

(1972) 02 KAR CK 0017
In the Karnataka High Court
Case No : Second Appeal No. 594 of 1968

Kallappa Sidappa Suryawanshi

APPELLANT

Vs

Akkavva

RESPONDENT

Date of Decision : 24-02-1972

Acts Referred:

Divorce Act, 1869 — Section 23
Limitation Act, 1908 — Section 120

Citation : AIR 1972 Kar 276 : (1972) 1 MysLJ 588

Hon'ble Judges : H.B. Datar, J

Bench : Single Bench

Advocate : V. Krishnamurthy, for the Appellant; S.L. Benadikar and N.A. Mandgi, for the Respondent

Final Decision : Dismissed

Judgement

H.B. Datar, J.—The appellant in this appeal is the plaintiff. He filed O. S. 163/62 in the court of the Civil Judge, Junior Division, Hukkeri, on 21st December. 1962, claiming the following reliefs:

1. Declaration that the marriage solemnised between the plaintiff and the defendant is null and void and as such the defendant is not the wife of the plaintiff; and
2. Declaration that the issue which would be bom to the defendant is not a legitimate issue of the plaintiff. For the purpose of proper appreciation of the points arising in this appeal, it is necessary to set out the genealogical tree which has been mentioned by the plaintiff in the plaint. It is as follows:--

RAGHU@RAYAPPA | _____

_____ | | | | | Satappa
Bharappaa Annappa Tavanappa- Padmavathi (Further geneology Ghantappa |
Sonawwa Husband Satappa is not given as be- (Gone in adoption Shankar
(Dead) Tavanappa cause it is not con- in another | Shankannawar cerned with

the branch.) _____ | | |
_____ Akkawwaa Annappaa | | Leelawati Shrimandhar
Sonawwa Kallappa (Deft.) (Plff.)

The case of the plaintiff is that he is the natural son of Padmavati wife of Satappa Tavanappa Shankannawar, who happened to be the daughter of Siddappa son of Raghu @ Rayappa shown in the genealogical tree. His case is that Siddappa's son Tavanappa died without any issues several years ago and it is for this reason he took the plaintiff, who happens to be the daughter's son in adoption on the 10th of November 1932. It was also stated that the deed of adoption has been executed on the 15th of December 1932 and as such he has become the adopted son of deceased Siddappa. It was therefore alleged that as the result of adoption his ties in the natural family have been extinguished and he has become the member of Suryawanshi family. It is also the case of the plaintiff that the defendant is the daughter of one Shanker who happens to be the son of the elder brother of his adoptive father Siddappa and on account of such relationship existing between them, there could not have been a marriage between the parties. It was, however, stated that such a marriage which had taken place in the year 1944 between him and the defendant as per Hindu Law is illegal because the relationship of the parties was within prohibited degrees.

It was further stated that after attaining majority, he came to know about his marriage being null and void on account of its being within prohibited degrees and also after coming to know that the defendant is leading immoral life, he did not keep any contact with the defendant as husband and wife. It was also alleged that as the defendant and her father did not agree for dissolution of the marriage and as there was every likelihood of the defendant leading an immoral life and giving birth to an illegitimate child, the suit was instituted.

2. In the plaint it was further alleged that the cause of action for the suit arose some time in October 1962 as the defendant has taken steps to approach the Magistrate's Court for recovery of maintenance.

3. The defendant resisted the suit on several grounds. It was contended by her that the marriage between herself and the plaintiff is not within the prohibited degrees and as such it is not null and void. It was contended that only blood relationship should be taken into consideration and not the relationship by adoption and therefore the marriage between the plaintiff and the defendant is not within the prohibited degrees. It was also contended that the parties are not governed by Hindu Law and even assuming that they are governed by Hindu Law, as there was no blood relationship between the parties, it could not be considered that the marriage is within the prohibited degree.

It was also contended by her that they have cohabited after marriage and the marriage has been consummated and they had access to each other at all the relevant point of time. It was specifically stated that the defendant was residing near her father's house and after attaining puberty she went to the plaintiff as a

wife and they were living together as husband and wife and that recently plaintiff's sister Sonawwa with an intention to marry her sister's daughter Chainpawwa began to treat the defendant with cruelty and she was compelled to leave the house. It was further stated that she had become pregnant on account of her cohabitation with the plaintiff and that the said Sonawwa was trying to take "Sodapatra" from the defendant with a view to marry her sister's daughter Champawwa with the plaintiff. The defendant contended that as she is the legally wedded wife of the plaintiff and has become pregnant by him, the plaintiff is not entitled to the reliefs sought for. The defendant also contended that the suit filed by the plaintiff was barred by limitation. It was stated that the marriage has taken place years ago and the suit which has not been filed within 6 years from the date of marriage, is barred by time. The defendant also pleaded estoppel.

4. The learned trial Judge on these pleadings framed the following issues:--

1. Whether the suit is barred by time?
2. Whether the defendant proves that the plaintiff is estopped from challenging the marriage?
3. Has this court no jurisdiction to try this suit?
4. Does the defendant prove that the parties are not governed by Hindu Law so far as the marriage between the plaintiff and defendant is concerned?
5. Is the marriage not consummated and that there was no cohabitation or access between the parties?
6. Does defendant prove that the marriage is valid by custom?
7. Does plaintiff prove that marriage is within prohibited degrees and hence void in law?
8. Is plaintiff entitled for declaration sought?
9. Is defendant entitled for compensation of Rs. 500/- as claimed by her?
10. What order?

The learned trial Judge after recording voluminous evidence upheld the case of the plaintiff and by the judgment dated 17th of April 1964 decreed the plaintiff's suit with costs. It was declared that the marriage of the plaintiff with the defendant is null and void and the defendant is not the wife of the plaintiff. It was further declared that any issue born to the defendant including the one that is to be born to her after this suit cannot be the lawful issue of the plaintiff.

5. The correctness of this decision was challenged before the appellate court in Civil Appeal No. 299/64. The learned Civil Judge by the judgment dated 8th February 1968 allowed the appeal, set aside the decree of the lower court and dismissed the plaintiff's suit. The learned Civil Judge also ordered that the parties shall bear their own costs. The learned Civil Judge has held that the suit

of the plaintiff was barred by limitation and dismissed the suit on this ground.

6. It is this decree that is challenged in the present second appeal.

7. Both the learned Advocates appearing for the parties submitted that in the event the decree of the lower appellate court is confirmed on the question of limitation, then the findings of both the courts below on the question of validity of the marriage between the plaintiff and the defendant may be kept open and the court need not decide that question in the present second appeal. Therefore I requested the learned Advocates appearing for the parties to advance arguments on the question of limitation. I am in agreement with the view taken by the lower appellate court and I think it appropriate and as requested by the learned Advocates appearing for the parties to set aside the finding of both the courts below on the question relating to the validity of the marriage between the plaintiff and the defendant

8. For the purpose of deciding the question as to whether the suit filed by the plaintiff is barred by limitation, it would be necessary to find out as to when the cause of action accrues. Therefore it would be necessary to go into the question as to whether the marriage ceremony has in fact taken place and whether it was consummated. It is clearly admitted in the plaint that the marriage ceremony has taken place. The other finding of fact recorded by the learned appellate Judge is that the parties lived as husband and wife and so I have to see as to whether the finding recorded by the appellate judge is justified by the evidence on record. One of the issues was as to whether the marriage was consummated and as to whether there was cohabitation between the parties. The learned appellate Judge accepted the evidence and held as follows:--

"Considering the probabilities in the case, I am inclined to rely on the evidence given by the defendant that she after attaining puberty, went and lived with the plaintiff in his house as his wife for a considerable time".

In the evidence before the court, the plaintiff who has been examined at (Ex. 38) stated that his marriage took place with the defendant 19 years ago, that at the time of his marriage he was 13 years of age and the defendant was 9 years of age. It was further stated that as the defendant filed criminal case against him he was required to file this suit for a declaration that the marriage is void. In paragraph 3 of his deposition, he has stated that he attained majority within 5 years after his marriage with the defendant. He denied in paragraph 4 of his deposition that after the defendant attained puberty she came to his house and began to cohabit with him as wife. The defendant who is examined (Ex. 49), on the other hand, in her evidence before the court has stated that after she attained puberty, her father sent her to the house of plaintiff with reattribute and sari. reattribute was distributed to all the inmates of the village after reaching the plaintiff's house. The bed ceremony took place on the same night and she began to reside with him for 8 years. She further stated that the relationship was good for long time, but after some time the sister of the plaintiff started giving

trouble.

This evidence of the defendant is supported by the evidence of Shankarappa who is the father of the defendant, whose evidence is marked at Ex. 54. He has also mentioned about the fact that after the defendant attained puberty, she was sent to her husband's house and the plaintiff and the defendant lived together as husband and wife. To the same effect is the evidence of Siddarai Adappa Bedakihal (Ex. 55); Kallappa Annappa Sankannavar (Ex. 58); Alagouda Nanagouda Patil (Ex. 59); Chintamani Parishnath Pandit (Ex. 60). All these witnesses have stated that the defendant was residing in the house of the plaintiff. The learned appellate Judge came to the conclusion that their evidence was acceptable and that there was cohabitation and the plaintiff and the defendant have lived as husband and wife. The finding, therefore, of the learned appellate judge that there was cohabitation is acceptable and is therefore affirmed. Now the question is whether having regard to these findings the plaintiff's suit for a decree that the marriage between the plaintiff and the defendant is void is within time. It is not disputed by the learned Advocates appearing for the parties that the provisions of Article 120 of the Indian Limitation Act applies to the facts of this case. So the only question is as to whether the present suit filed on the 21st December 1962 for a declaration that the marriage is void which has taken place in the year 1944 is within time or not. In the case of Bai Shirinbai v. Kharshedji Nasarvanji Masalavala. ILR (1893) Bom 430, the provision of Article 120 of the Indian Limitation Act came up for consideration before the High Court of Bombay. It was held in that case as follows:--

"It is admitted that Article 120 of the schedule to the Limitation Act governs the present case, as no other article in the schedule applies specifically to it. That article allows a period of six years within which to sue from the time when the right to sue accrues. We agree with the lower appellate court that the right to sue the cause of action-accrued during the plaintiff's infancy at the time when being of years of discretion she knew of the marriage and understood its consequences, which is found to be at latest when she was fourteen years of age. That being so, the effect of Section 7 of the Act is to allow the plaintiff three years' time within which to sue after attaining her majority. We must, therefore, inquire whether for the purpose of bringing this suit the plaintiff attained her majority on reaching the age of eighteen or of twenty-one years. The question is by no means free from difficulty".

It may be noted that in that case, the suit was filed on the 11th of September 1890 alleging that the marriage ceremony which had taken place in the year 1869 when she was born on the 20th of September 1866 was null and void and the marriage ceremony had not created the status of husband and wife. The defendant contended in that case that the suit was barred by limitation and the plaintiff could not repudiate the same. The trial court had dismissed the suit and the appellate court confirmed that decision and in second appeal the High Court

of Bombay confirmed the decisions of the courts below. From the extract of the judgment of the Bombay High Court which is already given above, it is clear that the court held that the cause of action accrued during the plaintiff's infancy at the time when being of years of discretion she knew of the marriage and understood its consequences and in any event within 3 years after attaining majority. It was further held that the suit must be within three years on attaining the age of eighteen years.

9. The next is the judgment in the case of Sophy Auerbach Vs. Shivaprosad Agarwalla, In that case, a question similar to one that arises in this appeal came up for decision whether the suit was barred by limitation. It was contended before the High Court of Calcutta that there is no limitation In matrimonial matters and the suit could be filed at any time. Lodge, J. rejected the contention and held that the Limitation Act does apply and it was Article 120 that applies. Thereafter considering the provisions of Article 120 this is what has been stated:--

"A suit for a declaration that the marriage of plaintiff with defendant is null and void is not a suit in the matrimonial jurisdiction of the court, but in its ordinary original civil jurisdiction and hence it is governed by the Limitation Act. Exception to Section 27 does not apply, since the exception in Section 27 regarding matrimonial matters refers only to suits under the Divorce Act. Section 23 has no application to the suit. Article 120 is the article to be applied. The right to sue in such a case accrues as soon as the wedding ceremony has been performed, or as soon as the defendant has claimed marital rights and not from the date of the plaintiff's knowledge of her rights".

It was further stated at page 485:--

"The claims of the defendant to marital rights were apparently conceded over a space of years. Therefore it cannot be suggested that they were repelled and were consequently unsuccessful, so as to make subsequent claims a new cause of action".

In another paragraph it was stated thus :

"In the present suit, it is obvious that the right to a declaration that the marriage was a nullity accrued at least as soon as the defendant claimed marital rights, and that there was a clear and unequivocal threat to infringe the plaintiff's rights by the defendant from that time".

Thus it is clear that according to the view taken by the High Court of Calcutta the right to sue in case of declaration that the marriage of the plaintiff and the defendant was null and void accrues as soon as the wedding ceremony was performed or as soon as the defendant has claimed marital rights.

10. The learned counsel appearing on behalf of the appellant brought to my notice two judgments of the Supreme Court. The first is the case of Mst. Rukhmabai Vs. Lala Laxminarayan and Others, . In that case. Head Note D of the

report was relied upon and it reads thus:--

"There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

Where there are successive invasions or denials of a right, the right to sue under Article 120 accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however, ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right".

Similarly reliance is placed upon the judgment of the Supreme Court in the case of C. Mohammed Yunus Vs. Syed Unissa and Others, and what is relied upon is Head Note B which reads as follows:--

"A suit for a declaration of a right and an injunction restraining the defendant from interfering with the exercise of that right is governed by Article 120. Under the Article there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right.

The plaintiffs claiming as heirs of one F sued to obtain a declaration of their rights in a certain institution which was in the management of trustees with an injunction restraining the defendants (other claimants) from interfering with their rights. The trustees never denied their right:--

Held that if the trustees were willing to allow the plaintiffs their legitimate rights, mere denial by the defendants of the rights of the plaintiff would not set the period of limitation under Art, 120 running against them".

Therefore, it was submitted by the learned counsel for the appellant that the cause of action accrues only when the defendant made a claim for maintenance by starting proceedings before the Magistrate's Court. It was stated that the cause of action does not arise until then and therefore the suit filed within six years thereafter was in limitation.

11. It was only for the purpose of appreciating this argument, in the earlier part of the judgment. I have considered the question as to whether the plaintiff and the defendant lived together as husband and wife i. e., as to whether the marriage was consummated or not. On a consideration of the entire evidence the conclusion arrived at by the appellate court was that the plaintiff and the defendant lived as husband and wife and that the marriage has been consummated. That finding has been accepted by me as I am bound by the finding because it is a finding on question of fact. As held by both the High Courts of Bombay and Calcutta, the right to sue for declaration that the marriage

between the plaintiff and the defendant is null and void accrues as soon as the marriage ceremony is over, at any rate if the parties to the marriage are minors when the parties attain the majority. I am in respectful agreement with this view. The cause of action for a suit for declaration that the marriage is void arises when a marriage takes place, if however the parties are minors at the time of the marriage when they attain majority. In any event the cause of action accrues when the Parties to the marriage claim the status and not from any other date.

12. In the present case, the parties were married in the year 1944 and the defendant came to live with the plaintiff as his wife, in about the year 1955-56. That right was conceded and there was cohabitation and parties lived as husband and wife for years. The suit filed several years thereafter, is clearly barred. As laid down by the Supreme Court what has to be seen is whether there was unequivocal threat requiring the person to sue. In other words of Lodge. J. there was such an equivocal threat to the right asserted when the defendant claimed to live as a wife.

The institution of the proceedings for maintenance did not give a fresh starting point to the plaintiff to file the suit. As already stated the suit must be instituted within a period of six years from the date on which the right to sue accrues or on the date of wedding ceremony performed or at all events as soon as the defendant claimed marital rights. In this case, as both the defendant and the plaintiff have lived as husband and wife for more than six years prior to the institution, of the suit, it is clear that the plaintiff's suit for declaration was barred by limitation. In that view of the matter the decision of the appellate Judge has to be upheld and the appeal has to be dismissed and at the same time the findings of both the courts below on the question as to whether the marriage between the plaintiff and the defendant is valid or not is kept open.

13. In the result this appeal fails and the same is dismissed with costs.