

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.04.2016

CORAM

THE HONOURABLE Mr. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) No.1082 of 2016
and C.M.P.No.5990 of 2016

N.Vinutha

... Petitioner

vs.

M.Ezhilan

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order passed by the II Additional Principal Family Court, Chennai in I.A.No.89 of 2014 in O.P.No.366 of 2005 pending disposal of the Civil Revision Petition.

For Petitioner : Mr.M.Mohanasundaram

For Respondent : Mr.M.Vivekanandan

ORDER

This matter stands listed today for admission.

2. The respondent has entered appearance through a counsel and in fact he has filed a caveat. The counsel has taken notice on behalf of the respondent. Learned counsel for the respondent submits that the respondent is prepared to submit his arguments for the

disposal of the Civil Revision Petition on merits at the stage of admission itself. Hence, this Court heard the arguments advanced by Mr.M.Mohanasundaram, learned counsel for the petitioner and by Mr.M.Vivekanandan, learned counsel for the respondent. The certified copy of the impugned order and the copies of the other documents produced in the form of typed set of papers are also perused.

3. The respondent herein has filed O.P.No.366 of 2005, which is now pending on the file of II Additional Principal Judge, Family Court, Chennai, for the relief of a declaration that the marriage between him and the petitioner herein that took place on 10.09.2004 at Sri Sathya Kalayana Mandapam, No.1A, White Field, Madhadevapuram, Bangalore is null and void. The said prayer came to be made on the basis of his contention that at the time of the said marriage, the revision petitioner was the wife of another person by name R.Jaikumar and the said marriage was legally subsisting.

4. The O.P is being resisted by the revision petitioner denying the contention that she was married to the said Jaikumar. Of course, it is true that the respondent herein went to the extent of denying the paternity of the child born to the revision petitioner herein, which

forced her to take proceedings before the Court below for conducting DNA test to ascertain the paternity of the child of the revision petitioner and that by the said test, the respondent was proved to be the biological father of the child and the denial made by the respondent in this regard was frivolous and untenable. The establishment of the paternity of the child negatives the chance of rebutting the presumption of legitimacy. The child's status shall be legitimate, even in case the marriage between the petitioner and the respondent which took place on 10.09.2004 is held to be null and void. Therefore, the issue relating to the paternity or legitimacy of the child does not arise for consideration, after the establishment of the paternity by the DNA test.

5. The only question that arises for consideration in the O.P. before the trial Court is, "whether the marriage is null and void as contended by the respondent herein on the premise that one of the conditions, namely, the condition found in Section 5(i) of the Hindu Marriage Act, 1955 was violated can be sustained? The consequent question shall be whether the marriage between the respondent and the petitioner is valid as contended by the revision petitioner or invalid as contended by the respondent herein?.

6. In this regard, after filing of the O.P. before the trial Court concerned in the Civil Revision Petition and after notice was served, the revision petitioner herein, who is the respondent in the O.P, chose to file a suit on the file of the I Additional Principal Judge, Family Court, Bangalore as O.S.No.77 of 2005 for a declaration that the memorandum of marriage registered before the Sub-Registrar, Shivaji Nagar, Bangalore and the certificate of registration of marriage issued by the said authority are null and void and for an injunction restraining the defendant therein, namely, P.Jaikumar from interfering with the personal affairs of the revision petitioner herein and from claiming to be her husband. The said suit was left undefended by the defendant therein and the same resulted in an *ex-parte* judgment and decree dated 18.08.2006. In fact, the certified copy of the said judgment has been obtained by the respondent herein and marked as an exhibit on his side in the O.P concerned in this Civil Revision Petition.

7. At that juncture, the revision petitioner herein filed I.A.No.89 of 2014 purportedly under Section 41 of the Evidence Act, 1872 read with 151 C.P.C with the following prayer:

"For the reasons stated in the accompanying affidavit, it is therefore prayed that this Hon'ble Court may be pleased to take into consideration the facts

stated above and grant an order declaring that the said judgment and decree passed by the I Additional Principal Judge, Family Court, Bangalore in O.S.No.77 of 2005, pertaining to the status of the respondent is relevant and binding on the petitioner in the proceedings in F.C.O.P.No.366 of 2005 pending on the file of this Hon'ble Court, Chennai and consequently direct the parties to act on the judicial order pending disposal of the F.C.O.P.No.366 of 2005."

8. The said application was opposed by the respondent herein contending that the said *ex-parte* judgment and decree came to be obtained behind the back of the respondent herein and it has no evidentiary value since it is also a product of an abuse of process of Court. The learned II Additional Principal Judge, Family Court, Chennai, after hearing both sides, passed the impugned order dated 20.02.2016 dismissing the said petition without costs, holding that the said judgment was not a judgment in *rem*, but it was a judgment in *personam* and that hence, the petition was not maintainable. It is as against the said order, the present Civil Revision Petition came to be filed.

9. It is an admitted fact that the marriage between the revision petitioner and the respondent took place on 10.09.2004 at Sri

Sathya Kalayana Mandapam, No.1A, White Field, Madhadevapuram, Bangalore in accordance with the provisions of the Hindu Marriage Act, 1955. It has also been established that a child was born to them out of their cohabitation pursuant to the said marriage. However, the respondent has chosen to challenge the validity of the marriage on the ground that at the time of their marriage, the revision petitioner had a spouse living and hence the marriage was null and void. The respondent relies on a marriage certificate issued by the Sub Registrar, Shivaji Nagar, Bangalore to the effect that the petitioner in the revision petition was married to one Jaikumar on 04.03.2001. Before ever she received notice in O.P.No.366 of 2005 filed by the respondent herein for a declaration that her marriage with the respondent is null and void, the revision petitioner did not take steps to have the registration of the alleged marriage with Jaikumar either declared null and void or the certificate of marriage declared null and void. Only after receiving notice, she chose to file O.S.No.77 of 2005 before the I Additional Principal Judge, Family Court, Bangalore. While doing so, the revision petitioner could have made the respondent herein a party to the said proceeding, since he will be a person equally affected by the result of the said proceeding initiated by the revision petitioner before the I Additional Principal Judge, Family Court, Bangalore. For the reasons

best known to the revision petitioner, she omitted to make the respondent herein a party to the said suit and obtain an *ex-parte* judgment and decree *ex-parte*, since the sole defendant therein did not contest the case and remained *ex-parte*.

10. Normally, the judgment and decree passed in matrimonial suits shall be considered to be judgments in *rem*, but, when the validity of the marriage is the main issue in another suit regarding the validity or otherwise of the subsequent marriage, then the opposite party in the other suit shall be a necessary party in the suit filed for a declaration of the marital status.

11. No doubt, Section 41 of the Indian Evidence Act, 1872 makes a judgment in a matrimonial cause relevant in other proceedings. But simply because it is made relevant and admissible, it does not mean that in all circumstances, judgment and decree will be binding on the other Court dealing with the other case filed by a person, who was not a party in the matrimonial suit. Even the principle of *res judicata* cannot be applied because the *lis* is not between the same parties.

12. In fact, a certified copy of the very judgment has been produced as an exhibit by the respondent on his side. As such there cannot be any controversy over the admissibility or relevancy of the said judgment in the present case, but what remains to be construed is the evidentiary value to be attached to the said judgment. If at all the petitioner in the revision wanted to rely on the decree as a document on her side and stopped with that, the petitioner cannot be found fault with. On the other hand, the revision petitioner wanted the Court below to hold that the judgment pronounced and the decree granted in O.S.No.77 of 2005 on the file of the Additional Principal Judge, Family Court, Bangalore gives finality to the issue involved in the present O.P and the same is binding on the respondent herein. The said part of the prayer cannot be sustained and the trial Court's order dismissing the petition on that ground cannot be found fault with. On the other hand, the trial Court has gone further to make an observation on the merits of the case to the effect that the judgment was not in *rem* and it was only a judgment in *personam*.

13. This Court is not in a position to approve the above said observation made by the trial Court. However, the final order dismissing the application can be sustained on the ground that the

document sought to be produced has already been produced by the opposite party. While, upholding the final order of the trial Court dismissing I.A.No.89 of 2014, this Court wants to clarify that the revision petitioner, who is the respondent in the OP, can be permitted to produce the certified copies of the judgment and decree in O.S.No.366 of 2005 as a piece of evidence on her side, leaving the decision relating the evidentiary value of those documents to be considered at the time of pronouncement of judgment.

14. Accordingly, the revision is dismissed with the above said observation and with a further direction that while considering such evidence, the trial Court should not be carried away by any of the observations made in the order passed in I.A.No.89 of 2014. No costs. Consequently, the connected miscellaneous petition is closed.

01.04.2016

Index: Yes/No

Internet: yes/No

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To

The II Additional Principal Family Court,
Chennai

P.R.SHIVAKUMAR.J

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