

HON'BLE SRI JUSTICE C.PRAVEEN KUMAR
AND
HON'BLE SMT JUSTICE T.RAJANI

CIVIL MISCELLANEOUS APPEAL No.393 of 2006

JUDGMENT: (Per the Hon'ble Smt Justice T. Rajani)

This appeal is filed by the appellant, who is the petitioner in the court below, assailing the judgment, dated 10.03.2006, passed by the Principal Senior Civil Judge, Chittoor, in O.P.No.106 of 2002. The petition was filed under Section 11 of the Hindu Marriage Act, 1955 (for brevity, "the Act") seeking to declare the marriage between the petitioner and the respondent as null and void.

2. The material averments of the petition are as follows:

The petitioner and the respondent got married on 09.09.1992 as per Hindu rights and customs. The respondent approached the petitioner while he was in service as Lt. Colonel Officer in Indian Army, Hyderabad, and expressed his consent for marrying the petitioner. The petitioner initially refused the proposal on the ground that he is already married and his wife is living. However, on the assurance from the first wife and her children, that there will be no interference with the petitioner's marriage, the petitioner agreed to marry the respondent. In the year 1998, an oral partition was held in between the petitioner and the younger sister and mother, but the cist receipts in respect of the properties stand in the name of the mother of the petitioner. The respondent and his first wife demanded the petitioner to part with some properties.

They exercised coercion and undue influence on her and obtained an unregistered Will, in favour of the elder son of the respondent through his 1st wife, with a stipulation that the property should go to Sekhar Reddy after the death of the petitioner. Thereafter, the respondent and his family members subjected the petitioner to mental cruelty. She filed a representation before the District Collector and the Sub-Inspector of Police, Chittoor, to provide protection to her life. They enquired into the matter and issued instructions to the respondent not to harass the petitioner. The marriage between the petitioner and the respondent is an illegal marriage and hence, the petition, seeking to declare it as null and void.

The respondent filed counter admitting the marriage and denying the allegations pertaining to the harassment. It was further contended that the first marriage of the petitioner was dissolved by way of a customary divorce. The elders held that the respondent can marry again and that the 1st respondent has no right against the respondent. The same was reduced into writing on 25.07.1991. It is the recognised custom in their community. Since then the respondent has been living separately from his first wife. Hence, he contends that the marriage between himself and the petitioner is a legal marriage and opposed the petition.

The lower court, after considering the rival pleadings, framed the following points for consideration:

1. Whether Sections 11 and 5(1) of the Hindu Marriage Act of 1955 has no operation to the divorce petition under consideration as the 1st marriage of the

respondent was duly dissolved as per the customary divorce of the respondent in his community?

2. Whether this court has no jurisdiction to try the case?
3. Whether the petitioner is entitled for divorce?
4. To what relief?

During trial, the petitioner got herself examined as PW1 and got marked Exs.A1 to A12. On behalf of the respondent, RWs.1 to 3 and Exs.B1 to B12 were marked. The court below after considering the evidence, passed the impugned order dismissing the OP.

3. Against the said order, this appeal is preferred on the followings grounds:

i) The court below should have recorded its findings in favour of the appellant.

ii) The court below erred in finding that the custom prevalent is in the community of the parties, for obtaining divorce.

iii) The court below failed to appreciate that the respondent did not prove the existence of such a custom.

iv) The court below should have seen that in terms of Section 4 of the Act, it was not open to the respondent to plead custom, enabling him to divorce his first wife.

v) The court below was not correct in holding that Section 29(2) of the Hindu Marriage Act recognises custom in any caste and confers the right to obtain dissolution of Hindu Marriage.

vi) The court below erred in placing reliance on Ex.B1, without considering that it was a fabricated document brought into existence at a belated stage of proceedings.

vii) The court below was not justified in observing that Kastoori, the sister of the petitioner, also obtained customary divorce, especially when the evidence is not that her previous husband belongs to Palle Reddy Caste.

viii) The court below erred in observing that the mother of the appellant had taken customary divorce from her first husband.

Based on the above grounds, the appellant seeks to set aside the judgment of the court below.

4. Heard Sri P.V.Vidya Sagar, learned counsel for the appellant, and Sri M.N.Narasimha Redy, learned counsel for the respondent.

5. The counsel for the appellant bases his argument mainly on the contention that the existence of customary divorce is not proved by the respondent and hence, for all purposes, it has to be considered that the marriage between himself and his first wife is subsisting and in such circumstances, the marriage between the respondent and this petitioner has to be declared as null and void, as it is in contravention of Section 5(1) of the Act, where neither party should have a spouse living at the time of marriage. Learned counsel further contends that the respondent failed to prove that there was a custom of obtaining divorce before the elders without approaching the court of law.

6. The counsel for the respondent, on the other hand, contends that from the evidence of PW1, the court below adopted the reasonable approach of inference that there was customary divorce in the community to which the parties belong and hence, the marriage between the petitioner and the respondent is contended to be valid.

7. From the above rival contentions, the following points fall for our consideration:

1. Whether there is a custom of obtaining divorce before the elders, in the community to which the parties belong.
2. Whether the order of the court below is sustainable.
3. To what result.

POINT Nos.1 and 2: -

8. The other allegations made in the petition and in the evidence given by PW1, with regard to cruelty and harassment need not be considered, as the petition is filed only under Section 11 of the Act. It is beneficial to look at Section 29(2) of the Act, which reads as follows:

“(2) Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.”

9. By virtue of the above provision, the parties are given freedom to follow the custom which is recognised by their

community, for dissolving the marriage between the spouses. Hence, if the respondent succeeds in proving that there was a custom in their community to obtain divorce before the elders, without taking remedy under the law, the marriage between himself and the petitioner would stand to be valid and consequently, it cannot be declared as null and void.

10. The respondent, who was examined as RW1, speaks about such custom prevalent in his community. The community of the parties is stated to be "palli". According to him, there was a document, which was reduced into writing on 25.07.1991 evidencing the divorce between himself and his first wife. The said certificate is marked as Ex.B1. The marriage certificate between the parties is dated 11.09.1992, which was subsequent to Ex.B1. RW1 speaks about the scribe of the said document i.e., S.Devarajulu, as being the sarpanch of the village and the attestors of the document are four in number. The scribe was examined as RW2. Speaking about the reasons, which lead to the divorce between the respondent and his first wife, he states that the respondent spent huge amount for the welfare of the petitioner and his first wife was aggrieved by the same. There was mediation in the village and an advice was given to the respondent, but the same turned futile. In the year 1990, when he was president of Gram Pachayat, another mediation was conducted. In order to avoid nuisance and complications, the petitioner and her mother instigated the respondent to get divorce from his first wife and to marry her. At their instance, in the year 1990, the respondent placed a proposal before the

elders of the community, to grant divorce as per the customs and usages which are prevailing in their community. After taking into consideration of the respondent's request and observing the attitude of the spouse on 25.07.1992, the elders of the community and relatives of the first wife of the respondent, on 25.08.1991, asked both the parties to be present and conducted a panchayat and held that the marriage of the respondent and his wife, which took place in 1950, was dissolved. They also held that the respondent can marry again and that the first wife has lost all her rights as a wife, with effect from 25.07.1991. He also spoke about the document, which was scribed by him under Ex.B1. He also stated the names of the attestors to the documents. Speaking further on the validity of the said divorce, he states that such procedure is recognised by custom in the community of Palli and the custom prevailed not only in the locality but also in their community and family and such custom was being uniformly observed by the community since ancient and from time immemorial. He also stated that the divorce is known to all the persons in the locality and the respondent and his first wife were living separately and independently thereafter. The cross-examination of RW2 shows that he handed over one of the copies of Ex.B1 to the first wife of the respondent. Three or four divorces were effected in that manner.

11. Except the above, nothing much was elicited from the cross-examination of RW2, to discredit his evidence with regard to the validity of the customs. In the cross-examination of RW1,

it was pointed out that in Ex.B3, his caste was noted as Kapu. He explained that his caste was palle kapu, but it was mentioned as Kapu. However, the evidence of RW2, which is that of the Sarpanch, who cannot be attributed with any motives and who is an elder, can be taken as a proof of caste of the respondent as Palle Kapu. RW3 is one of the attestors of Ex.B1. He corroborated the evidence of RWs.1 and 2 on all the aspects. He further states that he also obtained customary divorce from his first wife and married again. According to his evidence, the younger sister of the petitioner, Kasthuri, also got divorced through the custom of their community and married thrice. In the cross-examination, however, he stated that there is no record that the said Kasturi obtained divorce thrice and got married again.

12. Hence, from the above evidence of RWs.1 to 3, it can be understood that there was a custom prevalent in the community to which the petitioner and the respondent belong and that it was being followed since long. The evidence of PW1 can also be perused to see whether any support comes for the facts stated by RWs.1 to 3, with regard to the customary divorce. In the cross-examination, she states that K.Rajamma is her mother. She originally belonged to Rahcapalam Village of Palasamudram Mandal and her mother's marriage was performed with a person at Rachapalam village and she does not know the name of the said person. She does not know whether her mother had any other children at Rachapalyam through the 1st husband. Herself and her younger sister are the children through the 2nd husband

of her mother. She denied the suggestion that one Subhadra is the daughter of the first husband of her mother and she was given in marriage to Padmapuram Village. Her father belongs to Palle reddy caste before marrying her mother. One Kasthuri is her younger sister. She was married to one Anjanappa which is her first marriage. She was again married to one Jayapal subsequent to 1996. she obtained divorce from Anjanappa prior to her marriage with Jayapal. Jayapal again married another woman at Chittoor. She does not know whether he got divorce from Kasturi or not. She denied the suggestion that Kasturi is again married to another person by name Raja. It was elicited that one Arjun Reddy was acting as an elderly person for the disputes amongst their caste people. He is no other than one of the attestors to Ex.B1. It was also elicited that the respondent informed her that she divorced her first wife in the presence of caste elders as per the caste customs. She admitted that her father belongs to the same caste of the respondent. She did not enquire with the elders whether the respondent obtained divorce from his first wife or not. She could not say whether her mother married another person before she married her father. She pleaded ignorance about her mother and her elder sister Kasturi, taking divorce from the court. She also pleaded ignorance whether her mother, on giving customary divorce to her first husband, married the father of the petitioner. So also, her sister. She could not say whether her sister obtained customary divorce from Anjanappa and married Jayapal. But however she added to say that Kasturi married Jaypaal after the demise of

Anjanappa. She, however, stated that there is no divorce between her sister Kasturi's husband Jayapal, through a court of law.

13. From the facts elicited from the cross-examination of PW1, it is more than clear that the customary divorce allegedly taken by the respondent from his first wife, is informed to her, prior to the marriage itself. It also becomes clear that their family members were also practicing the custom of obtaining divorce before elders, without approaching the court of law. It is also evident that a person, who is admitted to be an elder, in their community signed on Ex.B1, evidencing the divorce between the respondent and his first wife. The evidence of RWs.1 to3 would prove that such custom was prevalent among their community members since long time.

14. The above facts would satisfy the requirements of a valid custom. The ruling of the Madras high Court reported in *Balusami Reddiar v. Balakrishna Reddiar*¹ is to the effect that the custom should not be opposed to decency or morality and should not be against public policy. The case dealt with by the Madras High Court (referred supra) pertains to a marriage between the man and his daughter's daughter. The said marriage was held to be against public policy. But, in the case on hand, the question of custom of obtaining divorce before the elders cannot be termed as being against public policy or being opposed to decency or morality. In the above ruling, it is the

¹ AIR 1957 Madras 97

custom of marrying a grand daughter, which is held to be opposed to public policy. Obtaining divorce cannot be held to be opposed to public policy. The custom only created a separate forum for divorce.

15. The legal requirements of a valid custom are Ancientness, continuity, Uniformity, Reasonableness, and not opposed to Public Policy. The evidence of the witnesses in this case would prove the existence of all the above factors in the customary divorce that was obtained by the respondent from his first wife.

16. Hence, in view of the above, we opine that the marriage between the respondent and his first wife is dissolved by way of a customary divorce and hence, the marriage between the petitioner and the respondent is a valid marriage which cannot be declared as null and void under Section 11 of the Act.

Accordingly, points 1 and 2 are answered.

POINT No.3:-

17. In the result, the Civil Miscellaneous Appeal is dismissed. As a sequel, the miscellaneous applications, if any pending, shall stand closed. There shall be no order as to costs.

JUSTICE C.PRAVEEN KUMAR

JUSTICE T. RAJANI

Sep 9th , 2018
LMV