produced by the third respondent with an endorsement of the second respondent agreeing with the same, that by itself will not give any cause of action. Since the allegation made by the petitioner against the third respondent is one of forgery and that issue is pending consideration before the appropriate Criminal Court. As per the charge sheet produced, the second respondent has not been made as a party

and if the petitioner thinks that the second respondent has connived with the third respondent, she can move the learned Magistrate for conducting a further investigation to pinpoint the role of the second respondent. At this stage, seeking for a document which was countersigned by the second respondent to be set aside by this Court will not arise. The documents gathered by the investigation officer are to be put before the Trial Court and should await its assessment. Thereafter, it is always open to the petitioner to seek appropriate compensation against her own husband namely the third respondent or if the petitioner still insists that the second respondent being a statutory authority failed to discharge his duties or that he connived with the third respondent in countersigning the 'Khulanama', such course of action will have to wait the outcome of the trial before the criminal court. The decisions relied on by the petitioner do not support that even before the criminal investigation and trial is complete, the court can order compensation. The decisions cited by the petitioner are all cases where a person was made to suffer illegal incarceration or torture at the hands of the Police authorities and such is not the case herein. Therefore, pending trial, this Court is not inclined to entertain the writ petition. The rights of the petitioner are relegated to be renewed after the conclusion of the criminal trial. At this stage the writ petition is premature and no relief can be given to the petitioner."

4. According to the learned counsel for the appellants, the learned Single Judge failed to take note of the life of the appellants, who have been stranded by the act of the 3rd respondent. He contended that the Khulanama dated 09.06.2006 is a forged one and by virtue of the Certificate issued by the 2nd respondent on 27.06.2006, the appellants are deprived of their rights. It is his further contention that the 2nd respondent/Government Chief Kazi ought to have conducted enquiry and solved the issue. He also submitted that only after exhausting the other remedies, the appellants have invoked Article 226 of the Constitution of India, seeking to revoke the order of the Chief Kazi.

5. In reply, learned Special Government Pleader submitted

that as per Muslim Law, the Khulanama is valid, if it contains proposal and acceptance from the wife and the husband, respectively and that the 2nd respondent is not a competent person to declare the Khulanama dated 09.06.2006 as valid or forged.

6. Heard the learned counsel for the parties and gone through the material documents available on record.

7. It is evident from the counter filed by the 2nd respondent/Chief Kazi, that he gave a letter to the 1st appellant on 27.07.2006 confirming that the alleged authoritative Fatwa dated 09.06.2006 is only an opinion based on the document placed before him and that it is neither a Certificate nor a final verdict. It is his further submission that if the Khulanama, dated 09.06.2006 contains manifestly noticeable incongruities, then the 1st appellant is not prevented from declaring the same as null and void before the appropriate authority.

8. It is also pertinent to note that the 2nd respondent/Chief Kazi, in paragraph 6 of the counter has clearly stated that in the purview of the Kazis Act, he has no authority to give any such verdict or declaration that the matrimonial status of the parties is dissolved.

9. It is submitted by the learned counsel appearing for the 2nd respondent/Chief Kazi, that a Kazi can only solemnize a marriage and has no right to dissolve it.

10. In such a background, for better appreciation of the case, Section 2 of the Dissolution of Muslim Marriages Act, 1939 is extracted hereunder:

"2. Grounds for decree for dissolution of marriage: A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say, (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or (b) associates with women of evil repute or leads an infamous life, or (c) attempts to force her to lead an immoral life, or (d) disposes of her property or prevents her exercising her legal rights over it, or (e) obstructs her in the observance of her religious profession or practice, or (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that (a) no decree shall be passed on ground (iii) until the sentence has become final; (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfied the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and (c) before passing a decree on ground (v) the Court

shall, on application by the husband, made an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

11. According to the 1st appellant, the learned Single Judge ought to have set aside the impugned order and ought not have held that the rights of the appellants are relegated to be renewed after the conclusion of the criminal trial.

12. Also, for the sake of convenience, Section 4 of the Kazis Act, 1880 is extracted hereunder:

"4. Nothing in Act to confer judicial or administrative powers; or to render the presence of Kazi necessary; or to prevent any one acting as Kazi: Nothing herein contained, and no appointment made hereunder, shall be deemed -

(a) to confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder; or

(b) to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony; or

(c) to prevent any person discharging any of the functions of a Kazi."

13. For the very allegations made by the appellants/writ petitioners, criminal proceedings have already been initiated and the same are pending before the Criminal Court. The veracity or otherwise of the allegations can be gone into by the Criminal Court after following the due process of law. The fact also remains that the criminal proceedings and the claim with regard to the relief sought in the Writ Petition are independent of each other. The allegations made by the appellants/writ petitioners are disputed questions of fact. It is well settled that the disputed questions of fact cannot be gone into by this Court under Article 226 of the Constitution of India. The writ Court is concerned only with the questions of law, but not the questions of fact. The disputed questions of facts have to be dealt with only by the appropriate forum or the Court or the

authority, as the case may be and not by this Court. Hence, in our considered opinion, the Writ Petition was not maintainable, as the appellants have to work out their remedy only before the appropriate forum or authority under the appropriate law. The learned Single Judge has dealt with the matter in detail and rightly come to the conclusion, dismissing the Writ Petition. Therefore, we do not find any infirmity with the order passed by the learned Single Judge.

14. Accordingly, the Writ Appeal is dismissed. We make it clear that the dismissal of this Writ Appeal will not come in the way of the Criminal Court or any other forum or authority in deciding the matter before it, independently on merits and in accordance with law. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To:

1. The Secretary,
State of Tamil Nadu,
Home Department,
Fort St. George,
Secretariat, Chennai 600 009.
2. The Commissioner of Police,
Office of the Commissioner of Police,
E.V.K. Sampath Salai,
Near Dhina Thanthi Office,
Vepery, Chennai 600 007.
3. The Assistant Commissioner of Police,
Ambattur Police Station,
Ambattur, Chennai 600 053.

4. The Inspector of Police,
Ambattur Police Station,
Ambattur, Chennai 600 053.

+2cc to Mr.R. Abdul Mabeen, Advocate, S.R.No.61434

+2cc to Mr.M.N.S. Mohamed Hobeab Raja, Advocate, S.R.No.61645

pvs (CO)

md (18/11/2016)

W.A.No.715 of 2015



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