

(1986) 06 KL CK 0028
In the High Court Of Kerala
Case No : C.R.P. No. 1150 of 1981-I

Chellamma

APPELLANT

Vs

Parakal Hamza and Another

RESPONDENT

Date of Decision : 24-06-1986

Acts Referred:

Citation : (1986) 06 KL CK 0028

Hon'ble Judges : Balakrishnan, J

Bench : Single Bench

Advocate : M.G. Sen, for the Appellant; P. Devakikutty, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishnan, J.—The revision-Petitioner Chellamma is alleged to be the wife of now deceased Parakal Ummer, who died on 9th August 1976. Ummer was employed in the Public Works Department. On 7th January 1973 they executed a marriage udampadi and they were living as husband and wife till the death of Ummer. They had no children. The Respondents herein are the near relatives of deceased Ummer.

2. After the death of Ummer an application was filed by the Petitioner for obtaining a succession certificate in respect of the assets left by deceased Ummer. The Respondents contested the matter and according to them there was no valid marriage between the Petitioner and deceased Ummer. They admitted the execution of marriage udampadi, but denied the existence of a valid marriage. The trial Court found that there was only an irregular marriage, since under the Mohammedan Law a marriage between a Mohammedan and Hindu woman was not permissible. The trial Court held that the Petitioner was entitled to 1/3 of the amount under the Provident Fund and gratuity as her name was nominated by the subscriber. The trial Court construed the nomination as a gift. The appellate Court concurred with the finding that the Petitioner was not a legal representative of deceased Ummer. However, the Court held that the nomination

by the deceased subscriber would only confer a right to receive the amount and it did not operate as a gift. The revision petition is directed against the order passed by the appellate Court.

3. The fact that deceased Ummer and the Petitioner entered into a marriage agreement and they lived as husband and wife is not disputed. The short question that arises for consideration is whether the marriage between a Hindu woman and a Mohammedan is legal and whether the wife is entitled to inherit the property of the deceased husband. If only the marriage was legal, it could be held that the wife was a legal representative of the husband.

4. Under Mohammedan Law marriage has a definite legal meaning. It is a contract for the legalization of intercourse and the procreation of children. "Marriage is an institution ordained for the protection of society and in order that human beings may guard themselves from foulness and unchastity" (See Amar Ali, "Students" 7th Edn. Page 97). The legal essentials of a valid Mohammedan marriage are that there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mohammedans. The proposal and acceptance must both be expressed at one meeting. The presence of witnesses is essential to the validity of the marriage. Marriages under Mohammedan Law are of three kinds. First there are valid marriages, second there are marriages which are void (batil) and thirdly there are marriages which are fasid, a word which has been translated as "vitiated". Like most other systems the Mohammedan Law discountenances a marriage between a Mohammedan male and a woman professing other religion. A Muslim cannot marry an idolatress or a fire-worshipper. As regards this the difference of school of law such as shiite or Hanafi is immaterial.

5. The learned author Mulla in his Principles of Mohammedan Law, 18th Edn. at page 287 has stated:

A Mohammedan male may contract a valid marriage not only with a Mohammedan woman, but also with a Kitabia, that is, a Jew or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular.

Professor A.A.A. Fyzee is of opinion that a marriage between a Hindu woman and a Mohammedan is void.

The present position appears to be that the nikah of a Muslim man with an idolater or fire-worshipper is irregular and not void. Mulla goes to say, however, that the marriage of a Muslim woman with a non-Muslim is only irregular, not void. This is, it is submitted an inaccurate statement of the law. The marriage of a Muslim woman with a non Muslim is declared by the Koran to be batil, void and not merely irregular. Thus it would seem that reform, in consonance with the view of Ameer Ali, can only be introduced by legislation.

(Emphasis supplied)

(Pages 95-96 "Outlines of Mohammadan Law" by Asaf A.A. Fyzee-3rd Edn.).

An important concept in this regard is the distinction made by Islam between Kitabi (scriptural) and ghayr-kitabi (non-scriptural) religions. In some old cases this aspect of Islamic Law was recognised and applied in India. A Hindu woman comes within the category of idolatress or fire-worshipper. A Muslim cannot marry an idolatress or a fire-worshipper. Dr. Tahir Mahmood in his book "The Muslim Law of India" 1980 Edn. at page 59 has stated that some schools of Islamic Law do permit the marriage of a Muslim with a non-Muslim in accordance with Islamic Law and such a marriage, under the legal theory of those schools, is to be governed by Islamic Law. Even if the opinion of Dr. Tahir Mahmood was accepted as the correct Law, it is difficult to hold that the marriage between Chellamma and Ummer was a valid one. There is no case for the Petitioner that the marriage between herself and deceased Ummer was held in accordance with these principles of Islamic Law. Therefore, there could not have been a valid marriage between the Petitioner and deceased Ummer.

6. The learned counsel for the Petitioner contended that the irregularity in the marriage could be cured and the wife would be entitled to inherit the property. Reliance was placed on the decision reported in AIR 1928 231 (Oudh) . In that case the marriage was contracted within the period of idath. Therefore, the Court held that such a marriage Was irregular or vitiated by a temporary defect and the marriage cannot be altogether void. A "fasid" marriage which is vitiated only by some temporary defect, can become valid when the defect is removed.

7. So also in AIR 1930 907 (Lahore) the Court held that under the Mohammedan Law governing Hanafi sect marriage with wife's sister during the subsistence of previous marriage with her sister is only "fasid" and not "batil" and the issue of such marriage is legitimate and inherits property from the father. Both these decisions are not helpful to the Petitioner, since the irregularity in respect of the Petitioner is on the ground of religion. There is no case that the Petitioner ever had converted from the Hindu faith and embraced Islam.

8. It was contended that in India all religions and all personal laws have equal recognition and therefore in a case of inter-religious marriage between two persons the personal law of the party cannot be applied in preference to or to the exclusion of the personal law of other party and such a discrimination will not be valid law. It was also contended that in the absence of statutory obligation to apply Muslim law the courts in this country may do so by way of justice, equity and good conscience and the rules of Islamic law relating to inter religious marriage do not form part of the Muslim law of India.

9. It is true that there is some force in the above contention. However, in the instant case the Petitioner made alliance with deceased Ummar in the year 1973 and Ummar died in 1976. There were no issue. The succession certificate was sought to be obtained in respect of the amount of provident fund and gratuity. As

there was no valid marriage, the lower appellate Court found that she is not the legal representative of deceased Ummar and that she is not entitled to get a valid succession certificate. I do not think that the finding entered by the Court below is against justice, equity and good conscience. As there was no valid marriage, the Petitioner cannot have a claim over the assets left by the deceased. No rights of inheritance are created between the husband and wife by an irregular marriage. Deceased Ummar was a Mohammedan and there is nothing wrong in applying Mohammedan law as regards the question of inheritance of his property. Hence the civil revision petition is dismissed. No costs.