

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.02.2022

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.1427 of 2010

Muthammal ...Appellant/1st Respondent/Plaintiff

Vs.

1. Thimmakkal (died)
...1st Respondent/Plaintiff/1st Defendant
2. The Office in charge
Records, ASC (M.T.)Bangalore
Karnataka State.
...2nd Respondent/2nd Respondent/2nd Defendant

R1 died, recorded as per memo dated 31.08.2021
vide court order dated 18.11.2021.

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 25.11.2009 passed in A.S. No.105 of 2004, on the file of the Principal Subordinate Judge, Krishnagiri, reversing the decree and judgment dated 30.06.2004 passed in O.S. No.176 of 2002, on the file of the District Munsif, Krishnagiri.

For Appellant : Mr. C. Parthiban
for Mr. M.V. Krishnan

For R2 : Mr.K.S. Jeyaganeshan

JUDGMENT

The appellant is the plaintiff in O.S. No.176 of 2002 on the file of the District Munsif Court, Krishnagiri. She filed the suit for a declaration that she is the legally wedded wife of late Krishnan.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at

appropriate places, their rank in the present appeal would also be indicated.

3. The case of the plaintiff, Muthammal, is that she got married to one Krishnan (since deceased) on 15.07.1974 after the latter got a customary divorce from his first wife, the first defendant. Actually, the first defendant got married to Krishnan in the year 1953 itself and both of them, due to marital discard, lived separately till the death of the said Krishnan. It is also the contention of the plaintiff that her name was mentioned in the provisional discharge certificate, canteen card and also Identity card of her husband who was in the Army service. In fact, late Krishnan had also sworn an affidavit before the Judicial Magistrate, Krishnagiri, that the plaintiff is his nominee. Late Krishnan had also given a fresh nomination in favour of the plaintiff which was not effected in the records of the Officer In-charge, Records, ASC (M.T.) Bangalore, the second defendant. Krishnan retired on 28.01.1971 and after his demise on 04.02.1999, the plaintiff approached the second defendant with a request to treat her as the only legal heir of late Krishnan and pay the family pension to her. It is the specific contention of the plaintiff that late Krishnan divorced his first wife as per the customs prevailing over in his community. Since the second defendant did not respond favourably with regard to the grant of family pension in favour of the plaintiff, she was constrained to file a suit before the District Munsif Court, Krishnagiri, for a declaration that she is the legally wedded wife of late Krishnan.

4. The suit was resisted by the first defendant Thimmakkal (since deceased) by contending that her husband late Krishnan was living with her, even after his retirement from Army in January 1971. Subsequently he joined Assam State Transport Corporation as a driver and retired on 31.01.1991. Though he lived with the first defendant, he had no children and all the records including the death certificate, family card, revenue records showed her as the only legal heir of late Krishnan. The first defendant also averred that the plaintiff was already married to one Chinnathaiyan and that though there was a secret affair between her deceased husband and the plaintiff, it was nothing serious to entitle her for any benefits. According to her, there was no divorce between her and her deceased husband as claimed by the plaintiff. She, therefore, prayed for the dismissal of the suit.

5. The second defendant in his written statement had contended that as per the service records of late Krishnan, the first defendant alone was the legally wedded wife and there was no change in the nomination by the deceased Krishnan till his death. There was no record regarding any divorce between late

Krishnan and the first defendant. However, since the plaintiff had issued a legal notice dated 07.09.2001 (Ex.A3) making a counter claim for the family pension, she was asked to produce the divorce papers. The claim thus remained unsettled awaiting the court decree in favour of anyone of the two. It was also contended that the second defendant is an unnecessary party to the suit.

6. The trial court after framing necessary issues and after full contest, decreed the suit in favour of the plaintiff vide its decree and judgment dated 30.06.2004. The trial court was convinced that the plaintiff and late Krishnan lived together as husband and wife from the year 1974 till 1999 as it was substantiated by documentary evidence like family card, voters list, pension book and canteen book. The trial court also opined that it was the fault of the second defendant for not effecting the change of nomination though a request was made by the plaintiff. The oral evidence of the witnesses on behalf of the plaintiff regarding customary divorce was also taken into consideration by the trial court and concluded that the plaintiff had satisfactorily proved her marital status with late Krishnan and also that she was the sole legal heir to the estate of late Krishnan and therefore, entitled for the family pension.

7. Aggrieved over the decree and judgment passed by the trial court, the first defendant filed an appeal in A.S. No.105 of 2004 before the Principal Subordinate Judge, Krishnagiri. The first appellate court, while setting aside the decree and judgment passed by the trial court, observed that the plaintiff besides not proving the alleged dissolution of marriage between the first defendant and late Kirshnan, also failed to prove her marriage with Krishnan in the year 1974. The first appellate court also observed that the alleged dissolution of marriage and conduct of the second marriage had not been reported to the second defendant, which according to the court, were created only to get the pensionary benefits. The first appellate court also concluded that the plaintiff's claim of marriage with late Krishnan was not valid in law. The first appellate court also analysed the oral and documentary evidence adduced on the side of the plaintiff and held that the plaintiff neither proved the customary divorce between late Krishnan and the first defendant nor the marriage between her and late Krishnan. Thus the first appellate court allowed the appeal filed by the first defendant.

8. Now the present second appeal is filed by the plaintiff on the following substantial questions of law.

- 1) Whether the finding of the lower appellate court is right in holding that the marriage took place between the first defendant and the said Krishnan, was not dissolved and the

plaintiff failed to prove the same, specifically when Ex.A2 and Ex.A7 are clearly evinced?

- 2) Whether the finding of the lower appellate court is correct that the marriage took place between the plaintiff and the said Krishnan was not proved with documentary evidence, when the P.W.2 to P.W.4 have clearly established about the marriage took place on 15.09.1974?
- 3) Whether the marriage solemnized between the plaintiff and the Krishnan, in accordance with the customary rites and ceremonies of either party is void under Section 7(1) and 8 (5) of the Hindu Marriage Act?
- 4) Whether the principle of estoppel could be applied to the first defendant, who consented for divorce before the panchayat and denying the same before the court of law?

9. Mr. C.Parthiban, learned counsel for the appellant contended that as per the customs prevailing in the community / society to which late Krishnan and the first defendant belonged to, Krishnan divorced his first wife (first defendant) in the presence of a panchayat, which paved way for the second marriage with the plaintiff Muthammal. His further contention is that right from the year 1974 i.e. the year of second marriage till the death of late Krishnan in the year 1999, late Krishnan lived only with the plaintiff and the first defendant was never in the picture. His further contention is that the trial court had properly analysed the evidence adduced on the side of the plaintiff and rightly decreed the suit in favour of the plaintiff. But, on the contrary, the first appellate court has dismissed the suit filed by the plaintiff without taking into consideration the evidence adduced on the side of the plaintiff to prove the customary divorce between late Krishnan and his first wife and the second marriage between the plaintiff and late Krishnan in the year 1974. He further contended that since the first defendant is no more, the pensionary benefits can be granted in favour of the plaintiff.

10. Mr. K.S. Jeyaganeshan, learned counsel for the second defendant contended that as per the records maintained by the Chief Controller of Defence Accounts (pension), the first defendant Thimmakkal was shown as the legally wedded wife of the deceased Krishnan and also as the person entitled to receive the family pension as well. According to him there was also no change of nomination effected in any of the records as no such request was made by late Krishnan till his death. He produced copies of the descriptive Roll, legalheirship records with the second defendant and pension record. He also relied on the decision in Bhartiben w/o. Amitbhai Vitthalbhai and d/o. Ravjibhai Kavani vs. Amitbhai Vitthalbhai Sojitra in First Appeal No.1624 of 2020 (High Court of Gujarat) and contended that when the plaintiff had failed to prove any practice of

customary divorce being prevalent in the community of late Krishnan and his first wife Thimmakkal, the suit filed by the plaintiff has to be dismissed. He also placed reliance upon the decision in Smt. Shamal Mahadeo Tate vs. The District Collector and others in W.P. No.2949 of 2019 (High Court of Judicature at Bombay) and contended that the marriage between the plaintiff and the deceased Krishnan is void in view of Section 51 of the Hindu Marriage Act and as such if the plaintiff's claim for family pension is accepted despite her marriage to the deceased being void, it would render statutory provisions of Hindu Marriage Act negatory. He further placed his reliance on the decision in Smt.Krishnaveni vs. The Union of India and others in W.P.A. No.2346 of 2018 (High Court of Calcutta) and contended that the witnesses examined on the side of the appellant had not deposed that there was a custom amongst the community of the deceased Krishnan and his first wife and that as per the custom late Krishnan divorced his first wife. It is further contended by him that the muchalika which is alleged to have been written by the panchayatdhars during the alleged customary divorce had not been produced by the plaintiff and therefore, in such circumstances, the suit filed by the plaintiff cannot be maintained.

11. Late Krishnan was in Army service and he reportedly retired way back in 1971 and was receiving pension till his death in the year 1999. It is intriguing as to why he did not give any representation to his employer for the change of nomination as required legally. It can, therefore, be inferred as contended by the first defendant in her written statement that the relationship between the plaintiff and late Krishnan was only illicit and not legal. In the instant case, the plaintiff was required to prove that such customary divorce was permissible in the caste of late Krishnan and his first wife, which they belonged to. The first appellate court has gone into this aspect in extenso and held that the plaintiff did not prove the customary divorce between the first defendant and late Krishnan. In the decision in M. Chandralekha Versus Subramani and others, reported in 2001 Supreme (Madras) 1284, it has been held thus.

6. The only point that survives for consideration is whether the document viz., Ex.B-1 dated 25.10.1984 would dissolve the marriage between the plaintiff and Kandasamy. The plaintiff is not disputing, having executed such a document. Section 29(2) of the Hindu Marriage Act is as follows:

"Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the

dissolution of a Hindu Marriage, whether solemnized before or after commencement of this Act."

Hence, firstly the defendants in order to establish their case has to satisfactorily prove that there has been a custom in the community in question, by which the marriage can be dissolved by an agreement. Or in other words, a party who claims that a marriage duly solemnized was dissolved by a custom, has to state with precision and clarity what that custom is. It is not enough to state that there is an ancient custom of divorce and that divorce could be obtained by even one party executing a deed or from the caste Panchayat. The law requires to prove a fact, first he/she must plead the same and then prove by letting in satisfactory oral and documentary evidence. Secondly, the party should convince the Court that whatever procedure required as per the said custom has been complied with by the parties.

To prove the customary divorce, the plaintiff must first establish the existence and the fact of prevailing of such custom. In the instant case, the plaintiff did not adduce any evidence to show the existence of any such custom in the community of late Krishnan and his first wife Thimmakkal. No document has been filed though it is contended by the plaintiff that a muchalika was written on the date of divorce. The plaintiff has not also pleaded and proved as to what was the custom prevailing in the community for divorce and that what were all the procedures followed by late Krishnan and his first wife Thimmakkal for a divorce. The witnesses examined on the side of the plaintiff had not specifically deposed that there was a divorce between late Krishnan and his first wife as per the custom prevailing in their community. The first appellate court infact, in paragraph No. 13 of its judgment has observed as follows:

"13. From the above discussion it is cristal clear that the plaintiff has failed to prove the alleged dissolution of marriage between the first defendant and the late Krishnan. Further she is also miserably failed to prove her marriage in the year 1974 with the said Krishnan. According to Section 7 of Hindu Marriage Act "A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

...
The evidence of P.W. 1 to 4 have not reflected the ceremonies of the marriage between the plaintiff and the said Krishnan. If really the marriage took place

as alleged by the plaintiff why he has not informed for the past 24 years till his death. According to Ex.A.12 the said Krishnan died on 04.02.1999.

.....

During life time of the said Krishnan only 2 documents Ex.A9 which is at the edge of death of the said Krishnan and Ex.A2 just 8 years before the death. Even though Ex.A2 was obtained in the year 1991 why it was not produced before the second respondent during the life time of the said Krishnan. There is no answer for that question from the plaintiff that is why the second defendant has clearly stated that no document regarding 1st defendant's divorce with late soldier Krishnan was ever have been forwarded to record office. In Ex.A2 also the said Krishnan had not stated about the execution of Muchalika. Another important point to be noticed that in Ex.A2 it was stated that "got divorce in the year 1973 at my native place." But as per the evidence of P.W.2 and P.W.4, the alleged panchayat and muchalika was executed at Kundarapalli village. Admittedly Kundarapalli is not the native village of said Krishnan. His native village is only Kalvenahalli in Ex.A2 also. The said fact was not discussed. The date of dissolution of marriage was not stated. If really there was a panchayat on a particular day why it has not been brought to the knowledge of the Record Office. Hence the non disclosure of the date of dissolution of marriage, place of dissolution of marriage and non disclosure the fact of dissolution and non disclosure of 2nd marriage to the record office are all cast a cloud of suspicious circumstances with regard to the alleged panchayat and execution of muchalika. From the Ex.B5 it can be easily inferred that for the purpose of getting death benefits and pensionary benefits Ex.A1 was created and Ex.A7 and A8 were created for that purpose the plaintiff has proved that she been living with the said Krishnan. The long cohabitation alone is not sufficient and it neither dissolved the 1st marriage nor proved the 2nd marriage. The learned counsel for the plaintiff emphasized embarrassed the long cohabitation of 25 years living with the plaintiff by the late Krishnan as a proof of valid marriage. It is not recognized by law. The specific case of the plaintiff is that the first wife was divorced after that 2nd wife was legally married. But both the said facts have not been proved by the plaintiff. But the lower court without sufficient proof and wrongly interrupted

citation referred on the side of the plaintiff and came to a wrong conclusion. Hence the finding of the lower court is not sustainable and this court comes to a conclusion that the marriage between the late Krishnan and the first defendant is not proved as dissolved. When there is a legally wedded wife the plaintiff cannot be recognized as a legally wedded wife. Hence the plaintiff is not entitled to the decree of declaration".

The above observations of the first appellate court are based on sound principals of law and by no stretch of imagination they can be said to be perverse. In view of the reasons stated by me, the substantial questions of law are answered accordingly.

12. As already observed the divorce between late Krishnan and Thimmakkal had not been proved by the plaintiff. The plaintiff had not also proved her marriage with late Krishnan. Late Krishnan has also not effected any change in the nomination in the records and he did not give any representation to that effect though the plaintiff states that she married late Krishnan during the year 1974. It is pertinent to mention that Krishnan died only in the year 1999. In such circumstances, granting of family pension to the plaintiff does not arise.

13. In the result,

i. the second appeal is dismissed. No costs.

ii. the decree and judgment dated dated 25.11.2009 passed in A.S. No.105 of 2004, on the file of the Principal Subordinate Judge, Krishnagiri, is upheld.

iii. the decree and judgment dated 30.06.2004 passed in O.S. No.176 of 2002, on the file of the District Munsif, Krishnagiri, is set aside.

iv. The suit in O.S. No.176 of 2002 on the file of the District Munsif, Krishnagiri, is dismissed with costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

To

1. The Principal Subordinate Judge,
Krishnagiri.
2. The District Munsif, Krishnagiri.
3. The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.K.S. Jeyaganeshan, Advocate SR. No. 12427

+1cc to Mr.M.V.Krishnan, Advocate SR. No. 12225

S.A.No .1427 of 2010

RP (CO)
PR (28/07/2022)