

(2013) 06 MAD CK 0108
In the Madras High Court
Case No : Criminal R.C. No. 674 of 2007

Aysha

APPELLANT

Vs

Ozir Hassan

RESPONDENT

Date of Decision : 17-06-2013

Acts Referred:

Evidence Act, 1872 — Section 112

Citation : (2013) 4 CTC 90 : (2013) 200 DLT 388 : (2013) 2 DMC 468 : (2013) 2 KHC 875 : (2013) 3 KLT 176 : (2013) 3 LW 870 : (2013) 2 LW(Cri) 194 : (2013) 5 MLJ 31 : (2013) 3 MLJ(Cri) 13 : (2013) 3 RCR(Civil) 595 : (2013) 3 RCR(Criminal) 633

Hon'ble Judges : C.S. Karnan, J

Bench : Single Bench

Advocate : S. Mukunth for M/s. Sarvabhauman Associates, for the Appellant;

Judgement

C.S. Karnan, J.—The short facts of the case are as follows:-

The petitioner herein has filed a Maintenance Case in M.C. No. 64 of 2000, on the file of Family Court, Coimbatore, against her husband and

claimed a monthly maintenance of a sum of Rs. 5,000/- per month for her two minor children and herself. The first petitioner stated that the

respondent herein had married her on 16.09.1994 as per Muslim Customs. Immediately after the marriage both had led their marital life at

Coimbatore. Out of wedlock, she gave birth to two female children on 23.12.1996 and 01.01.1999 respectively. In the year 1999, the

respondent/husband left the house and deserted the first petitioner/wife and second and third petitioners/children. Thereafter mediation was

conducted by the panchayat for a reunion which was in vain. The respondent/husband is manufacturing and selling footwear in the name and style

of ""Ozir Hassinin Nazma"" at Coimbatore and earning Rs. 25,000/- per month. Hence, the maintenance case has been filed by the first

petitioner/wife against the respondent/husband.

The respondent/husband had filed a counter statement and resisted the maintenance case. The respondent stated that the first petitioner is not his

wife and she is aged about 35 years and a lady of dubious character and has denied the marriage. Further, any marriage conducted by the Muslim

Customs should be recorded in the Nikha book as per Muslim Customs and maintained by the concerned mosque. The respondent/husband had

also denied that the children are born through him. The respondent further stated that the first petitioner is making all sorts of feverish attempts to

hold this respondent as the husband of the petitioner and as father of the second and third petitioners. The petitioner is a working woman and is

earning Rs. 3,000/- per month. The respondent further stated that he is an employee in a footwear godown and earning Rs. 1,500/- per month.

Hence, the respondent/husband prays to dismiss the said maintenance case.

2. The learned judge after considering the averments of both parties had framed three issues, viz.,

(i) Whether the first petitioner is the legally wedded wife of the respondent and whether the petitioners 2 and 3 are legitimate children of the

respondent?

(ii) Whether the petitioners are entitled to claim maintenance from the respondent. If so, what is the quantum?

(iii) To what relief the petitioners are entitled to?

3. On the side of the petitioners, three witnesses were examined and 16 documents were marked as Exs. P1 to P16, viz., Ex. P1-photos with

negative (series), Ex. P2-letter written by the first petitioner to the respondent dated 03.07.2000, Ex. P3-acknowledgment card, Ex. P4-letter

written by the first petitioner to the respondent dated 11.08.2000, Ex. P5-returned cover, Ex. P6-telegram issued by the first petitioner to the

respondent, Ex. P7-letter written by the first petitioner to the Muthavalli, dated 30.08.2000, Ex. P8-letter written by the first petitioner to the

Jamath, Ex. P9-letter written by the first petitioner to the respondent dated 12.09.2000, Ex. P10-birth certificate of Seybunisha dated 23.02.1999,

Ex. P11-birth certificate of Shapana dated 31.12.1999, Ex. P12-education

certificate of Seybunisha dated 21.08.2000, Ex. P13-birth register of second female child, Ex. P14-live birth report, Ex. P15-temperature chart, dated 31.12.1998, Ex. P16-application for new family card. On the side of the respondent, two witnesses were examined and no document was marked.

4. P.W. 1, the first petitioner/wife had adduced evidence that she is the wife of the respondent and the second and third petitioners are the children born to them. The respondent/husband married her on 16.09.1994 and the second and third petitioners were born to them on 21.12.1996 and 31.12.1998 respectively. She further stated that her husband left the matrimonial home in the year 1999 and thereafter he has not returned to the house. P.W. 1 further stated that she was working at Kajmeer Godown and at that time her husband had developed a relationship with her and thereafter both got married on 16.09.1994, at the residence of one Aziz as per Muslim Customs. After the marriage, both had led their marital life at a rental house at Coimbatore; during that time, the second and third petitioners were born. Thereafter, the respondent/husband suggested to her to undergo family planning operation and accordingly she had complied with it. She further stated that she made several attempts for a reunion which was futile. Her husband is actually running a footwear manufacturing unit and selling organization at Coimbatore and earning Rs. 25,000/- per month. She has no income to take on the responsibility of the family.

5. P.W. 2, Dr. Rajini had adduced evidence that they do not have the records pertaining to the birth of the first child of the petitioner as they do not keep records of birth at their hospital after seven years from the time of birth. He deposed that the second child's birth certificate had been marked as Ex. P-14 and as per birth report, the father's name has been mentioned as Ozir Hassan and the mother's name as Aysha.

6. P.W. 3, Dr. Sheela had adduced evidence that P.W. 1 had been admitted at her clinic and she gave birth to a female child, through caesarean operation, on the same day itself. She deposed that P.W. 1's husband had also signed in the hospital records consenting for the caesarean operation.

7. R.W. 1 had adduced evidence that the petitioner is not his wife but a co-employee working in a footwear godown. The second and third

petitioners were not born through him. He further adduced evidence that there was no such marriage solemnized between them as per Muslim

Customs.

8. R.W. 2, the father of the respondent had adduced evidence that his son had not married the petitioner as per Muslim Customs at the house of

Aziz as alleged by the petitioner. He further stated that he never went to the first petitioner's house with a kerosene can in order to kill her. Further

he deposed that he belongs to Thakkali section and speaks Urdu and that the petitioner belongs to Ravuthar community.

9. On considering the evidence of both parties and on perusing the documents marked by the petitioners and on hearing the arguments of the

learned counsels on either side, the learned judge had come to the conclusion that the second and third petitioners are the children of the

respondent and as such, the petitioners 2 and 3 are entitled to receive monthly maintenance and hence, the learned judge directed the

respondent/husband to pay monthly maintenance of a sum of Rs. 500/- to each of second and third petitioners and also directed him to pay a sum

of Rs. 1,000/- towards litigation expenses. The trial Court further observed that the marriage of the first petitioner with the respondent has not been

proved through documentary evidence and hence held that the first petitioner/wife is not entitled to get any maintenance and as such, dismissed the

claim of maintenance for herself.

10. Against the order passed in M.C. No. 64 of 2000, dated 28.04.2006 by the learned Family Court judge, Coimbatore, the first petitioner, viz.,

Aysha has filed the above revision.

11. The learned counsel for the revision petitioner has contended in the grounds of revision that the lower Court failed to take note of the fact that

the petitioner is the legally wedded wife of the respondent and that two children were born out of their wedlock. The learned counsel further

submitted that the trial Court had also erred in concluding that the petitioner has not established the factum of marriage and failed to take note of

Exs. P1 to P16 marked by the petitioner. A case in point would be that P.W. 2, Dr. Rajini had adduced evidence that the records maintained in

the hospital shows that R.W. 1, was the father of the second child and in support of his evidence, he had marked Ex. P14, Live Birth Report.

Further, at the birth of the second child, P.W. 3, Dr. Sheela had adduced evidence that P.W. 1's husband had signed in the hospital record

consenting to his wife's caesarean operation. Finally, at the suggestion of her husband/R.W. 1, the wife/P.W. 1 underwent the family planning

operation after the birth of their second child. The learned counsel further contended that the lower Court after having observed that two children

were born through the respondent should have held that the respondent and the petitioner are husband and wife.

12. The learned counsel further raised legal points in the grounds of revision stating that the lower Court totally overlooked the provisions of

Section 112 of the Indian Evidence Act to the fact that "any person born during the continuance of a valid marriage, shall be conclusive proof that

he is the legitimate son of the man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could

have been begotten". The learned counsel further submitted that the learned trial judge failed to appreciate that great care and caution should be

exercised before bastardizing a child considering the social stigma that would be cast upon an innocent child. The learned counsel furthermore

submitted that the lower Court erred in disallowing the claim of the petitioner merely on the ground of non-registration of marriage in the Nikha

book. On the other hand, the respondent has also not produced any evidence to show that there was no marriage subsisting between the petitioner

and the respondent. He further submitted that the doctor had adduced evidence that the respondent has signed in the declaration form and given

consent for caesarean operation of the petitioner and in order to prove the same, Ex. P14, viz., live birth report had been marked; the same was

not opposed by the respondent.

13. The learned counsel for the revision petitioner had raised another point stating that the respondent has affixed his signature in Ex. P16, that is

application for new family card to show that the respondent had signed it in the capacity as head of the family. Hence, the learned counsel entreats

the Court to grant maintenance to first petitioner/wife also.

14. On the side of the respondent, no one appeared. However considering that the maintenance case has been filed in the year 2000, this Court is

constrained to pass a final order in order to dispose the case speedily without

any further delay.

15. After scrutinizing the trial Court judgment and on perusing the list of documents marked on the side of the petitioner, this Court is of the view

that:-

(i) A valid marriage does not necessarily mean that all the customary rights pertaining to the married couple are to be followed and subsequently

solemnized. In this case, customary formalities have not been followed, but the respondent had signed in the hospital records authorizing Dr.

Sheela, when the petitioner/wife had been admitted on 31.12.1998 for her second delivery. The second delivery was a caesarean one for which

the respondent gave his consent to the doctor in the prescribed form.

(ii) The learned trial Court judge has concluded that the second and third petitioners are illegitimate children of the respondent and the same has not

been challenged by the respondent herein through any appeal and the respondent has signed in the ""Live Birth Report"" of the hospital. In the

prescribed hospital records viz., ""Live Birth Report"", there are separate columns for husband and wife to attest their signatures and this had been

adhered to and as such, it is sustainable under law. Therefore, the argument of illegitimate children does not arise in this case, in view of the

commitments already made by the respective parent in the hospital record as maintained by the hospital authorities.

(iii) The petitioner herein and the respondent have not been debarred from marriage through a religious decree, for example, in the Hindu Religious

Custom, upto 7th degree/generation a boy and girl is forbidden to marry if they are termed as brother and sister in the 7th generation as mentioned

above.

(iv) The petitioner herein and the respondent herein have no encumbrance or other disqualification for solemnizing their marriage as per their

customs. For solemnizing marriage, legal aspects are to be placed on higher scale and the customary aspects do not command such a scale. In this

case, the respondent has signed in the ""Live Birth Report"" and given his consent for a caesarean operation for the birth of the second child and as

such, the respondent had openly and officially admitted that the petitioner is his wife/spouse.

(v) Without legal encumbrance or third party interference or without affecting

third party's rights, both the petitioner and the respondent lived together as spouses and begot two children. Therefore, illegitimate relationship does not arise in this case. Marriage solemnization is only a customary right and obligation, but not a mandatory one. Hence, this Court treats the petitioner and the respondent as spouses in normal life with a typical identity of their own.

(vi) It is not disputed that the petitioner has been a spinster before she gave birth and that the respondent was a bachelor before developing sexual relationship with the petitioner. Both of them led their marital life under the same shelter and begot two children. Therefore, the petitioner's rank has been elevated as the "wife" of the respondent and likewise the respondent's rank had been elevated as the "husband" of the petitioner.

Therefore, the children born to them are "legitimate" children and the petitioner is the "legitimate" wife of the respondent. This Court is of the view

that if a women aged 18 or above has a sexual relationship with a man, aged 21 or above, and during the course of such relationship, if the woman

becomes pregnant, she would henceforth be treated as the "wife" and the man would be treated as the "husband". Even if the girl does not become

pregnant after having such sexual relationship with a man but if there is strong documentary evidence to show the existence of such relationship then

also the couple involved in such acts would be termed as ""wife"" and ""husband"".

(vii) This Court is of the further view that even after such a sexual relationship, if both decide to separate due to difference of opinion, the

"husband" cannot marry without getting a decree of divorce from the Court of law against the "wife". He could not marry a second time without

getting such a decree as it had been established that the sexual relationship had existed between them and consummation had taken place.

(viii) This Court is of the further view that if the bachelor has completed 21 years of age and the spinster 18 years of age respectively then they

acquire the freedom of choice as guaranteed by the Indian Constitution. Consequently, any couple who choose to consummate their sexual

cravings then that act becomes a total commitment with adherence to all consequences that may follow except on certain exceptional

considerations. Therefore, the marriage formalities as per respective religious

customs viz., tying of thali, exchange of garlands, exchanging of finger rings, circling around the matrimonial fire pit or registering of marriage at a Government Registration Office is only to comply with each one's respective religious customs for the satisfaction of the society. However, if any couple, subject to their attaining the mandatory age of freedom, who indulge in sexual gratification, then that would be considered as valid marriage and they could be termed as "husband and wife", as a result of their choice of freedom. On the other hand, in some cases, both bachelors and spinsters, who adhering to all formalities of their respective religion and culture with marriage solemnized, find it that their conjugal rights for sexual consummation had not been fulfilled, then such a marriage is deemed to be a failure, void or lapse. So, in total, what is expected after adhering to norms and formalities is the sexual consummation by the couple which has occurred in the case on hand. Hence, the main legal aspect for valid marriage is consummation or sexual interaction such as in the instant case, the point is squarely and wholly applicable. Of course, this Court's further view is that if necessary, either party may approach the Family Court for declaration to the effect of marital status by supplementing documentary proof of evidence in order to prove the sexual relationship. After such a declaration from the concerned forum, the victim can establish herself in all the government records or any other relevant records where she can encrypt her name as wife to her counterpart. Legal rights applicable to the normal wedded couples will also be applicable to couples who have had sexual relationships which are established.

(ix) In some cases, both the bachelor and spinster even after observing all the formalities of their religious customs and solemnization of marriage, are unable to have sexual relationship, as such consummation is deemed to be non-occurring, such a marriage would be referred to as an invalid marriage. What is expected after adhering to normal formalities is the consummation by the union (spouses) which has occurred in the present case.

(x) That the main legal aspect for valid marriage viz., consummation between both spouses has happened even before the formalities. Therefore, in the instant case, the point is elaborately explained. If the consummation has taken place between the spouses (bachelors and spinsters) then from

that time onwards both are declared husband and wife. This declaration will not be prejudicial to either party. This Court's further view is that this

declaration would strengthen the Indian Culture and would protect the young womens welfare, character and status among the society. This

pertinent view of this Court is in order to protect Womens Civil Rights and personal life. This Court further opines that it is an appropriate time to

prevent the Indian Culture from deteriorating further when it comes to living honestly as spouses. It is an imperative need that the morals and ethics

of Indian Culture is taken to the next level and maintained so as to never slander the life of an innocent woman. Finally and most importantly the

Courts do give paramount importance to the customs and rights to every religion so long as it remains in tandem with civil rights that are controlled

by the Courts.

The instant case concludes with the main perceivable details as detailed above.

16. Therefore, after taking into consideration the trial Court judgment and perusing the grounds raised in the revision and this Court's view listed in

(i) to (x), mentioned above, this Court allows the above revision and directs the respondent herein/husband to pay a monthly maintenance of Rs.

500/- to the petitioner herein from the date of petition i.e., from the month of September 2000. This Court further directs the respondent to pay the

arrears of maintenance upto May 2013, within a period of three months from the date of receipt of a copy of this order. Thereafter, the

respondent/husband has to pay monthly maintenance as per this Court order, on every English calendar month on or before the 10th of every

succeeding month directly or through Court. In the result, the above revision is allowed. Consequently, the order and decreetal order passed in

M.C. No. 64 of 2000, dated 28.04.2006, on the file of Family Court at Coimbatore, is modified. Accordingly ordered.