

(2003) 09 AP CK 0070

In the Andhra Pradesh High Court

Case No : SA No's. 313 and 1165 of 2001

Nallagondla Kanthamma

APPELLANT

Vs

Nallagondala Rajyam and Others

RESPONDENT

Date of Decision : 19-09-2003

Acts Referred:

Hindu Marriage Act, 1955 — Section 11, 16, 5(1)

Citation : (2004) 3 ALD 168 : (2004) 1 ALT 450 : (2004) 1 CivCC 431 : (2004) 1 DMC 467

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : V. Eswaraiah Choudary, in SA No. 313 of 2001 and V. Jagapathi, in SA No. 1165 of 2001, for the Appellant; V. Eswaraiah Choudary, in SA No. 1165 of 2001, V. Jagapathi, for Respondent Nos. 1 and 4 to 7 in SA No. 313 of 2001 and R.S. Murthy, for the Respondent

Judgement

P.S. Narayana, J.—The suit O.S.No. 81/96 on the file of Junior Civil Judge, Nandalloor was filed by one Nallagondla Kanthamma against General Manager, Integral Coach Factory, Madras, Chief Personal Officer, Integral Coach Factory, Madras for declaration that she is the legally wedded wife of Nallagondla Penchalaiah who died on 19-6-1996 while working in Integral Coach Factory, Madras and entitled to receive the benefits i.e., Provident Fund, Gratuity, Pension, Leave Salary and other privileges incidental thereto and also for permanent injunction and mandatory injunction. The 3rd defendant one Nallagondla Rajyam was impleaded as party by virtue of an order dated 29-6-1998 in I.A. No. 500/96.

2. On the respective pleadings of the parties after settlement of issues, P.W.1 and D.W.1 to D.W.6 were examined and Exs.A-1 to A-7 and Exs.B-1 to B-4 were marked. The learned Junior Civil Judge, Nandalloor, on appreciation of oral and documentary evidence, had declared that the plaintiff is the legally wedded wife of late Nallagondla Penchalaiah, entitled to receive the benefits due to the deceased Penchalaiah and the suit was decreed without costs by the judgment

and decree dated 2-4-1999. Aggrieved by the same, the 3rd defendant filed A.S.No. 24/99 on the file of Senior Civil Judge, Rajampet.

3. Respondents 4 to 7, the children of the said Penchalaiah through Rajyam, the 3rd defendant, were added as parties in I.A. No. 11/2001 dated 25-1-2001. The Appellate Court vide Judgment and decree dated 2-2-2001 had modified the judgment and decree of the Trial Court declaring that the plaintiff/1st respondent and the 3rd defendant/appellant, the two widows of Penchalaiah, along with Respondents 4 to 7 as Class I heirs, are equally entitled to receive the benefits due to the deceased Penchalaiah from the office of Integral Coach Factory, Perambur, Madras. It was also specifically stated that the widows are entitled to receive in equal shares. Aggrieved by the same, the plaintiff filed S.A. No. 313/2001 and the 3rd defendant and her children filed S.A. No. 1165/2001. Hence, both these Appeals are being disposed of by this Common Judgment.

4. For the purpose of convenience, the plaintiff is referred to as the "first wife" and the 3rd defendant is referred to as the "second wife" and Respondents 4 to 7, the children of the deceased Penchalaiah through the second wife added as parties at the appellate stage are referred to as "children".

5. The only question which was raised and elaborately argued by the respective parties is, whether the second wife is entitled to receive any of the benefits due to the deceased husband.

6. Sri Eswaraiiah Choudary, the learned Counsel representing the first wife with all vehemence had contended that inasmuch as the first wife is living, by virtue of Section 5(1) of the Hindu Marriage Act, 1955, hereinafter referred to as "Act" for the purpose of convenience, read with Section 11 of the Act, the second marriage is void and hence the finding of the Appellate Court that the second wife also is entitled to receive the benefits due to the deceased husband cannot be sustained at all. The learned Counsel also had drawn my attention to the oral and documentary evidence available on record and had submitted that in view of the admissions made in Ex.A-4, the counter in M.C.No. 1/85 and also the evidence of D.W.6, it is clear that as a fact it was proved that the plaintiff alone is the first wife of the deceased Penchalaiah. The learned Counsel also commented that though an attempt is made to show that the plaintiff again had remarried by examining D.W.5 unless she is a divorced wife, the said marriage cannot be said to be a marriage at all in the eye of law and hence in view of the oral and documentary evidence the finding recorded by the Appellate Court in this regard cannot be sustained,

7. Sri R.S. Murthy, the learned Standing Counsel representing Defendants 1 and 2 had contended that in view of the nomination made by Penchalaiah, irrespective of the fact that the 3rd defendant is the second wife, she alone is entitled to receive the benefits. The learned Counsel also submitted that the Defendants 1 and 2 are not concerned with the other aspects -the disputes between the widows inter se. The learned Counsel also made an attempt to

contend that in view of the remarriage of the plaintiff with D.W.5, the claim of the plaintiff/first wife cannot be sustained.

8. Sri Pramod representing Srinivas, the second wife and the children of Penchalaiah through the second wife, had advanced elaborate arguments drawing the attention of this Court to the scope, object and ambit of Section 16 of the Act and also had contended that in the light of the said provision it is clear that the children of the deceased Penchalaiah are entitled to their respective shares. The learned Counsel also pointed out that one of the children being no more, the mother - the second wife of Penchalaiah, is entitled to the said benefits and hence in any view of the matter, the judgment and decree of the Appellate Court do not suffer from any illegality warranting interference at the hands of this Court.

9. Heard the Counsel on record at length and also perused the oral and documentary evidence available on record.

10. The only controversy between the parties is the entitlement of the second wife to the benefits of the deceased Penchalaiah. The first wife had pleaded in the plaint as hereunder:

11. The marriage of the plaintiff with Penchalaiah was solemnized according to Hindu rites and customs about 15 years ago. But it was a bad affair for her because at the time of the marriage, her husband was unemployed and after marriage he got a job at the first instance in Postal Department. Securing this job had changed his life style and he began to neglect the plaintiff. The plaintiff was therefore compelled to file M.C.No. 1/85 for maintenance, During the pendency of the said case, the husband of the plaintiff got more handsome job in the Factory of the defendants. The Court was pleased to grant Rs. 350/- per mensem towards her alimony by recognising her as the neglected wife of her husband. The defendants as the employers have also sent the amounts for 18 months by deducting in the salary payable to the husband of the plaintiff. In or about 1990, the parents of the plaintiff approached her husband and requested him to take her into his society by burying the past. Though he did not express his willingness, the plaintiff went to him at Madras hoping that her destiny is with him only as a dutiful Indian wife. She soon found that her husband is having illicit intimacy with one married woman viz., Rajyam who was already big with four children through her husband. His world was Rajyam and his activity was only caressing her children being under her influence totally. The plaintiff was necked out by her husband. Finding no other way to sustain herself, the plaintiff was driven to the necessity of approaching the Court again for maintenance by filing M.C. No. 3/95 u/s 125 Cr.P.C. Her husband had successfully evaded to receive the notices sent by the Hon"ble Court and finally on 20-4-1996, he was set ex parte on substituted service and the plaintiff was awarded Rs. 500/- per month towards her living. Before the plaintiff would execute the decretal order, as the fate would have it, her husband passed away. She went along with her parents and got defaced apprising the defendants about the claim, which accrued

on his death. The plaintiff submitted a representation to the defendants and they have acknowledged the same. Though they were satisfied about the status of the plaintiff as the legally wedded wife of late N. Penchalaiah, they wanted to get it by the declaratory suit.

12. The 2nd defendant and also the 3rd defendant filed their respective written statements wherein these parties had taken a stand that the deceased N. Penchalaiah was appointed in the Integral Coach Factory, Madras as III Machinist on 26-10-1987 and at the time of appointment the deceased employee had mentioned his wife's name as N. Rajyam and hence as per the particulars given by the deceased employee, these defendants had incorporated the name of Rajyam in the records and nowhere the deceased employee mentioned the name of his wife as N. Kanthamma. An admission was made that as per the records in Crl.M.P. No. 72/88, these defendants paid Rs. 367/- per month to the plaintiff towards her maintenance, but however, they are not aware of the proceedings M.C. No. 3/95.

13. The second wife/3rd defendant filed written statement with the following allegations:

14. It is true that Nallagondla Penchalaiah died on 19-6-1996 while working in the Factory managed by defendants 1 and 2. It is false to aver that the plaintiff is the wife of late Penchalaiah and that her marriage with him took place about 15 years back under Hindu rites and custom. It is further false to state that at the time of the alleged marriage, N. Penchalaiah was unemployed and later he got a job in the Postal Department. It is nothing but a tissue of falsehood to aver that after being employed in the Postal Department, N. Penchalaiah changed his life style and began to neglect the plaintiff. This defendant is not aware of the alleged proceedings in M.C.No. 1/85 and awarding of monthly maintenance of Rs. 350/-. It is false to state that in or about 1990 the parents of the plaintiff approached N. Penchalaiah and requested him to take her into his society. It is also denied that the plaintiff went to Madras and found that Penchalaiah was having illicit intimacy with this defendant. The entire narration is a cock and bull story invented for the purpose of this suit. It is submitted that this defendant is not aware of the alleged proceedings in M.C.No. 3/95, If really the plaintiff obtained bona fide Rs. 350/- towards maintenance in M.C. No. 1/85 there is no need for her to file again another M.C.No. 3/95 wherein Nattagondla Penchalaiah remained ex parte. It is false to state that the plaintiff went along with her parents and attended the funeral of N. Penchalaiah. It is only this defendant and her children who mourned the death of N. Penchalaiah and performed the funeral rites. The real facts are that the defendant is the only wife of late Penchalaiah. The marriage between them took place about 17 years back under Hindu rites and custom. After the solemnization of the marriage, three daughters and a son were born out of the lawful wedlock. Late Penchalaiah acknowledged this defendant as his wife and the children born out of the marriage with her in all the official records maintained by defendants 1 and 2. The plaintiff lured the husband

of this defendant and both of them developed illicit intimacy. To the knowledge of this defendant, the husband of this defendant got rid off the plaintiff by paying substantial amount. To avoid family unhappiness N. Panchalaiah did not reveal the Court proceedings to this defendant. It is clearly seen that the proceedings in M.C. Nos. 1/85 and 3/95 are collusive in nature purely meant to satisfy the unjust claim of the plaintiff who was only a concubine of late N. Panchalaiah. It is submitted that the plaintiff married one Chitipireddy Sreenivasulu of Railways Kodur of Kodur Mandal in the year 1989 and living with him and it is false to aver that the plaintiff led married life with Nallagondla Panchalaiah. It is submitted that the plaintiff has no right to file the suit for declaration and consequential relief of mandatory injunction.

15. On the strength of the respective pleadings of the parties, the following Issues were settled by the Court of first instance:

- (1) Whether the plaintiff is entitled for being declared the legal wedded wife of deceased Panchalaiah to receive Provident Fund, Gratuity, Pension, Leave salary and other benefits of Panchalaiah?
- (2) Whether the plaintiff is entitled for permanent injunction against the defendants from conferring such benefits?
- (3) Whether plaintiff is entitled for mandatory injunction against the defendants to receive the payments so long as she is entitled ?
- (4) Whether the 3rd defendant is the only wife of late Panchalaiah ?
- (5) To what relief ?

After recording oral and documentary evidence, as already referred to supra, the first wife was successful in the Court of first instance but the same was modified by the Appellate Court and hence these two Second Appeals.

16. In the evidence of P.W.1 categorically she had deposed about the factum of marriage. Ex.A-1 is the legal notice dated 11-7-1996; Ex.A-2 is the postal acknowledgment card; Exs.A-3 and A-4 are the certified copies of the petition and counter in M.C. No. 1/85 on the file of Judicial First Class Magistrate, Nandalur; Ex.A-5 is the intimation letter from the Office of Defendants 1 and 2 dated 13-12-1986; Ex.A-6 is a certified copy of the order dated 30-9-1986 in M.C. No. 1/85; Ex,A-7 is a certified copy of the petition in M.C.No. 3/ 95 on the file of Judicial First Class Magistrate, Nandalur. Both the Courts had recorded a finding relating to the factum of marriage. The evidence of D.W.6, the Welfare Inspector, also supports the fact that the plaintiff alone is the first wife of the deceased Panchalaiah. Though an attempt is made to show that again there was remarriage and for this purpose D.W.5 was examined, but it is pertinent to note that never the first wife had taken divorce from the deceased Panchalaiah and hence the alleged marriage with D.W.5 cannot be said to be a valid marriage at all in the eye of law and hence the marriage between the deceased Panchalaiah and the first wife subsists. In view of this finding recorded by the Courts below, I

am inclined to accept that the plaintiff is the first wife. No doubt there is evidence of D.W.2 to D.W.5 who had supported D.W.1, the second wife, but the second wife herself had made a representation wherein certain admissions had been made and this is clear from the evidence of D.W.6 and these aspects were not denied by D.W.1. In the light of the same, the finding that the plaintiff/P.W.1 is the first wife of the deceased Panchalaiah is hereby confirmed.

17. D.W.1 no doubt had deposed that she is entitled to the benefits and had marked Ex.B-1 photo dated 29-1-1991, Ex.B-2 is the memo dated 12-9-1989, Ex.B-3 is the attestation form dated 7-10-1987 and Ex.B-4 is the Family composition form dated 2-2-1999. It may be true that the 3rd defendant was married by the deceased Panchalaiah and hence the finding recorded by the Courts below that she was taken as the second wife, also cannot be disturbed. It is further clear that the deceased Panchalaiah had the children Respondents 4 to 7 and one of the children is no more, cannot be in dispute in view of the material available on record. In the light of this factual position, now, it has to be seen whether the second wife is entitled to any benefits and whether the children through the second wife are entitled to any benefits. The Appellate Court had recorded a finding that both the widows are entitled to the benefits.

18. Section 5 of the Act deals with Conditions for a Hindu marriage and Section 5(1) of the Act specifies that a marriage may be solemnized between any two Hindus if neither party has a spouse living at the time of the marriage. Section 11 of the Act deals with void marriages and the provision reads as hereunder:

"Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5."

In *Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another*, , the Apex Court while observing that the expression "wife" used in Section 125 Cr.P.C. should be interpreted to mean only a legally wedded wife held:

"Clause (i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. The plea that the marriage should not be treated as void because such a marriage was earlier recognized in law and custom cannot be accepted. By reason of the overriding effect of the Act as mentioned in Section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. Such a marriage cannot also be said to be voidable by reference to Section 12. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnized in violation of Section 5(1), Clause (i), Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party

exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a Court in a proceeding specifically commenced for the purpose. The provisions of Section 16 also throw light on this aspect. Section 16(3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Sections 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child".

19. As already referred to supra, the fact that the plaintiff is the first wife had been established. It is also pertinent to note that the deceased husband Penchalaiah never had divorced the first wife and hence the evidence of D.W.5 relating to the fact of remarriage of the first wife is of no consequence since the legal status of the plaintiff is in no way changed, affected or altered by the said fact. In view of Section 5(1) of the Act, read with Section 11 of the Act, it is clear that when the first wife was living, the deceased Penchalaiah married the 3rd defendant, who is the second wife, and hence the second wife cannot get the legal status of a wife so as to be entitled to the benefits of the deceased Penchalaiah, The mere fact that her name was furnished by the deceased Penchalaiah and had been entered in service records will not alter the situation in any way in view of the clear legal position. Hence, the finding recorded by the Appellate Court that both the widows i.e., the second wife also is entitled to the benefits of the deceased husband has no legs to stand and cannot be sustained. It is no doubt brought to my notice that one of the children being no more, the second wife being the mother, is entitled to the share of the benefits to which the deceased child might have been entitled to in law. This fact is not in dispute. Now, as far as the children of the second wife through her husband are concerned, by virtue of Section 16 of the Act, they are entitled to the benefits of the deceased father. Section 16 of the Act reads as hereunder:

"(1) Notwithstanding that a marriage is null and void u/s 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage u/s 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their

legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity u/s 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

The original Section was amended by Section 11 of the Marriage Laws (Amendment) Act of 1976 and the main section before amendment which had dealt with the Children born of void marriages was replaced by Sub-section (1) and the proviso to the old section by virtue of the amendment had been incorporated as Sub-section (3). The original section dealing with Children of voidable marriages had been introduced as Sub-section (2) by the Amending Act. Thus the provision before the Amending Act dealing with children of void marriages provided that if a decree of nullity was passed, the children begotten or conceived before the decree who would have been legitimate children of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate children. The present provision, by virtue of the Amending Act had remedied the same stating that notwithstanding that a marriage is null and void u/s 11 any child of such marriage who would have been legitimate if the marriage had been valid shall be legitimate (1) Whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976, (2) Whether or not a decree of nullity is granted in respect of that marriage under the Act, and (3) Whether or not a marriage is held to be void otherwise than on a petition under this Act. (See: Gurnam Kaur v. Puran Singh, 1996 (1) HLR 446). In Rasala Surya Prakasarao and others Vs. Rasala Venkateswararao and others, , the Division Bench held:

"Even prior to the advent of Section 16 of the Hindu Marriage Act, both as per the Shastraic and textual law as well as the decisions of the highest Courts, the illegitimate son of a Sudra is entitled to enforce a partition after the father's death. He is entitled to the rights of survivorship as he becomes a coparcener with the legitimate son, He is a member of the family and he has status as a son and by virtue of that he is entitled to the right of survivorship. Section 16 of the Hindu Marriage Act has conferred on him the status of a legitimate son and his other pre-existing rights are, in no way, curtailed. After the 1976 amendment of Section 16, the benefits of Section 16 are enlarged and such benefits are also conferred on a son of a marriage which is void under the provisions of the Hindu Marriage Act, whether a decree of nullity is passed or not, such a son becomes a legitimate son. Such a child is also entitled to rights of succession under the Hindu Marriage Act. A child of void marriage is related to its parents within the meaning of Section 3(1)(j) of the Hindu Succession Act by virtue of Section 16 of the Hindu Marriage Act. Proviso to Section 3(1)(j) must be confined to those

children who are not clothed with legitimacy u/s 16 of the Hindu Marriage Act. Thus by virtue of Section 16(1) of the Hindu Marriage Act as amended in 1976, the illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father whether the property be originally joint family property or not. The only limitation is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to seek a partition. He can seek a partition only after the death of the father."

In Rameshwari Devi Vs. State of Bihar and others, , it was held:

"Under Section 16 of the Hindu Marriage Act, children of void marriage are legitimate. Under the Hindu Succession Act, 1956 property of a male Hindu dying intestate devolve firstly on heirs in Clause (1) which include widow and son. Among the widow and son, they all get shares. The second wife taken by the deceased Government employee during subsistence cannot be described a widow of deceased employee, their marriage void. Sons of the marriage between deceased employee and second wife being the legitimate sons of deceased would be entitled to the property of deceased employee in equal shares along with that of first wife and the sons born from the first marriage. That being the legal position when Hindu male dies intestate, the children of the deceased employee born out of the second wedlock would be entitled to share in the family pension and death-cum-retirement gratuity. The second wife was not entitled to anything and family pension would be admissible to minor children only till they attained majority."

20. In the light of the settled legal position, it is clear that the second wife is not entitled to any share at all in the benefits of the deceased Penchalaiah. The first wife is definitely entitled to the said benefits. However, since one of the children of the second wife died and the second wife became the heir to succeed to the said share, it is clarified that the second wife, as the legal heir of the deceased child would be entitled to the share to which the deceased child would be otherwise entitled to. It is needless to say that as far as the other children are concerned, by virtue of Section 16 of the Act, they are entitled to their due shares in the benefits left by the deceased father. In the light of the same, the result is that all the parties - the first wife, the second wife as the legal heir of her deceased child, and the other children now alive, are entitled to their respective shares in the benefits left by the deceased Penchalaiah. Except making this clarification, the other findings need not be disturbed in any way.

21. Accordingly, the judgment and decree of the Appellate Court are modified as specified supra and the Second Appeals are partly allowed to the extent indicated above. No costs.