

(1960) 04 AP CK 0014

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1734 of 1957

Padala Latchamma and Another

APPELLANT

Vs

Mutchi Appalaswamy and Another

RESPONDENT

Date of Decision : 15-04-1960

Acts Referred:

Hindu Succession Act, 1956 — Section 14

Hindu Widows Remarriage Act, 1856 — Section 5

Citation : AIR 1961 AP 55

Hon'ble Judges : Sanjeeva Row Naidu, J

Bench : Single Bench

Advocate : C.V. Dikshitulu, for the Appellant; M. Bhujanga Rao, for A. Gangadhara Rao, for the Respondent

Final Decision : Allowed

Judgement

Sanjeeva Row Naidu, J.—Two points have been taken in this C.R.P. : (1) that the custom set up is invalid, being opposed to Jaw; (2) that section 14 of the Hindu Succession Act, 1956 gave absolute rights to the widow in the property in her hands and therefore any custom to the contrary cannot prevail against the express provisions of the statute. The petitioners figured as defendants 1 and 2 in the suit. One Muchi Sithanna married the 1st petitioner Padala Lachamma about 10 or 12 years ago. At the time of the marriage she was given a gold Kanti weighing 2 tolas and silver ornaments of 4 tolas. Subsequently Sithanna died. Then Latchamma married Padala Pottiyya who figured as the 2nd defendant in the suit in or about April or May, 1956.

It is claimed by the plaintiff, Appalaswami, who is the father of Sithanna, that he is entitled to recover the Ornaments given to the 1st defendant at the time of her marriage, as she has remarried, in accordance with the custom prevailing in Golla community in Srikakulam District to which the parties belong, on the ground that she is bound to return the jewels to the heirs of her deceased husband. The suit was accordingly brought for the recovery of the jewels.

According to the custom set up by the plaintiff, when a widow remarries, she forfeits her claim to the jewellery and other gifts given to her at the time of her marriage either by her husband or her relations. Hence the suit.

2. The question naturally arises whether the custom as set up is valid, recognisable by courts and enforceable. The question whether a custom could override the ancient texts like Smritis and other texts had been examined in several cases and as these texts are very ancient, and the custom set up invariably develops long subsequent thereto, a well established custom is accepted as binding in preference to the written texts. The law is very clearly laid down in *Collector of Madura v. Mootoo Ramalinga*, 12 Moo Ind App 397 (PC), wherein the Judicial Committee of the Privy Council observed:-

"Under the Hindu system of law, clear proof of usage will outweigh the written text of the law".

3. But it is one thing to say that a custom can override the ancient texts and quite another thing to say that a custom can override the statutory provisions which are all comparatively of recent times and which incorporated the policy of the law. A custom which attempts to defeat or nullify a statute must be struck down as invalid without further examination, for the simple reason that the Legislature had determined the policy of the law and what law would govern the parties; find that legislative enactment shall prevail unless the enactment itself saves any prevailing custom to the contrary.

Dealing with the essential attributes of a custom that it should be ancient, reasonable, must have been continued or been observed without interruption and must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain, and of the persons whom it is alleged to affect, and that it should be uniform and obligatory, Mulla in his *Hindu Law*, 12th Edition, observed at Page 64 thus:-

"It must not be immoral or opposed to public policy and cannot derogate from any Statute unless the statute saves any such custom or generally makes exception in favour of rules of custom".

4. It falls next to be examined whether there are any statutory provisions which run counter to the custom pleaded by the plaintiff, assuming for the purpose of consideration that the custom fulfilled all other requirements to be followed and to be recognized. Section 5 of the *Hindu Widows' Remarriage Act* of 1856 which is an enactment expressly calculated to do away with the obstacles and hindrances to the Hindu widow's re-marriage is as follows:-

"Except as in the three preceding sections is provided, a widow shall not, by reason of her remarriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has remarried shall have the same rights of inheritance as she would have had, had such marriage been her first marriage".

5. This section expressly prohibits the forfeiture of any property or right of a widow by reason of her marrying again, other than the rights set out in Sections 2, 3 and 4. Section 2 deals with the rights of the widow in the property of her deceased husband and it declares that she loses her right to that property. Section 3 deals with guardianship of the children of the deceased husband on the remarriage, with which we are not concerned.

Section 4 deals with the childless widow inheriting to the property if she had been capable of inheriting the same before the passing of the Act. The forfeiture involved in this present case, namely, of the gifts given to her at the time of the marriage by her husband or her relatives is not contemplated or provided for in Sections 2, 3 and 4. Hence Section 5 safeguards and provides against the forfeiture of any such property, as is given to the widow by way of gifts at the time of her marriage. The custom set up therefore goes directly against the spirit and word of the section and therefore cannot be recognised as valid.

6. In this connection, the learned counsel for the respondent placed reliance on the decision reported in *Palla Sanyasi Vs. Kayitha Guruvulu*, wherein it was held that gifts made to a widow at the time of her first marriage is not an absolute gift but one subject to the customary incidents attaching to such a gift and therefore Section 5 of the Hindu Widows' Re-marriage Act would not affect the operation of the customary rule with reference to such gifts and they can be recovered by the husband's family on the widow's re-marriage. It is true there occurs in that judgment the following:

"The gift was subject to the customary incidents of the community and therefore Section 5 would not affect the operation of the customary rule with reference to the gift in question".

7. I must respectfully dissent from the view expressed in this case. A custom to be valid as has been enunciated by the Privy Council on more than one occasion should not go against the express provision of the statute unless that provision of the statute expressly provided for the operation of the custom, or excluded from the operation the cases governed by special customs. In the absence of any such provision, any custom which goes against the express provision of law must be struck down as invalid and unenforceable. The view expressed in the decision reported in *Palla Sanyasi Vs. Kayitha Guruvulu*, must be deemed to have been impliedly overruled by a Division Bench of this court in *Nannapaneni Venkata Subba Rao Vs. Thummala Bhujangayya (died) and Others*, .

In that case my learned brother Satyanarayana Raju, J., while adverting to the incidents of a valid custom, the conditions required to be fulfilled before a custom could be upheld and given effect to, made it quite clear that one of the conditions is that it should not derogate from any statute unless the statute saves any such custom or generally makes exception in favour of the rules and the custom. Since Section 5 of the Hindu Widows' Remarriage Act did not contain any such exception, that section must be held prevailed over the custom which is contrary

to it. In any view, the decision in Palla Sanyasi Vs. Kayitha Guruvulu, cannot therefore be regarded as laying down the correct law.

8. The other point taken by Mr. Dikshitulu is, that u/s 14 of the Hindu Succession Act 1956, any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. The explanation to that section is important and must be extracted:

"Explanation: In this sub-section, "Property" includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not before, at or after her marriage or by her skill or exertion, or by purchase or by prescription, or in any other manner whatsoever and also any such property held by her as stridhana immediately before the commencement of this Act".

Section 14 of the Act therefore converts the movable property in the shape of jewels which are in the possession of the 1st defendant and which had been gifted to her at the time of her marriage, whether by relatives or not, as her own absolute property, and to engraft upon this section a condition that on the remarriage the gift would be forfeited to the donor is to nullify the operation of this section. While a section declares a property as the absolute property of the lady, the custom would make it not so, by contemplating a transfer by the return of the jewels to the donors.

Mr. M. Bhujanga Rao, the learned counsel for the respondents relies on Sub-section (2) to Section 14 which says that nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award, where the terms of the gift, will or other instrument or the decree, order or award Prescribed a restricted estate in such property. It is not understood how the sub-section could help the respondents. There are no terms of the gift as such. The gift was given absolutely at the time of the marriage. To contemplate that it must have been in the mind of the donor at the time of the gift that the woman becomes a widow and then to take into consideration the consequences that would flow on the happening of such contingency at the time of making it, would be most extraordinary.

There is nothing to show that the gift was made subject to any such terms in this case, and that those terms confer a restricted estate on the lady. Obviously, Sub-section (2) was not intended to take under cover all possible customs existing in the country contrary to the specific provisions of the Statute, if that were the intention of the legislature, there would have been a specific mention that all customary law should be excluded. In the view I have taken above, it is unnecessary to go into the other questions raised in this petition.

9. In the result, the Petition is allowed. The decree of the lower court is set aside

with costs throughout to be paid by the 1st respondent-plaintiff.