

(2009) 09 KL CK 0025

In the High Court Of Kerala

Case No : Regular Second Appeal No. 1114 of 2007

Krishnamma

APPELLANT

Vs

Viswajith

RESPONDENT

Date of Decision : 30-09-2009

Acts Referred:

Family Courts Act, 1984 — Section 7
Hindu Marriage (Amendment) Act, 1984 — Section 27(2), 29
Kerala Joint Hindu Family System (Abolition) Act, 1975 — Section 7
Limitation Act, 1963 — Article 58, 65
Travancore Nair Act, 1912 — Section 4

Citation : (2009) 4 KLT 840

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : V. Chitambaresh, T.C. Suresh Menon, Jibu P. Thomas, P.S. appu and C.A. Anoop, for the Appellant; George Varghese (Manachirackel), for the Respondent

Final Decision : Allowed

Judgement

Thomas P. Joseph, J.—Substantial questions of law formulated in the second appeal are,

(i) Whether lower Appellate Court was justified in law in reversing the well-founded decree of the Trial Court on the ground that the suit is barred by limitation when the same is filed within three years of Ext.A1 judgment?

(ii) Has not the lower Appellate Court erred in computing period of limitation from Ext.P17 order in O.P. No. 14836 of 1996 instead of from Ext.A1 judgment directing the parties to approach the competent Civil Court?

After hearing both sides, the following substantial question of law is also framed:

(iii) Whether the finding of the courts below that the suit is maintainable in the Civil Court is correct?

2. The second appeal arises from judgment and decree of learned II Additional District Judge, Kollam in A.S. No. 124 of 2007 reversing judgment and decree of learned Principal Munsiff, Kollam in O.S. No. 917 of 2000 on the ground that the suit is barred by law of limitation.

3. Short facts necessary for consideration of the above substantial questions of law are:

Appellant claimed to be the widow of Chandrasekharan Nair who retired as a P.D. teacher from Government High School and breathed his last on 26.02.1994. Respondents are the mother and nephew of late Chandrasekharan Nair. The parties belonged to Hindu Nair Community and it is not disputed that they are governed by the provisions of Hindu Marriage Act and Hindu Succession Act. Appellant claimed that late Chandrasekharan Nair married her on 13.09.1978. He took voluntary retirement from Government service on 31.07.1991. They have no issues. Chandrasekharan Nair died intestate according to the appellant leaving herself and respondent No. 1 (mother) as legal heirs falling in Class I of Schedule I of the Hindu Succession Act and hence they are entitled to succeed to the estate of late Chandrasekharan Nair. She alleged that respondents and others obtained documents from her under coercion which are not binding on her. A marriage dissolution agreement was got executed by her on 22.10.1979 but according to the appellant, that document is void and without any legal effect. Appellant prayed for a declaration that she is the legally wedded wife and legal heir of late Chandrasekharan Nair and is entitled to receive family pension from 27.02.1994 onwards, that respondent No. 1 is not entitled to get family pension, and for partition and separate possession of her half share in the suit properties with mesne profits. Respondents contended that in view of the declaration prayed for which concerned the marital status of appellant, the Civil Court has no jurisdiction and that the Family Court alone could entertain the suit. They also contended that there was no legal marriage between appellant and late Chandrasekharan Nair and hence appellant is not his legal heir. The marriage dissolution agreement executed between appellant and late Chandrasekharan Nair is valid and binding on the appellant. It is not correct to say that documents have been got executed by coercion. Further contention is that since the Government has negated the claim of appellant that she is entitled to get family pension and ordered that respondent No. 1 is entitled to get that pension, the suit filed beyond three years from the date of that order is barred by law of limitation. Learned Munsiff found that the suit is maintainable in the Civil Court, Ext. A7 agreement as per which the marriage between appellant and late Chandrasekharan Nair was dissolved is void. It was found that there was legal marriage between appellant and late Chandrasekharan Nair and hence appellant is entitled to get family pension and half share in the immovable properties left behind by the said Chandrasekharan Nair. The plea of limitation was found against the respondents. Accordingly, declaration prayed for was granted and preliminary decree for partition of immovable properties was also granted. Respondents took up the matter in appeal. Learned Additional District Judge

while concurring with the other finding of learned Munsiff that the suit is maintainable, held that the suit filed after three years of the order of the Government declaring right of respondent No. 1 to receive the family pension is barred by limitation and consequently dismissed the suit. That judgment and decree are under challenge in this second appeal on the substantial questions of law first above stated.

4. It is contended by learned Counsel for appellant that finding of learned Additional District Judge regarding limitation is not correct. According to the learned Counsel challenging the Government order dated 30.08.1996 appellant had filed O.R No. 14836 of 1996 in this Court (the Government order is exhibited as Ext.P17 in Ext.A1, copy of order dated 7.11.1997 in O.P. No. 14836 of 1996). That Writ Petition was disposed of observing that appellant could approach the Civil Court to redress her grievance and accordingly, Writ Petition was disposed of. Learned Counsel would contend that the Writ Petition was filed on 16.09.1996 and disposed of on 7.11.1997. Suit was instituted on 6.11.2000, i.e. within three years of the disposal of the Writ Petition and hence the suit is not barred by limitation. Alternatively it is contended that Ext. A7, agreement dissolving the marriage between appellant and late Chandrasekharan Nair has no legal sanctity, is ab initio void and hence, the Government order referred above based on that document has no legs to stand. In that situation, declaration prayed for by appellant regarding her status or widow of Chandrasekharan Nair was quite unnecessary and the suit must be treated as one for partition of immovable properties belonging to the late Chandrasekharan Nair and for declaration that appellant is entitled to receive family pension which cannot be said to be barred by limitation for the reason the suit is filed after three years of government order dated 30.08.1996. Learned Counsel for respondents per contra would contend that Ext. A7, agreement dissolving marriage cannot be said to be void, assuming that it is voidable it has to be avoided in accordance with the provisions of law and appellant having prayed for a declaration as to its invalidity and her marital status, the suit must be governed by Article 58 of the Limitation Act. The Government Order is dated 30.08.1996 and the suit is filed on 06.11.2000. Therefore First Appellate Court was correct in holding that the suit is barred by limitation. Further contention is that at any rate, Civil Court has no jurisdiction to entertain the suit since dispute is regarding marital status and declaration arising out of marital status having been claimed it came within Section 7(b) or (d) of the Family Courts Act and hence jurisdiction of the Civil Court is ousted.

5. Since the issue regarding jurisdiction related to the declaration prayed for, it is appropriate to consider that question first. Ext. A7 is the trump card of respondents. That is a registered document styled as a marriage dissolution agreement executed between appellant and the late Chandrasekharan Nair on 22.10.1979. Respondents would contend that as per the said document the marriage has been dissolved in accordance with the provision of the Travancore Nair Act (for short, "the Act"). Learned Counsel for respondents invited my attention to Section 4 of that Act which states,

A marriage may be dissolved only in one of the following ways, that is to say,-

- (i) by the death of either party, or
- (ii) by mutual consent evidenced by a registered instrument: or
- (iii) by a formal order of dissolution as hereinafter provided,

It is the argument of learned Counsel that it is in accordance with Clause 2 of Section 4 that the marriage between appellant and the late Chandrasekharan Nair was dissolved as per Ext.A7, registered instrument which is saved by Section 27(2) of Hindu Marriage Act. Learned Counsel has placed reliance on decision of this Court in *Prasanna Kumari. G v. Union of India* 2008 (3) KLT 736 : ILR 2008 Ker. 323.

6. In the *Prasannakumari* 's case, the marriage was solemnized on 11.07.1974 and it was dissolved as per a registered instrument by mutual consent in the year 1974 itself as revealed from the fact that registered instrument bears the number, 15 of 1974. The marriage between appellant and the late Chandrasekharan Nair was solemnized on 13.09.1978 and the so called dissolution as per Ext. A7 was on 22.10.1979. The Act has been repealed by Section 7 of the Kerala Joint Family System (Abolition) Act, 1975 (for short "the Abolition Act"). Section 7 of the Abolition Act reads,

(i) Save as otherwise expressly provided in this Act, any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provisions is made in this Act.

(ii) The Acts mentioned in the schedule, in so far as they apply to the whole or any part of the State of Kerala, are hereby repealed.

Referring to repeal u/s 7 of the Abolition Act a learned single Judge of this Court in *Krishnan Namboodiri v. Unnikrishnan* 1982 KIT 640 (referring to the provisions of Kshatriya Act) held,

the repeal under the Kerala Abolition Act is a simple repeal without any saving clause.

The provisions of the Act have no application to the marriage and dissolution in the case on hand as both were after the Act was repealed by Section 7 of the Abolition Act. Hence the decision in *Prasannakumari*'s case has no application to the facts of the case.

7. Learned Counsel for respondents would contend that Section 7(i) of the Abolition Act saved custom or usage which were in force immediately before the commencement of the Abolition Act. There is no plea or evidence that there was any custom prevalent in the community as per which there could be dissolution of marriage by a registered instrument. Therefore that contention cannot stand. The conclusion is that the dissolution of marriage as per Ext. A7 being against

the provisions of Section 29 of the Hindu Marriage Act is void. Learned Munsiff found accordingly. I find no reason to differ."

8. Now I shall refer to the question whether the suit is barred by limitation as contended by learned Counsel for respondents. Appellant has prayed for a declaration as to her legal status in view of Ext. A7 and a further declaration that she is entitled to succeed to the estate of late Chandrasekharan Nair and get family pension. Then the question will rise as to what is the legal effect of a document which is ab initio void. A void document is non est in the eye of law while an illegal document is something which involves a contravention or prejudice to an express or implied provision of law, rule or bye law. I found as rightly held by learned Munsiff that Ext.A7 is void, has no legal effect and is non est in the eye of law. Once Ext.A7 goes out from consideration, appellant continued to be a legal heir of Chandrasekharan Nair along with respondent No. 1. When the document which stood against the appellant is void in the eye of law, it is not necessary to set aside that document or even ask for a declaration regarding the validity of that document. Apex Court considered that issue in State of Maharashtra Vs. Pravin Jethalal Kamdar (Dead) by Lrs., . There, possession was taken under a void document. The suit was for declaration and recovery of possession. It was held that there was no need to seek declaration about invalidity of a void document and that even if relief of declaration along with recovery of possession is sought for, the suit would be governed by Article 65 and not Article 58 of the Limitation Act. The Apex Court in Prem Singh v. Birbal 2006 (2) KIT 863 (SC) held that when a document is void ab initio, a decree setting aside the same would not be necessary as the same is non est in the eye of law and is a nullity. In such cases when a declaration regarding the void character of the document is sought for, that is only an ancillary relief which would not govern the period of limitation for the suit. The consequential relief sought for is to be treated as main relief governing the period of limitation for the suit. (See Mrs. Indira Bhalchandra Gokhale (deceased by LRs) Vs. Union of India and Another, . Therefore declaration prayed for in this case as relief Nos. 1 and 2 were unnecessary, and even if made, need only be treated as ancillary to the main relief of partition of immovable properties and the claim that appellant is entitled to get family pension.

9. It is next contended by learned Counsel that at any rate the Government having denied the claim of appellant for family pension as per order dated 30.08.1996 as seen from Ext.P 17 appended to Ext. A1, that relief cannot be granted since the claim is barred by limitation as the suit is not filed within three years from 30.08.1996. While considering that contention, I have to bear in mind that the Government order is based on Ext.A7 which I found is void and non est in the eye of law. Therefore, the Government order has no legs to stand and has to fall to the ground. Once it is found that appellant is the widow of Chandrasekharan Nair, she is entitled to get the family pension. Appellant therefore can seek a declaration that she is entitled to get family pension consequent to the finding that she is the widow of Chandrasekharan Nair and the

question of limitation does not arise.

10. I shall refer to the contention raised by learned Counsel for respondents as to the jurisdiction of the Civil Court. That contention is based on Section 7(b) and (d) of the Family Courts Act. Section 7 of the Family Courts Act is as follows.

7. Jurisdiction.-- (1) Subject to the other provisions of this Act, a Family Court shall,-

(a) have and exercise all the jurisdiction exercisable by and any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court, or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation: The suits and proceeding referred to in this Sub-section are suits and proceedings of the following nature, namely,-

(a) suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise,-

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

Sub-section (b) refers to a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person. Sub-section (c)

relates to suit or proceeding between parties to the marriage with respect to property of the parties or of either of them. Sub-section (d) relates to a suit for proceeding for an order or injunction in circumstances arising out of a marital relationship. A Division Bench of this Court has held in *Syamaladevi v. Sarala Devi and Ors.* 2009 (1) KLT 892 that a reading of the Sub-sections of Section 7 would show that all the Sub-sections do not require that the litigation must be between parties to the marriage and that it depended on the facts and circumstances of each case whether litigation is maintainable in the Family Court. I found that it was not necessary for the appellant to have prayed for a declaration that Ext. A7 is void. She could avoid Ext. A7 as non est and prayed for the substantive reliefs. Hence Clause (b) of Section 7 referred above has no application. So far as Clause (c) is concerned, that proceeding must be between parties to the marriage. The Division Bench in *Syamaladevi's* case (supra) observed in para.6,

Then again, Clause (c) refers to a suit or other proceeding between the parties to marriage with respect to their properties or of either of them whereas Clause (d) refers to a suit or proceeding for an order of injunction in the circumstances arising out of the marital relationship. Therefore, to attract Clause (c) the dispute must be between the parties to the marriage whereas Clause (d) will be attracted if the dispute arises out of marital relationship and need not necessarily be between the spouses.

It is true, there is an observation in para. 11 of the judgment,

but, it cannot be said that the disputes referred to under Clauses (c), (d) and (g) will be confined to parties to the marriage.

That observation appears to be an error in view of the finding in para.7 that so far as litigation of the nature referred to in Sub-section (c) of Section 7 is concerned, it is doubtless that to attract jurisdiction of the Family Court dispute must be between parties to the marriage. In this case only one of the parties to the marriage i.e., the appellant is on the party array. Hence Clause (c) of Section 7 has no application. Clause (d) of Section 7 relied on by learned Counsel also has no application as the suit is not for an order of injunction. I must also bear in mind that respondent No. 2, nephew of late Chandrasekharan Nair is claiming right over the property as per Ext.B2, said to be executed by respondent No. 1. Therefore, the jurisdiction of Civil court to entertain the suit as found by the courts below is not ousted.

11. Learned Counsel for respondent Nos. 1 and 2 raised an argument that even if Ext. A7 is not valid as a deed of dissolution of marriage, recitals in Ext. A7 would show that appellant and late Chandrasekharan Nair mutually relinquished their right over the property of the other. Learned Counsel referred me to the relevant clauses in Ext.A7 and its nomenclature. The nomenclature of the document cannot decide the intention of the parties and the real purport of the instrument. On going through Ext.A7, what I find is that it was intended to be an agreement

whereby parties dissolved the marriage with certain terms and conditions, one of which was that the parties mutually relinquished their right over the property of the other. Ext. A7 cannot be understood as an agreement of relinquishment of rights between appellant and late Chandrasekharan Nair. I can only understand the various recitals in Ext. A7 as terms and conditions following their resolution to dissolve the marriage which, I found is void and non est in the eye of law. Hence the terms and conditions in Ext. A7 alone cannot survive and the relinquishment if any remains not supported by any consideration.

12. It is lastly argued by learned Counsel for respondent Nos. 1 and 2 that late Chandrasekharan Nair had nominated respondent No 1 as his nominee in the matter of pension benefits. That certainly was at a time when late Chandrasekharan Nair thought that his marital relationship with appellant has been dissolved validly as per Ext. A7 which I found is void in the eye of law. It is also trite law that a nominee can only collect the amount on behalf of the legal heir who is otherwise entitled to get the amount. The mere fact of nomination of respondent No. 1 to receive the family pension will not clothe her with any right to get the same. Family pension has to go to the widow, i.e. the appellant.

13. My above discussion leads me to the conclusion that finding of learned Additional District Judge that the suit is barred by limitation is not correct. It follows that the judgment and decree of the First Appellate Court are not legal, are liable to be set aside, and I do so. The substantial questions of law raised above are answered accordingly.

Resultantly, the Second Appeal is allowed. Judgment and decree of the First Appellate Court are set aside and that of the Trial Court are restored. Parties are directed to suffer their respective costs in this Second Appeal.