

(2000) 01 KAR CK 0037

In the Karnataka High Court

Case No : Miscellaneous Second Appeal No. 372 of 1998

Smt. Nagarathnamma

APPELLANT

Vs

Smt. Venkatalakshamma and Others

RESPONDENT

Date of Decision : 03-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1
Hindu Marriage Act, 1955 — Section 11, 16, 5

Citation : AIR 2000 Kar 181 : (2000) 2 KarLJ 484

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : Sri B.R. Viswanath, for the Appellant; Sri Ashok R. Kalyan Setty, for the Respondent

Judgement

1. This appeal under Order 43, Rule 1 of C.P.C. has been filed by the plaintiff/appellant in the Trial Court from the judgment and order dated 13-8-1997.
2. The facts of the case in brief are that, the present plaintiff/appellant filed the suit for declaration that she is the legally wedded wife of deceased S. Narayanaswamy and she is entitled to receive the benefits of family pension and other monetary benefits of the deceased S. Narayanaswamy. She also prayed for a decree for injunction against the defendant 3 i.e., the present respondent 1 prohibiting and restraining her from withdrawing any of aforesaid benefits. The defendants 1 and 2 to the suit namely, the Secretary of the Karnataka Electricity Board and the Assistant Executive Engineer, Karnataka Electricity Board, filed joint written statement, whereas the 3rd defendant, who is present respondent 1, filed a separate written statement.
3. The plaintiff/appellant asserted herself to be the legally wedded wife of Sri S. Narayanaswamy, an Assistant Lineman in the Karnataka Electricity Board, who had died on 28-1-1992. According to the plaintiff/appellant, she got two children from the wedlock with late Sri S. Narayanaswamy namely Devaraj and Devarajeshwari. According to the plaintiff/appellant's case, the marriage

between the plaintiff/appellant and deceased S. Narayanaswamy had taken place on 1-5-1977 and they lived as husband and wife. The plaintiff asserted that with defendant 3-Venkatalakshamma, the deceased S. Narayanaswamy developed an illicit relationship sometimes in 1986 and she, under the guise thereof, is trying to claim share in monthly pension and other monetary benefits which are payable due to the death of Sri S. Narayanaswamy and with the assistance of the Employees' Union and Officers, the defendant 3 got the records built up and is claiming half portion of the monthly pension and other benefits. So the plaintiff prayed that an injunction be issued against the defendant 3 i.e., present respondent 1 that she be restrained from receiving or withdrawing any pensionary benefits or retiral benefits.

4. The defendant 3-the contesting respondent, who is the respondent 1 before this Court, asserted herself to be the legally wedded wife of the deceased S. Narayanaswamy and alleged that her marriage was registered in the Sub-Registrar's Office, copy of which has been produced. She further asserted that out of wedlock between her i.e., the 3rd defendant who is present respondent 1 and the deceased Narayanaswamy, three children were born namely Shilpa, Sheela and Shashi. The defendant 3 asserted that before filing of the suit, the defendant/respondent 1 and the plaintiff received in equal proportion of one half each the retiral benefits and pension of Narayanaswamy and withdrew with consent of each other half share each and this consent was brought among the two, i.e., between the plaintiff and the 3rd defendant i.e., appellant and the 1st respondent, by the intervention of the elderly members of the village and because she also learnt that the plaintiff was the kept mistress of her late husband. The defendant stated that the suit at the instance of the plaintiff was not maintainable and further that suit was bad for non-joinder of necessary parties.

5. The Trial Court framed the following issues.-

- (1) Whether the plaintiff has proved that she alone is entitled to receive the monthly pension and other benefits of the deceased S. Narayanaswamy?
- (2) Whether the suit for bare injunction is maintainable in law?
- (3) Whether the suit is not maintainable as contended by the 3rd defendant in para 11(d) of her written statement?
- (4) Whether the suit is bad for non-joinder of necessary parties?
- (5) Whether the suit is bad for mis-joinder of parties?
- (6) What order and what decree?

An additional issue was also framed by the Trial Court.

- (1) Whether the plaintiff has proved that she is the legally wedded wife of the deceased Narayanaswamy?

6. The Trial Court after having considered the material evidence on record, held that Ex. P. 1 and P. 2 along with other evidence of P.W. 1 and the circumstantial evidence to the effect that the defendant 3 had not denied in cross-examination the fact that the plaintiff is the wife of deceased Narayanaswamy, held that the plaintiff/appellant was and has been the wife of deceased Narayanaswamy and she had been married in 1977. It further held that the plaintiff has proved that she alone is entitled to receive the monthly pension and other benefits of deceased S. Narayanaswamy. It held that bare suit for injunction is not maintainable. Issue 3 was also answered in negative. Issues 4 and 5 have also been answered in negative. The Trial Court, as such, passed the decree declaring that the plaintiff is the legally married wife of deceased Narayanaswamy and passed an injunction order restraining the defendant 3 from claiming benefits from the defendants 1 and 2 payable to deceased S. Narayanaswamy. It dismissed the plaintiffs claim against defendants 1 and 2 i.e., present respondents 2 and 3. It may also be mentioned here that looking to the circumstances and taking into consideration that both of them have produced the survival certificates in which both were shown as wives of deceased S. Narayanaswamy, as they had sought release of amount to them, it opined that as plaintiff's marriage is proved, she is, no doubt, legally wedded wife of deceased S. Narayanaswamy, but the marriage of 3rd defendant/respondent 1 with the deceased S. Narayanaswamy, as alleged by the defendant 3/respondent 1, took place in the year 1986. As such, it opined that the marriage of 3rd defendant/respondent 1 with the deceased Narayanaswamy had taken place subsequent to 1977. Therefore, the marriage of 3rd defendant i.e., present respondent 1 had no value in the eye of law as it was null under Sections 5 and 11 of the Hindu Marriage Act and on that basis, the Trial Court held that the 3rd defendant/respondent 1 was not entitled to get any benefits. The Trial Court further observed that u/s 16 of the Hindu Marriage Act, children of null and void marriage are also entitled to claim with reference to the personal and separate properties of their parents. Therefore, children of the 3rd defendant could claim against the plaintiff their rights. It observed that though 1st and 2nd defendants have released some amount in favour of the plaintiff and the 3rd defendant on a joint representation made by the plaintiff and the 3rd defendant, 1st and 2nd defendants are not to be blamed as it was the result of the agreement and joint representation of the present appellant and respondent 1. But, as the 3rd defendant is not the legally wedded wife, so she cannot claim any pensionary benefits. Taking this view, the Court below passed the decree and injunction against the defendant 3.

7. The defendant 3, aggrieved by the judgment and decree of the Trial Court, preferred an appeal. The Appellate Court allowed the appeal and set aside the decree and remanded it to the Trial Court again to determine the question of validity of the marriage of the 1st respondent namely Venkatalakshamma, who was appellant before the Appellate Court, in the light of additional documents produced with I.A. III afresh. It also directed that the Trial Court should give an

opportunity to both the parties to lead evidence and if the application to implead the children is made, it shall be decided according to law and it directed that entire matter be decided afresh. Feeling aggrieved from the judgment and order of remand passed by the lower Appellate Court, the plaintiff has come up in first appeal from the order under Order 43, Rule 1. This appeal, no doubt, is described here as Miscellaneous Second Appeal.

8. I have heard the learned Counsel for the appellant.

9. The learned Counsel for the appellant contended that the Court below acted illegally in remanding the case. The learned lower Appellate Court ignored from consideration the factum that the plaintiff/appellant had been married in 1977, whereas the 3rd defendant/respondent 1 claim herself to have married the deceased Narayanaswamy somewhere in 1986. The learned Counsel further submitted that it was not proved nor it was anybody's case that the marriage with the appellant i.e., the plaintiff had been dissolved by divorce. The learned Counsel further urged that once the marriage of deceased Narayanaswamy with the appellant had not been dissolved and under the survival certificate it has been admitted that the plaintiff was wife of the deceased Narayanaswamy and once the evidence shows that the marriage took place in the year 1977, the Court below should have applied its mind to the question whether second marriage which did take place during the life time of 1st wife and during subsistence of 1st marriage i.e., with plaintiff, is and has been illegal, null and void. The learned Counsel submitted that the Trial Court had considered that aspect of the matter and kept all those facts in view and held that the second marriage was void u/s 11. The learned Counsel contended that if a transaction is void, it is void and non est and there was no need for declaration. Even if no declaration was sought, the consequences of the fact that first wife was alive and Narayanaswamy was living with her as husband and their marriage has been subsisting, in view of Section 11 as such, the second marriage with defendant 3 i.e., respondent was in breach of Section 5(i) of Hindu Marriage Act. As such, the second marriage was a nullity and null and void i.e., non est, so, there was no need to seek for declaration when the injunction was sought, that question so involved had to be decided and the parties had urged their arguments during hearing. The learned Counsel submitted, therefore, the direction of the lower Appellate Court that the Trial Court should decide the question of validity of marriage of 3rd defendant i.e., the appellant before it is bad and was not required at all. The learned Counsel further contended that injunction was sought only against defendant 3 and not against other heirs or children of the deceased and therefore, it was thought that they were not necessary parties. Even if they were necessary parties, the lower Appellate Court itself could have directed impleadment of those children and instead of remanding and could have passed suitable order or decree modifying the Trial Court's decree.

10. Notice of the appeal had been served on the respondents. On behalf of the respondent 2, appearance has been put by Sri Ashok R. Kalyan Shetty. Notice to

respondent 1 is held sufficient. But, in spite of service of notice, none has appeared on behalf of respondent 1. Respondent 3 is served and unrepresented.

11. The learned Counsel for the respondent 2 contended that validity of marriage was not an issue and no issue was pressed, and under law even the children born of an illicit relationship or illegitimate relationship are also held to be entitled to get equal share in the property of the parents. So children were necessary parties for final adjudication.

12. I have applied my mind to the contentions of the learned Counsel for the parties.

In this case, the decree really has been passed against the children. But, there can be no dispute, as regards the proposition of law is concerned, that children, born of a marriage which is void or voidable in view of Section 16(3) of the Hindu Marriage Act, 1955 are entitled and are capable of possessing rights of succession as regards self-acquired property of the deceased parents so far are concerned and section provides that children born of such marriage shall be deemed to be legitimate children notwithstanding the nullity of marriage. In view of the provisions of Section 8 of Hindu Succession Act read with schedule to the Succession Act and in particular in view of Section 16 which provides that if children born out of a void or voidable marriage, such children are entitled to inherit the property of their father or mother and of no other person in the order of succession as indicated in the schedule, and son or daughter born of null marriage will be deemed to be legitimate son or daughter entitled to inherit the property of their parents. In this view of the matter, the children born to the deceased from the present appellant, who was married in 1977, as well as present respondent 1, who was married in 1986, - both no doubt may be entitled to retiral benefits subject to law relating to services. As regards second marriage under Special Marriage Act, Section 18 provides that effect of marriage by registration under Chapter 3 is that marriage shall be deemed to have been solemnized under this Act and of children born after the date of ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always to have been the legitimate children of their parents. Proviso to Section 18 provides that nothing contained in this section shall be construed as conferring upon any such children any rights in or to the property of any person other than their parents. It provides that children born after solemnisation of marriage will be entitled to rights and it is further provided u/s 4 of the Special Marriage Act that one of the conditions for solemnisation of special marriages is namely, that neither party has a spouse living. When this essential condition is provided for solemnisation of marriage, the grant of certificate in such a case may not be of any help because the fact is at the time of Narayanaswamy's marriage with defendant 3 i.e., respondent 1 in 1986, that plaintiff i.e., appellant herein has been alive as the wife of deceased S. Narayanaswamy and plaintiff/appellant and Narayanaswamy were married in the year 1977 and the case of defendant 3/respondent 1 is that she married the

deceased Narayanaswamy in the year 1986, so in view of Section 4 and Section 18 of the Special Marriage Act it is beyond doubt that the second marriage cannot be deemed to be a validly performed marriage. But no doubt, as mentioned earlier, the children born from the two wives to the deceased are heirs of deceased Narayanaswamy. The children born from 1st respondent are also entitled to inherit the personal and separate property of the deceased Narayanaswamy, but they cannot claim property of any other person, while children of present appellant are entitled to inherit the personal property of deceased Narayanaswamy as well as ancestral property, if any.

13. In this case, there was no need to remand the case. The Appellate Court could have modified the decree on facts emerging and materials on record. It could have affirmed the findings of the Trial Court that so far as plaintiff/appellant is concerned, she is the legally wedded wife, married in the year 1977. Secondly, the present respondent 1 prima facie was married to the deceased, but as marriage had been performed during the lifetime of other spouse of deceased, with whom the marriage was not dissolved as such the respondent 1 was not entitled to inherit the property, separate or ancestral, left by the deceased. It could have further held that children born of Narayanaswamy from two ladies herein were entitled to the property involved in the suit equally, no doubt, subject to rule relating to grant of pension and other monetary benefits. If under service rules the pension is payable to widow, only then the plaintiff i.e., present appellant would be definitely entitled to decree that plaintiff would be entitled to pension because she is the legally wedded wife of the deceased. As regards gratuity and provident fund accumulated, sons and daughters may be entitled to succeed in equal share with plaintiff i.e., present appellant. If the daughters of defendant 3 are minors, the Court could pass the decree that to the extent of share of her three daughters, the defendant 3 could act as guardian and the plaintiff could, 110 doubt, get the pension amount and so far as the provident fund or gratuity are concerned, plaintiff will only be entitled to the extent of her share and if her children are minors, she can realise on their behalf acting as guardian. Really it comes out to be that the plaintiff/appellant with her son and daughter may be entitled to 3/6 and 3/6 may go to three daughters of the defendant 3/respondent 1 and if the children of defendant 3 i.e., the present respondent 1 are minors, she can realise on their behalf as their guardian. But so far as pension amount is concerned, she has no right to it.

14. So, Trial Court's decree is modified. The plaintiff/appellant is held to be the legally wedded wife of the deceased Narayanaswamy and she is entitled to 50% of the provident fund and 50% of gratuity amount along with her children, subject to any earlier agreement reached between the parties. As regards pension is concerned, subject to service rules, the widow is entitled to family pension for her life. The defendant 3 i.e., the present respondent 1 not being the legally wedded wife, cannot claim any share in pensionary benefits. It is only the appellant who is entitled to pensionary benefits and the defendant 3/respondent 1 is restrained from taking any pension or pensionary amount which is payable

only to the plaintiff/appellant. The Trial Court's decree is modified to this extent, The 2nd respondent is directed to make the payments of pensionary benefits and others keeping in view the observations and directions made herein above.

The appeal is thus allowed and order of remand is set aside and the trial decree is modified as and in above terms.