

(1997) 04 KL CK 0010
In the High Court Of Kerala
Case No : S.A. No. 235 of 1989

Chalakuttiyl Mutteri Karthiyayani Amma	APPELLANT
Vs	
Padinhare Talasseri Veettil Narayanan Nair	RESPONDENT

Date of Decision : 01-04-1997

Acts Referred:

Hindu Marriage Act, 1955 — Section 5

Citation : (1999) 1 DMC 52

Hon'ble Judges : S. Sankarasubban, J

Bench : Single Bench

Advocate : C.P. Damodaran Nayar, for the Appellant; K. Divakaran Nair and P.M. Balasubramaniam, for the Respondent

Final Decision : Allowed

Judgement

S. Sankarasubban, J.—Defendant is the appellant and the plaintiff is the respondent. Plaintiff Narayanan Nair married the defendant Karthiyanyini Amma on 5th May, 1961 at the Thiruvananthapuram Sree Ramaswami Temple in accordance with the customs of the community to which they belonged. In that wedlock, a child was born and she was named Mynavathi. The conjugal relationship lasted for five years. Then the spouses lived apart for about 2 years and 5 months. Plaintiff filed an application for dissolution of marriage in the Munsiff's Court, Tellicherry as O.P. No. 5/1996. An order of divorce was obtained. According to the plaintiff, even though the marriage was dissolved, certain mediators intervened and they requested the plaintiff and the defendant to live together considering the future of the child. Thus, they lived together from 8th January, 1968 and two children were born to them.

2. Plaintiff further submits that there was no customary marriage conducted, but a registered document was executed on 8.1.1968. Though the plaintiff and the defendant lived together, the relationship was not having the legal status of a husband and wife. There was no valid marriage. Plaintiff does not want to live with the defendant and continued the unlawful relationship. According to the

plaintiff, he wants to live away from the defendant and the defendant cannot thereafter claim any legal right against him. Hence the suit was filed for a declaration that no marriage relationship subsists between the plaintiff and the defendant and the defendant does not have the status of the wife of the plaintiff.

3. Defendant filed written statement. In the written statement, she contended as follows:

The marriage on 5th May, 1961 was acknowledged and also the order obtained in O.P. No. 5/66 for dissolution was admitted. But the defendant denied that it was on the intervention of the mediators that the plaintiff and the defendant started to live together. According to the defendant, inspite of the order of dissolution, the plaintiff realised the seriousness of the wrong he has committed and suggested that he wanted the marriage relationship between him and the defendant continued. But since the marriage was already dissolved, as suggested by the defendant's relatives, the plaintiff and the defendant were again married according to the customs of the community. The registration was done later, since the plaintiff himself suggested that there should be some documents to evidence the marital relationship.

4. After the plain tiff and the defendant were married according to the customs of the community, two children, viz., Manojkumar and Reena, were born to them. Plaintiff had suppressed all these facts. Plaintiff, defendant and their children lived together till 15th May, 1985 when the plaintiff went away from the house.

5. Plaintiff had been demanding that the house and the property in which they were living should be assigned in his name. Defendant did not agree for the same, since the character and conduct of the plaintiff were unpredictable. Suit was filed because of the fact that the defendant did not agree for assigning the property.

6. On the basis of the above pleadings, the Trial Court raised four issues. The second issue was whether the plaintiff and the defendant are husband and wife and the third issue was whether the plaintiff is entitled to the declaration as prayed for. On behalf of the plaintiff, he was examined a PW1. On behalf of the defendant, in addition to the defendant (examined as DW1), DWs 2 and 3 were examined. Exts. A1 and A2 were marked on the side of the plaintiff, while Exts. B1 to B4 were marked on the side of the defendant. After analysing the evidence of the plaintiff, the Trial Court observed thus:

"A reading of the testimony of the plaintiff reveals his callous nature. He admits that at the time of the birth of the second child and the third child the defendant was his wife. He admits that he and the defendant lived together as husband and wife, after Exhibit A2 documents. He admits that the second child and third are also born to him through the defendant...But in cross examination he has admitted that he filed the suit for fear that after his death his children may inherit his assets."

The Trial Court relied on the decision reported in *Badri Prasad Vs. Dy. Director of Consolidation and Others*, , and held that the presumption with regard to the marriage can be rebutted by evidence. It further held that there was no difficulty in coming to the conclusion that the plaintiff and the defendant are husband and wife. Thus, the suit was dismissed. Against the dismissal of the suit, the plaintiff preferred appeal, A.S. No. 41 /88 before the District Court, Tellicherry. The learned District Judge allowed the appeal and decreed the suit. The learned District Judge held that there was no valid marriage between the plaintiff and the defendant. The lower Appellate Court first relied on the statements in Ext. A2 and held that prima facie there was no valid marriage. Then it went on to discuss the evidence adduced in the case. The evidence of DWs 2 and 3 were analysed. According to the lower Appellate Court, DW 2 was an interested witness and DW 2 did not see the presentation of cloth, whereas DW 3 stated that he saw the presentation of cloth. DW 3 further deposed that DW 2 was standing outside. Hence, according to the lower Appellate Court, the evidence of DWs 2 and 3 are not at all helpful for the defendant to prove that there was a marriage as per their customs in the community after the dissolution of marriage as per the order in O.P. No. 5/66.

7. Thereafter, the lower Appellate Court considered whether there was any presumption on the basis of co-habitation. The decisions in *Badri Prasad v. Dy. Director, Consolidation*, (supra), and *Janaki Amma v. Rama Warriar* 1985 KLT 283, were cited on behalf of the defendant, while the decisions in *Kali v. Kamalakshi Amma* 1967 KLT 1063, was cited on behalf of the plaintiff. Court below held that Ext. A2 will not go to show that there was any valid marriage and hence the defendant will not get the status of a legally wedded life. Ultimately the Court below allowed the appeal and also decreed the suit giving a declaration that there was no valid marriage between the parties and the defendant will not have the status of the wife of the plaintiff. It is against the above judgment and decree of the Court below that the present appeal has been filed.

8. Learned Counsel for the appellant contended that the reasoning given by the Court below that there was no valid marriage between the plaintiff and the defendant is not correct. Counsel submitted that Ext. A2 does not go against the contention of the defendant that there was valid marriage. Further, he submitted that the evidence of DWs 2 and 3 will show that the plaintiff and the defendant underwent a form of marriage after the earlier divorce and insofar as there is evidence to show that the marriage ceremony has been conducted, it is for the plaintiff to prove that it was not validly conducted. Further he relied on the fact that the plaintiff and the defendant have been residing since 1968 and two children were born to them in that wedlock. He also stressed the fact that it is because of the cruel desire of the respondent to disinherit his children and to bastardise them that the present suit has been filed.

9. Learned Counsel for the respondent submitted that it cannot be said that the reasoning given by the Appellate Court is against any provision of law or that it

was perverse. According to the learned Counsel, the finding given by the lower Appellate Court is a finding of fact, which cannot be interfered u/s 100 of the Code of Civil Procedure. Learned Counsel further submitted that if the marriage ceremony was conducted by the plaintiff and the defendant, then it was not necessary to execute Ext. A2 document.

10. I heard the Counsel for the appellant and the respondent. The oral evidence as well as the documentary evidence produced in the case was read over. Before proceeding to the oral evidence, I shall look into Ext. A2. Ext. A2 states thus:

(Vernacular matter is omitted)

Thus, Ext. A2 was executed as a document to prove that the plaintiff and the defendant were residing as husband and wife. Ext. A2 document does not give any indication to show that any formal marriage ceremony was conducted.

11. The lower Appellate Court relied on the decision in *Kali v. Kamalakshi Amma*, (supra). In that case, the recitals in the document in question was as follows:

(Vernacular matter is omitted)

Thus, the document itself shows that there was no marriage between the plaintiff and the defendant as per the customs. It was in such circumstances that the Division Bench held that there was no valid marriage between the parties thereto. The Division Bench further held that "as no marriage was ever solemnised between the parties through any form of marriage known to and recognised by law as capable of producing a valid marriage, we must hold that there was no marriage between the plaintiff and Narayanan Madhavan, inspite of the long and intimate relations that apparently obtained between them". This was on the basis that even if there is cohabitation between the parties if there is evidence to show that there was no marriage between them, the long cohabitation will not by itself prove that the couple was married. Thus, according to me, the lower Appellate Court went wrong in relying on the decision in *Kali v. Kamalakshi Amma*, (supra), in order to show that there was no marriage between the plaintiff and the defendant.

12. Next I shall go into the question whether there was actually a marriage between the plaintiff and the defendant after divorce was obtained by the plaintiff in O.P. No. 5/66. In this connection, it is very well to remember the observation of the Privy Council in *Inderun Valungypooly v. Ramaswamy Pandia* (1869) 13 MIA 141. It reads thus:

"Then, if there was a marriage in fact, was there a marriage in law ? When once you get to this, namely, that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law. The zemindar, according to the usage of his country and nation, on parting with his first wife, would be naturally desirous of marrying again, and having male issue. It would be a most unlikely thing for a person of his caste to go through the ceremony of marriage if it was known that the marriage was marriage which was invalid in law."

Unnikrishna Kurup, J. in the decision reported in Kunji Pillai Amma v. Somanathan Pillai 1971 KLJ 105, held as follows :

"The law appears to be clear that when the factum of marriage has been proved, the conditions required for a valid marriage would be presumed to have been fulfilled. The long course of conduct, the fact that the husband had openly acknowledged the 1st plaintiff as his wife and the 2nd plaintiff as his son, the marriage certificate and the various other circumstances afford ample proof that there was a valid subsisting marriage."

In that case, the contention was that there was no legal evidence to show the presentation of cloth by the bridegroom to the bride as required by the provisions of the Nair Act. His lordship relied on the decision of the Supreme Court in Veerappa v. Michael AIR 1963 SC 923, and held that insofar as there is proof to show that the marriage had taken place, the law will presume that all the necessary ingredients have been performed.

13. Here PW1, the plaintiff denies any such form of marriage being conducted. But the defendant as DW1 has given evidence as to the form of marriage underwent. DW 2 is the neighbour of the defendant. He says that he attended to the marriage on the invitation of the father of the defendant. The marriage was performed at the Padinjatathil of the house. He further stated that the plaintiff and the defendant sat together and they exchanged garlands and also conducted Pradakshana. But to a pointed question in cross-examination as to whether he saw the presentation of the cloth, he said that he did not see it. He had further stated that he was present inside the house when the marriage was performed. DW 3 is also a neighbour. He has also witnessed the marriage. He also stated that both plaintiff and the defendant exchanged garlands. He also stated that the plaintiff presented the cloth to the defendant. But he stated that he did not see DW 2 inside the house.

14. The Court below rejected the evidence of DWs 2 and 3 on the above apparent conflict. I don't find any serious inconsistency in the evidence of DWs 2 and 3. DW 2 said that he was present inside the house, while DW 3 said that DW 2 was outside the house. Either it may be a mistake on the part of DW 3 or when DW 3 saw DW 2 he was outside the house. Anyhow, it cannot be denied that both DWs 2 and 3 were present in the house on that day and they have also given all the material particulars regarding the conduct of the marriage ceremony. Thus on an over-all appreciation of the evidence of DWs 2 and 3, I am of the view that the marriage ceremony was in fact conducted. There is also a presumption that all the ceremonies necessary for the conduct of the marriage were performed. Further it is difficult to believe the case of the plaintiff that after he divorced the defendant once, the parents of the defendant would have allowed the plaintiff and the defendant to reside together without any form of marriage. PW 1 says that he wanted to keep the relationship with the defendant considering the future of his daughter and it cannot be believed that the parents of the defendant would have allowed the defendant to reside with the plaintiff

without undergoing any form of marriage. Hence taking all the above circumstances into consideration, I am of the view that a valid marriage was conducted between the plaintiff and the defendant in 1968.

15. My above conclusion is further strengthened by the long cohabitation of the plaintiff and the defendant. As stated by Eversley on Domestic Relations, the marriage state being the chief foundation on which the superstructure of society rests, it follows naturally that the law, which is the expression of the sentiments prevailing among organised communities, assumes a favourable attitude towards it. The presumption of the law is clearly in its favour. This presumption of law is much stronger than most other legal presumptions; it is not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct and satisfactory. The more distant the date of the marriage the more readily will the maxim omnia rite acta praesumuntur be applicable. The Author further states in page 6 that the presumption of marriage arising from cohabitation and repute can only be rebutted by clear and satisfactory evidence. Thus, where a man and a woman have lived together as man and wife, the law will presume, unless the contrary be clearly proved that they were living together by virtue of a legal marriage and not in concubinage. The Supreme Court in *Badri Prasad v: Dy. Director, Consolidation*, (supra), held that strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, the heavy burden lies on him who seeks to derive the relationship of legal origin.

16. In the present case, if one analysis the evidence of PW1, it will be clear that the plaintiff lived with the defendant as husband and wife. In the evidence of PW1, it is stated thus :

(Vernacular matter is omitted)

The above statements of the plaintiff will throw light on the fact that the plaintiff and the defendant were living as husband and wife. Further in the ration card produced, the plaintiff and the defendant are shown as husband and wife. The names of their three children were also included in the ration card.

17. Counsel for the respondent submitted that the lower Appellate Court is the final fact finding authority and that this Court, u/s 100 of the Code of Civil Procedure, cannot interfere with the finding. This argument cannot be accepted in toto. The Supreme Court in *Major Singh Vs. Rattan Singh (Dead)* by LR's. and others, observed thus :

"Under these circumstances, when the Courts below has rejected and disbelieved the evidence on the ground that the propounder had not properly discharged his duty, it is the duty of the High Court to consider whether the reasons given by the Courts below were sustainable in law. In view of the above reasoning of the Trial Court as affirmed by the Appellate Court, necessarily the High Court requires to go into the question to test the reasons. In this perspective, the High

Court has rightly gone into that question and found that the reasons given by the Courts below are flimsy. Thus there is substantial question of law that has arisen for consideration and the High Court has rightly considered the question. We are entirely agree with the High Court."

In the above circumstances, the suit filed by the respondent is ill-conceived and the appeal is allowed. The suit is dismissed.