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W.P.(MD)NO.3893 OF 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.02.2024

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)Nos.3893 & 3899 of 2024

W.P.(MD)No.3893 of 2024

A.Abdul Malik

... Petitioner

Vs.

1. The District Collector,
O/o.Collectorate,
Sivagangai,
Sivagangai District.
2. The Superintendent of Police,
Sivagangai District.
3. The Revenue Divisional Officer,
Sivagangai,
Sivagangai District.
4. The Tahsildar,
Karaikudi Taluk,
Karaikudi,
Sivagangai District.
5. The Inspector of Police,
Karaikudi North police station,
Sivagangai District.
6. Shanthi

... Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, to direct the respondents 1 to 5 herein to take action for immediate release the petitioner father's body



from the Old Government Hospital, Karaikudi and its return to petitioner's family for a peaceful burial in accordance with Islamic rites and direct the respondents 1 to 5 herein to provide adequate police protection to petitioner's family to prevent any further intimidation or violence.

For Petitioner : Mr.I.Sabeermohamed

For R-1 to R-4 : Mr.M.Lingadurai,
Special Government Pleader

For R-5 : Mr.A.Albert James,
Government Advocate.

For R-6 : Mr.V.Malaiyendran

* * *

W.P.(MD)No.3899 of 2024

Shanthi

... Petitioner

Vs.

1. The District Collector,
O/o.Collectorate,
Sivagangai,
Sivagangai District.
2. The Revenue Divisional Officer,
Devakottai Revenue Division,
Devakottai, Sivagangai.
3. The Superintendent of Police,
Sivagangai District,
Sivagangai.
4. The Inspector of Police,
Karaikudi North police station, Karaikudi,
Sivagangai District.



5. Syed Ali Fathima

... Respondents

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Prayer: Writ petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the 1 and 2 respondents to handover the dead body of Balasubramanian, S/o. Udaiyan of kept in the mortuary of Government Head Quarters Hospital, Karaikudi to petitioner and to give adequate police protection to the petitioner and his daughter namely Bavani to perform the final rites as per Hindu custom on the basis of the petitioner's representation dated 18.02.2024.

For Petitioner : Mr.V.Malaiyendran

For R-1 & R-2 : Mr.M.Lingadurai,
Special Government Pleader

For R-3 & R-4 : Mr.A.Albert James,
Government Advocate.

For R-5 : Mr.I.Sabeermohamed

* * *

COMMON ORDER

One Balasubramanian married B.Shanthi, the petitioner in W.P.(MD)No.3899 of 2024, on 16.07.1988 as per Hindu rites and customs. A girl child Bhavani was born through the wedlock. Balasubramanian was employed as driver in Tamil Nadu State Transport Corporation, Karaikudi Branch. He chose to ride two horses. He developed illicit intimacy with one Syed Ali Fatima. Balasubramanian



embraced Islam and became Anwar Hussain. He married Syed Ali Fatima as per Islamic rites and customs on 19.02.1999. Abdul Malik, petitioner in W.P.(MD)No.3893 of 2024 was born through the said relationship.

2. Balasubramaian @ Anwar Hussain passed away on 17.02.2024. He was no Kabir and yet his death has given rise to a serious dispute over his dead body. The question is to whom it should be handed over and how it should be disposed of. Shanthi is asserting her rights as the legally wedded wife of the deceased and the authorities are in a quandary as to what to do. The body is lying in the mortuary of Government Hospital, Karaikudi. Both Shanthi as well as Abdul Malik are before this Court.

3. Balasubramanian notified through Tamil Nadu Government Gazette dated 04.08.2017 that he converted to Islam with the name of Anwar Hussain on 10.05.2016. He thereafter filed H.M.O.P.No.34 of 2019 on the file of Sub Court, Mudhukulathur for dissolving his marriage with Shanthi that was solemnised on 16.07.1988. The OP. was allowed vide order dated 13.12.2021. Balasubramanian himself had marked copy of the order made in M.C.No.17 of 1993 whereby maintenance was awarded in favour of Shanthi. Yet the learned trial Judge chose to hold that Shanthi had committed cruelty on her husband and hence, granted



divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. The said order makes a strange reading. Aggrieved by the same, Shanthi filed H.M.C.M.A.No.5 of 2022 and the order passed by the trial Court was rightly set aside by the learned Additional District Judge, Paramakudi on 14.06.2023. The legal consequence flowing out of these proceedings is that Shanthi alone can be considered as the legally wedded wife and Bhavani alone is the legitimate child. The marriage between Balasubramanian @ Anwar Hussain and Syed Ali Fatima cannot be legally recognised. Syed Ali Fatima cannot be conferred the status of wife in the eye of law.

4. *Lily Thomas V. Union of India (2000) 6 SCC 224* was decided by a Bench of two Judges. But, both the Lordships were on the same page. They rejected the argument of the non-Muslim male who converted to Islam and married again without dissolving the first marriage that prosecuting for the offence under Section 494 IPC. would be a violation of Article 21 and 25 of the Constitution of India. They held categorically that the second marriage solemnised during the subsistence of the first marriage is an offence punishable under the penal law. The freedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of other persons. Under



the Constitutional scheme, every person has a fundamental right not merely to entertain the religious belief of his choice, but also to exhibit this belief and ideas in a manner which does not infringe the religious right and personal freedom of others. It has been further held therein that under Hindu Law, marriage is a sacrament and that it has to be preserved.

5. I held vide order dated **11.02.2024** in ***Crl.O.P.(MD)No.2228 of 2024 (S.Gurumoorthi V. State rep. By the SI of Police, Theppakulam police station)*** that the right to participate in the funeral ceremony of the parent / spouse will fall within the sweep of the right under Article 25. Shanthi as well as Bhavani as the legally wedded wife and legitimate daughter of the deceased are entitled to offer their respects in the customary religious manner. The authorities concerned are directed to hand over the body of the deceased to Shanthi and Bhavani so that they can perform certain customary religious ceremonies. But this has to be done within the premises of the hospital in the open ground and concluded within 30 minutes.

6. There are two issues involved here- the rights of those who are alive and the right of one who is dead. I have consistently held that even dead persons are entitled to certain rights and that courts must have due regard to the same. While Shanthi and Bhavani can discharge their



fundamental rights under Article 25 of the Constitution of India, that cannot extend to the disposal of the body of the deceased. It is beyond dispute that the deceased died a Muslim. Of course in *Lily Thomas*, it was held that the apostasy of the husband cannot take away the religious rights of the wife. That is why, I have permitted Shanthi as well as the daughter to perform certain ceremonies. But then, Anwar Hussain has to be buried only as per Islamic rites and customs. Courts are obliged to give effect to the intention of the testator while construing Wills. Anwar Hussain obviously would have intended that he should be buried only as per Islamic rites. If Anwar Hussain had executed any Will or testament regarding the manner of disposal of his body, I would not have hesitated to uphold the same. Such a testament is not available. In any event, in view of the undisputed position that he died a Muslim, I permit Amaanath Nagar Pallivasal, Karaikudi in which he was a member to take charge immediately after Shanthi and Bhavani and their relatives complete their rites. Syed Ali Fatima and Abdul Malik are of course entitled to participate in the funeral rites after Jamath takes over. The Inspector of Police, Karaikudi North police station is directed to ensure that both the parties adhere to the direction given above. If anybody endeavours to act in defiance of this order, the Inspector of Police,



Karaikudi North police station shall ensure that law takes its own course.

These writ petitions are disposed of. No costs.

19.02.2024

NCC : Yes / No

Index : Yes / No

Internet : Yes/ No

PMU

Note : Issue order copy on 19.02.2024

To:

1. The District Collector,
O/o.Collectorate, Sivagangai, Sivagangai District.
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Sivagangai District.
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Karaikudi Taluk,
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Karaikudi North police station, Sivagangai District.
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Devakottai Revenue Division,
Devakottai, Sivagangai.
7. The Superintendent of Police,
Sivagangai District,
Sivagangai.



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W.P.(MD)NO.3893 OF 2024

G.R.SWAMINATHAN,J.

PMU

W.P.(MD)No.3893 of 2024

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