

(2002) 04 KAR CK 0024

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 3431 of 2000

Deva Prasad Reddy

APPELLANT

Vs

Kamini Reddy and Another

RESPONDENT

Date of Decision : 19-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
Evidence Act, 1872 — Section 44

Citation : (2002) ILR (Kar) 2835 : (2003) 3 KarLJ 38

Hon'ble Judges : Tirath S. Thakur, J;D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : K.G. Raghavan and M. Arun Ponnappa, for the Appellant;
Sundarswamy, Ramdas and Anand, for the Respondent

Final Decision : Dismissed

Judgement

1. This is a defendant's appeal arising out of a suit for declaration and consequential relief. The Court below has while decreeing the suit held that the plaintiff-respondent 1, in this appeal is the legally wedded wife of the defendant-appellant and their daughter Ms. Mrinalini Reddy their only legal heir. The Court has also declared the marriage between the appellant and defendant-respondent 2 to be a nullity and restrained the said respondent from claiming herself to be the wife of the appellant.

2. The appellant and plaintiff-respondent 1 are Christians by faith. They were married on 21st of January, 1992 at Madras as per Roman Catholic rites. After the marriage they lived for some time in Koramangala from where they later shifted to a house in Coxtown, Bangalore. In May 1992, the plaintiff-wife is alleged to have discovered an extramarital affair between her husband and respondent 2-Smt. Nagina. The plaintiffs case is that when confronted the appellant could not explain the illicit liaison and walked out of the house leaving the plaintiff in a helpless state and forcing her to shift residence with her parents in Madras. At Madras she gave birth to a female child on 16th of October, 1992

named Mrinalini Reddy. Efforts made by the plaintiff-wife to go back to the appellant-husband and to rehabilitate her relationship with him proved futile because the husband declined to accept her back and claimed to have converted to Islam. The plaintiff's further case is that the appellant and respondent 2-Smt. Nagina are living as husband and wife and that respondent 2 is openly claiming herself to be the wife of the defendant-appellant herein. Left with no alternative to establish her status as the legally wedded wife of the appellant, O.S. No. 130 of 1995 was filed for a declaration to the effect that the marriage between the plaintiff-respondent 1 and defendant-appellant was subsisting and that the second defendant-respondent 2 in this appeal was not entitled to claim herself to be the wife of the appellant.

3. In the written statement filed :by the husband, appellant herein, it was inter alia alleged that after about three months of their marriage, the plaintiff-wife started behaving strangely and picking up fights with the defendant and his family members. Allegations suggesting an extra- marital relationship between the husband and the defendant 2 were denied. It was also alleged that during their stay at coxtown, the defendant-husband happened to notice the plaintiff's name as Mrs. Kamini Selvam in the passport issued to her, meaning thereby that she was earlier married. The earlier marriage of the respondent having come to light the plaintiff started harassing the appellant-husband, which he could escape only by leaving the house. It was alleged that by the time the defendant did so, the plaintiff was pregnant and that the defendant had been totally deceived and misled to get married to a woman who had been married earlier.

4. The written statement went on to state that the plaintiff-wife had obtained a decree of divorce from her earlier husband Sri Robert Selvam, but since the said decree was not granted by a competent Court, the marriage between the plaintiff and the said Sri Robert Selvam continued to be valid and subsisting. It was also alleged that since the marriage between the parties was by deceit and fraud allegedly played upon the husband, the same was a nullity in the eye of law. The allegation that the defendant had changed his faith from Christianity to Islam was also denied. The change of the name was according to the defendant due to some superstitious belief.

5. In the replication filed by the wife, the fact that she was earlier married to Sri Robert Selvam was not disputed. It was asserted that at the time of dissolution of the marriage between the plaintiff-wife and Sri Robert Selvam, both of them were residing in USA. The decree of dissolution granted by the American Court was according to the plaintiff valid and binding upon all concerned. The allegation that the defendant had come to know about the plaintiff's earlier marriage with Sri Robert Selvam only in May 1992 after seeing her passport was dubbed as utterly false. The husband, it was pointed out was a signatory to the Church records which showed that the plaintiff was married earlier and was divorced. So also the parents of the defendant-husband knew about the earlier marriage and its dissolution. The fact that the marriage between the parties had taken place

pursuant to an advertisement published in the "Daily Hindu" was also brought out. The advertisement specifically mentioned that the plaintiff-wife was a divorcee. The defendant-husband, it was averred was estopped from contending that he was ignorant about the earlier marriage of the plaintiff or the dissolution thereof.

6. On the above pleadings, the Family Court framed as many as nine issues. Evidence adduced by the parties comprised the statement of the plaintiff and her two witnesses. The defendant-husband did not however produce any evidence except getting his own statement recorded.

7. By the impugned judgment, the Family Court decided issue No. 1 in the affirmative and held that the plaintiff was the legally wedded wife of the defendant-appellant herein. Issue No. 4 relating to the subsistence of the marriage between the plaintiff and Sri Robert Selvam was held in the negative. So also issue No. 3 was found against the husband rejecting his version that the marriage between him and the plaintiff was the result of fraud and deceit on the part of the plaintiff. Issue No. 4 relating to the parentage of Ms. Mrinalini Reddy was held in the affirmative and so was issue No. 5 relating to the marriage between the appellant and defendant-respondent 2. A decree for declaration and injunction as prayed for by the plaintiff was accordingly granted to the plaintiff, aggrieved whereof the defendant-husband has filed the present appeal as noticed earlier.

8. Appearing for the appellant M/s. Raghavan and Ponnappa submitted that the only question that required to be examined in this appeal was whether the decree of divorce granted by the Court in America was valid and enforceable in law. They urged that if the answer to that question be in the affirmative, nothing further would survive for consideration for in that case the marriage between the appellant and respondent 1 shall have to be treated as a valid marriage and the daughter born out of the wedlock declared as their legal heir. It would according to the learned Counsel be unnecessary in that eventuality to go into the question whether the appellant had converted to Islam and taken the 2nd respondent as his second wife. Suffice it to say that the challenge to the impugned judgment and decree is in the light of the submissions made by learned Counsel at the Bar confined to examining the correctness of the finding recorded by the Court below insofar as the validity of the foreign decree is concerned. The findings of fact recorded by the Trial Court which have not been assailed and which we find are perfectly justified on the available evidence may be summarised thus:

(1) That the appellant and respondent 1 got married as per Roman Catholic rites at Madras in January 1992,

(2) That after marriage they resided at Bangalore as husband and wife till May 1992.

(3) That out of the wedlock a daughter named Mrinalini Reddy was born to the couple in October 1992.

(4) That the appellant had changed his name from Deva Prasad Reddy to Salman Dev.

(5) That the appellant married respondent 2-Nagina according to Muslim rites.

(6) That a son has also been born to the appellant and respondent 2.

9. What then remains to be examined is whether the decree of divorce granted by the American Court is valid for if it is a nullity as argued by the appellant, the marriage contracted by the appellant with respondent 1 shall also be non est in the eye of law. On the contrary, if the decree is held to be valid as between the parties and even qua the appellant, the marriage between the appellant and respondent 1 shall have to be treated as validly contracted and a declaration to that effect granted. As a necessary consequence, the marriage contracted by the appellant and respondent 2 shall have to be declared to be illegal and void ab initio.

10. Section 13 of the CPC inter alia provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim except in situations enumerated in Clauses (a) to (f). One of the situations, where such a judgment will not be conclusive and binding is where it has not been pronounced by the Court of competent jurisdiction. The argument advanced on behalf of the appellant therefore was that the judgment of the American Court dissolving the marriage between the respondent and Robert Selvam was not conclusive and binding as the same had not been pronounced by a Court of competent jurisdiction. It was also argued that the judgment of the American Court was not binding and conclusive because it was founded on a breach of personal law applicable to the parties before the said Court. Inasmuch as the American Court has dissolved the marriage on a ground not otherwise recognised by the law applicable to the parties, it had committed an error which vitiated the judgment.

11. On the question of jurisdiction of the American Court, it was argued that the jurisdiction of the said Court depended entirely on the parties being domiciled in that country. It was urged that neither Robert Selvam nor the respondent were strictly speaking domiciled within the jurisdiction of the Court that had dissolved their marriage. Domicile, it was argued, implied the intention to permanently reside in a given country. None of the parties before the Court in America had the intention at any time to reside permanently in that country. Indeed after the marriage was dissolved, both of them had shifted back to India which implied that they had never really intended to stay in America. Reliance was placed upon a series of decisions of different Courts including those rendered by the Apex Court of India in support of the submission that in order that a foreign decree be recognised, it must be shown that the Court passing the same did not lack the jurisdiction to do so.

12. In the case of R. Viswanathan Vs. Rukn-Ul-Mulk Syed Abdul Wajid, , the Supreme Court declared that the Courts in India will not examine whether

conclusions recorded in the judgment of a foreign Court are supported by evidence, or are otherwise correct as the binding nature of the judgment can be displaced only by establishing that the case falls within one or more of the six clauses enumerated u/s 13 and not otherwise.

13. In the case of Smt. Satya Vs. Shri Teja Singh, the Supreme Court held that the private international law is not the same in all countries and that there is no system of private international law which could claim universal recognition. The question whether a decree of divorce passed by a foreign Court is entitled to recognition in India must depend principally on the rules of private international law as recognised by Indian Courts. Such recognition is accorded not as an act of courtesy but on consideration of justice. It is implicit, declared the Court, in that process that the foreign law must not offend against the public policy in India.

14. In the case of Budhia Swain and Others Vs. Gopinath Deb and Others, the Court was dealing with the question of lack of jurisdiction or mere error of jurisdiction. It pointed out that a distinction had to be drawn between the lack of jurisdiction which strikes at the very root of the exercise and vitiates the proceedings themselves and a mere error in the exercise of jurisdiction, which does not vitiate the legality and validity of the proceedings and the order passed therein unless the order is set aside by a challenge in the prescribed manner.

15. The interplay of the municipal laws of this country and the private international law was however exhaustively examined by the Supreme Court in the case of Y. Narasimha Rao and Others Vs. Y. Venkata Lakshmi and Another, . That was also a case where the parties were married in India according to Hindu law. A petition for dissolution of marriage was filed in a Court at Tirupathi. Another petition for dissolution was filed in the Circuit Court of St. Louis County, Missouri, USA. It was inter alia alleged in the said petition that the petitioner had been a resident of State of Missouri for a period of 90 days or more immediately preceding the filing of the petition. From the averments made in the pleadings however it was evident that the parties had last resided together at New Orleans, Louisiana and never within the jurisdiction of the Circuit Court of St. Louis County in the State of Missouri. The Circuit Court all the same assumed jurisdiction over the matter on the ground that the husband had been a resident of State of Missouri for 90 days before the filing of the petition and passed a decree for dissolution of the marriage in the absence of the respondent on the only ground that the marriage was irretrievably broken down. The petition filed in the Tirupathi Court was thereupon dismissed as not pressed. Criminal proceedings were next initiated against the husband for bigamy, in which the decree for dissolution of marriage passed by the Missouri Court was set up as a defence. The Magistrate discharged the husband holding that the complainant i.e., the wife had failed to make out a prima facie case against the husband. The High Court set aside that order holding that the photostat copy of the judgment from the American Court was inadmissible in evidence to prove the dissolution of the marriage. The matter was then taken to the Supreme Court, The Court held

that time had come to ensure certainty insofar as recognition of foreign judgments in matrimonial matters were concerned. The minimum rules of guidance for securing the certainty, observed the Court, need not await legislative initiative and described its effort as a beginning in that direction leaving the lacunae and the errors to be filled in and corrected by future judgments. The Court after discussing the provisions of Section 13 and an earlier decision in *Smt. Satya*'s case, *supra*, deduced certain rules insofar as recognition of foreign matrimonial judgments were concerned. It observed:-

"From the aforesaid discussion the following rule can be deduced for recognising a foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign Court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties".

The Trial Court has relying upon the above decision held that the decree passed by the American Court falls in Exception 3 carved out by the Supreme Court in the passage extracted above. The parties to the proceedings before the Court in America having consented to the grant of relief prayed for in the same, the decree passed by the said Court will remain binding and conclusive between them, the alleged error of jurisdiction notwithstanding. We shall presently advert to that aspect, but before we do so, we need to deal with two other submissions that were made before us on behalf of the respondent-wife. It was contended that the decree passed by the American Court was final and conclusive u/s 13 between the parties to the same. The binding and conclusive nature of such a decree could be assailed only on one of the grounds available u/s 13 of the CPC that a party to the decree or any person claiming under them. A second husband had no pre-existing right which could be affected by the previous divorce so as to give him the locus to challenge its validity in collateral proceedings either on the ground that the Court that passed the decree had no jurisdiction or that the decree was contrary to the law that applied to the parties before it. Reliance in support of that proposition was placed upon *Widera v Widera* 118 N.Y.S. 2d 127 : 1952 N.Y. M. L 2753 where a challenge to the decree for divorce by the second wife was held invalid. The Court observed:-

"In *deMarigny v deMarigny*, Fla. 43 So. 2d 442 a second wife ought to have the divorce decree of the first marriage declared invalid. The Supreme Court of Florida held that the putative wife, being a stranger, without then existing

interest to the divorce decree, could not impeach it. It quoted with approval 1 Freeman on judgments (5th edition) 636 and 319: It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from, the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interests acquired prior to its rendition 43 So. 2d at page 447".

16. We are in respectful agreement with the view expressed in the above decision. The provisions of Section 13 of the CPC declare the decree passed by any Foreign Court to be conclusive between the parties except where the same falls under any one of the Clauses from (a) to (f) enumerated thereunder. The validity of any such decree is therefore beyond the pale of any challenge unless the same is by one of the parties affected by the decree and on a ground which falls in one of the clauses enumerated in Section 13. Any person, who was a stranger to the proceedings culminating in the passing of a decree cannot assail the validity of such a decree unless he had a pre-existing interest which the decree affects adversely. The test in our opinion is whether before contracting a marriage with the respondent the appellant could bring an action either in America or in any Court in this country for a declaration to the effect that the decree for divorce by the American Court between the respondent and Robert Selvam was illegal either for want of jurisdiction of the said Court or on account of any other invalidity attached to the same. The appellant could not, in our opinion do so. That is because he had no pre-existing right or interest in the subject-matter nor did the decree affect any such pre-existing right. That being so, the mere fact that the appellant contracted a second marriage with the respondent cannot improve his position. He cannot on the basis of that subsequent development acquire a right which he did not possess on the date he entered into the wedlock with the respondent. The argument that the decree could be assailed even by a stranger to the proceedings on grounds mentioned in Section 44 of the Indian Evidence Act even when the stranger is unaffected by the decree must also be rejected. The adverse effect of the decree vis-a-vis the person challenging the same must be seen by reference to the date on which the decree was passed and not the developments that take place subsequently. The question therefore is whether on the date of the decree, the person, who now seeks to assail the same had any right to do so. The answer has to be in the negative, A challenge mounted on the basis of events that have happened subsequent to the passing of the decree cannot clothe the person bringing the challenge with the right to maintain an action or seek a declaration.

17. It was next argued on behalf of the respondent that the appellant having contracted a marriage, fully conscious of the fact that she was earlier married and divorced, cannot be heard to turn around and argue that his marriage was invalid as the divorce granted to the respondent from the first marriage was not by a Court of competent jurisdiction. The fact that the respondent was earlier

married and divorced was duly published in the matrimonial advertisement and even disclosed in the Church Marriage Register Book, which was signed by the appellant and the respondent both. Having thus accepted the divorce to be valid and having contracted the marriage and consummated the same, the appellant is estopped from contending that the respondent was not eligible to contract such a marriage or that the marriage between the parties was a nullity. We find considerable merit even in that contention. It is not a case where previous marriage of the respondent was concealed from the appellant and the wedlock brought about by fraud or deception. It is common ground that the advertisement issued by the parents of the respondent had clearly disclosed that she was earlier married and that she had been divorced. So much so, the Church register, in which entries were made in regard to the marriage between the appellant and the respondent and which was signed by both the parties clearly mentioned that the respondent was a divorcee. Having thus accepted the fact that the respondent is a divorcee and taken her as his wife, lived with her as her husband and begotten a child out of the wedlock, it is not permissible for the appellant to argue that the marriage between the two was non est for any reason.

18. Spencer and Bower in their Book "Law Relating to Estoppel by Representation" refer to a decision of the House of Lords in *G v M* 1885 (10) A.C. 171, where Lord Selborne has made the following observations:

"I think I can perceive that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it, as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them to treat as if no such relation had ever existed".

19. In *H. Vs. H.*, the observations made in the case mentioned above have been followed and a petition filed by the wife for annulment of marriage dismissed on the ground of estoppel.

20. To the same effect is the decision in *W v. W* 1952(1) All ER 859. That was a case where the parties were married in 1941. The marriage was not consummated till 1945. The couple adopted a child in 1946. A suit for nullity of marriage on the basis of the wife's inability to consummate the marriage was filed in 1946. While the lower Court annulled the marriage, the Appellate Court in appeal filed by the wife observed that there were circumstances which plainly implied recognition of the existence of the marriage so as to render it inequitable and opposed to public policy to permit it to be challenged.

21. The decision in *Tindall v Tindall* 1953 (1) All ER 139 : (1953) is on the same principle of law. In *Bakshi Ram and Others Vs. Brij Lal*, . Supreme Court declared

that in equity a person drawing benefit from a transaction cannot escape the disadvantage if any flowing from it. Parties in a dispute cannot be permitted to turn round and take a stand that "Heads I win, tails you lose".

22. Applying the above principles to the instant case, it would be extremely inequitable, harsh and even contrary to public policy to allow the appellant to contract a marriage with the respondent to consummate the marriage, beget a child from her and then turn round to argue that the respondent was not his wife but the wife of Robert Selvam because the divorce granted to her was bad for want of jurisdiction of the Court granting the same. There is no gainsaying that if the respondent were to know as on the date she contracted the marriage with the appellant that the latter will after contracting the marriage and enjoying the benefits and pleasures flowing from the same, turn round to argue that she is not his wife, but the wife of her previous husband, she would not have even thought of much less consented to any such marriage. That apart to allow the appellant to argue that he has been living all these years not with his own wife but with the wife of another person will mean that what was lawful and morally right between them becomes unlawful and immoral giving rise to complications not only in terms of the legitimacy of the child born out of the wedlock, but also in terms of the consequences, which the previous husband may have acting upon the divorce decree granted by the Court in America, contracted a marriage and be happily living with his wife. We therefore have no hesitation in holding that the appellant is estopped from arguing that his marriage with the respondent was invalid or non est only because the decree passed in her favour by the American Court suffered from any error of law or jurisdiction.

23. It is in the light of what we have said in the foregoing paragraphs unnecessary to examine the question whether the judgment and decree passed by the Court in America truly fell within the purview of the 3rd exception carved out by the Supreme Court in Venkata Lakshmi's case, supra. The 3rd exception, reliance whereupon has been placed by the respondent as also the Trial Court in declaring the decree dissolving the marriage to be conclusive deals with a situation where the respondent consents to the grant of relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties. The Supreme Court has recognised the principle that if the respondent has consented to the grant of relief before a Foreign Court, the judgment and decree granted by any such forum would be conclusive no matter the jurisdiction of the Court was not in accordance with the provisions of the matrimonial law of the parties. In other words, consent to the grant of relief is in matters relating to matrimonial laws and decrees granted by Foreign Court taken to be sufficient to cure the jurisdictional defect. To that extent there was no difficulty. What was argued was that consent may cure the defect in the jurisdiction of the forum but the same cannot authorise the forum to pass an order contrary to the provisions of the matrimonial law applicable to the parties. It was submitted that the decree passed by the American Court proceeds on a ground not available to the parties as per their personal law. No divorce by

mutual consent was envisaged by the Indian Divorce Act till the Parliament amended the Act to incorporate the same. Consent to the grant of relief could not therefore imply that the forum could grant relief on a ground not otherwise available to the parties as per their personal law.

24. There are two reasons why we cannot subscribe to that view. Firstly because, consent of the respondent to the grant of relief by a foreign forum has been taken as curing the defect in the validity of the decree. If consent can cure the defect of jurisdiction of the forum, which grants the decree, by the same logic it should also place a decree granted by such a forum beyond challenge on the ground that the relief granted was not available to the parties as per the personal law prevalent in the country of their origin. If consent to the grant of relief is taken as a relevant circumstance, we see no reason to make a distinction between cases, where the defect to be cured is one relating to the jurisdiction of the forum and others, where the defect arises from the ground on which the relief has been granted.

25. Secondly because, as on the date the question whether the foreign decree was valid as per the personal law applicable to the parties arises for consideration, the ground on which the decree was passed is available. Divorce by mutual consent was no doubt not envisaged by the Indian Divorce Act on the date the American Court dissolved the marriage between the respondent and Robert Selvam but as on the date the validity of the decree is being adjudicated upon, such a ground is available. The object of the amendment introduced in the Act obviously was to make divorce by mutual consent permissible in cases where the marriages had not worked for any reason or broken down irretrievably. The fact that the respondent and Robert Selvam had decided to part company on account of reconcilable differences between them and the fact that the respondent had contracted a second marriage, can hardly leave any doubt that the previous marriage had irretrievably broken down. Such being the position, to declare the divorce granted by the American Court to be invalid because the ground on which it was granted was not available to the parties as on the date of the decree would be tantamount to taking an unrealistic and pedantic view. That is especially so when declaring the marriage between the respondent and Robert Selvam to be subsisting would amount to thrusting upon the respondent-wife an unwilling husband and vice versa.

26. In the result, there is no merit in this appeal, which fails and is hereby dismissed with costs.