

(2011) 02 MAD CK 0051

In the Madras High Court

Case No : S.A (MD) Nos.63 and 64 of 2011

Smt. Rajakani, Manoj Kumar and Petchiammal

APPELLANT

Vs

Sumathi, R. Gowtham and The Tahsildar
Smt. Rajakani
Vs Sumathi, R. Gowtham, The Forest Ranger,
Oddanchathiram and The District Forest Officer

RESPONDENT

Date of Decision : 15-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Marriage Act, 1955 — Section 16

Citation : (2011) 02 MAD CK 0051

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : V. Saravanan, for R. Narayanan, for the Appellant; A. Saravanan, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—The Plaintiffs in O.S. No. 67 of 2004, on the file of the learned District Munsif, Uthamapalayam are the Appellants in

Second Appeal No. 63 of 2011. The Defendants therein are the Respondents in the second appeal, namely S.A. No. 63 of 2011. The Appellants

in S.A. No. 63 of 2011 filed the above said original suit O.S. No. 67 of 2004, on the file of the learned District Munsif, Uthamapalayam for the

reliefs of declaration that the Appellants in S.A. No. 63 of 2004 and the second Respondent in the said second appeal, namely minor R. Gowtham

alone were the legal heirs of deceased Ponniah.

2. The Respondents 1 and 2, namely Sumathi and minor Gowtham had filed another suit on the file of the very same court as O.S. No. 89 of 2004

arraying Rajakani, the first Plaintiff in O.S. No. 67 of 2004 and one Petchiammal

as Defendants 1 and 5, besides arraying the officials as

Defendants 2 to 4 praying for a declaration that Sumathi and minor Gowtham and Petchiammal alone were the legal heirs of the deceased Ponniah

and for a consequential direction to pay the terminal-cum-death benefits of Ponniah to Sumathi, minor Gowtham and Petchiammal.

3. Both the suits were tried together by the trial court and the trial court dismissed the suit O.S. No. 67 of 2004 and decreed the suit O.S. No. 89

of 2004. The common judgment and decrees were passed on 21.09.2005. The Plaintiffs in O.S. No. 67 of 2004 preferred an appeal on the file of

the learned Subordinate Judge, Uthamapalayam as A.S. No. 8 of 2006 against the decree passed by the trial court dismissing O.S. No. 67 of

2004. Similarly, Kani @ Rajakani, who figured as the first Defendant in O.S. No. 89 of 2004 preferred another appeal in A.S. No. 7 of 2006, on

the file of the learned Subordinate Judge, Uthamapalayam challenging the decree passed by the trial court in O.S. No. 89 of 2004.

4. Both the appeals were tried together and the learned Subordinate Judge, Uthamapalayam allowed the appeal A.S. No. 7 of 2006 in part and

modified the decree passed by the trial court to the effect that along with the Plaintiffs in O.S. No. 89 of 2004, namely Sumathi and minor

Gowtham and the fifth Defendant therein namely Petchiammal, minor Manoj Kumar, who figured as the second Plaintiff in the connected suit,

namely O.S. No. 67 of 2004 was also the legal heir of the deceased Ponniah and that Sumathi and Gowtham were entitled to proportionate share

in the terminal-cum-death benefits of the deceased Ponniah. Similarly, A.S. No. 8 of 2006 was allowed in part and minor Manoj Kumar,

Petchiammal, Sumathi and minor Gowtham were declared as the legal heirs of the deceased Ponniah.

5. Questioning the correctness of the decrees passed by the lower appellate court, second appeal No. 63 of 2011 has been filed by Tmt.

Rajakani, minor Manojkumar and Petchiammal, who figured as Plaintiffs in O.S. No. 67 of 2004 and Tmt. Rajakani alone preferred an appeal in

S.A. No. 64 of 2011.

6. Both the second appeals involve one and the same issue. Admittedly, Late Ponniah married Sumathi and through Sumathi, got a son by name

Gowtham(minor). Petchiammal is the mother of the said Ponniah. It is also not in

dispute that minor Manoj Kumar is also a son of the late. Ponniah born through Tmt. Rajakani. It is the contention of the appellants in both the second appeals that the marriage between Late. Ponniah and Sumathi got dissolved by a customary divorce and thereafter, he married Rajakani and out of the said wedlock, minor ManojKumar was born. Based on the said pleading, the Appellants in S.A. No. 63 of 2011, who were the Plaintiffs in O.S. No. 67 of 2004 have taken a stand that they alone were the legal heirs of the deceased Ponniah and that Sumathi and her son Gowtham were not the legal heirs of the Late. Ponniah.

7. Per contra, it is the contention of sumathi and minor Gowtham, the Respondents 1 and 2 in both the appeals, who figured as Plaintiffs 1 and 2 in

O.S. No. 89 of 2004 and Defendants 1 and 2 in O.S. No. 67 of 2004, that they and Petchiammal alone are the legal heirs of deceased Ponniah. It

is their contention that the alleged customary divorce was not true and hence the marriage of Ponniah with Rajakani was not legally valid and minor

ManojKumar, having been born not out of lawful wedlock, would not become the legal heir of late Ponniah. Though, the trial court dismissed the

suit O.S. No. 67 of 2004 in entirety and decreed the suit filed by Sumathi and Gowtham as prayed for, on appeal the lower appellate court has

modified the decrees passed in both the suits by holding that though the customary divorce pleaded by the Appellants herein was not proved and

hence, the marriage of Ponniah with Rajakani was not legally valid, minor Manoj Kumar was also a legal heir of Late. Ponniah by virtue of Section

16 of the Hindu Marriage Act, 1955, since admittedly, he was born out of the marriage between Late. Ponniah and Rajakani which shall be void

because of the fact that it took place during the lifetime of the legally wedded wife Sumathi and that marriage had not been dissolved by then. Thus

the learned first appellate Judge has held that Sumathi the legally wedded wife of Ponniah, minor Gowtham the son born through Sumathi,

Petchiammal, mother of Ponniah and son born out of a void marriage, namely minor Manoj Kumar were the legal heirs of deceased Ponniah.

8. Questioning the correctness of the judgments and decrees of the first appellate court, insofar as the finding relating to the issue of the alleged

customary divorce dissolving the marriage between Ponniah and Sumathi and the resultant consequences in the relationship, the Appellants have

preferred these two second appeals. The decision in both the second appeals revolves around the resolution of the issue as to whether the

Appellants were able to substantiate their contention that a custom of having extra judicial divorce is prevailing in the community of Piranmalai

Kallar of Theni District and whether actually such a customary divorce took place before the marriage of Ponniah with Rajakani. Since the issues

are common and since both the cases were tried together by the trial court as well as the first appellate court and disposed by common Judgment,

this Court also deems it fit and convenient to hear both the appeals jointly and dispose of the same by the following common Judgment.

9. The arguments advanced by Mr. V. Srinivasan, learned Counsel for the Appellants appearing on behalf of M/s.R. Narayanan (Counsel on

record) in both the second appeals, regarding the admission of the second appeals were heard. The grounds of appeal, copies of the judgments of

the courts below, copies of the decrees of the courts below and copies of other documents produced in the form of typed-set of papers were also

perused.

10. u/s 100 of CPC Code, an appeal from the decree of an appellate court subordinate to the High Court shall be entertained by the High Court

only on a substantial question of law. In this case, the learned Counsel for the Appellants has made an attempt to show that these second appeals

involve a substantial question of law. It is the contention of the learned Counsel for the Appellants that though a specific plea of custom prevailing in

the community was made by the Appellants and such a plea was disputed by the contesting Respondents, namely Respondents 1 and 2, the trial

court failed to frame a specific issue in this regard and the non-framing of such issue could be projected as a substantial question of law in the

second appeals. It is also the contention of the learned Counsel for the Appellants that though the lower appellate court has framed a specific point

for determination in this regard, the defect caused in the proceedings of the trial court does not stand cured by the same and that both the courts

below have erroneously held that even assuming the existence of such custom, actual divorce was not proved by reliable evidence. In support of

his contention, the learned Counsel for the Appellants cited a judgment of the Honourable Supreme Court in subramani and others .v. M.

Chandralekha reported in 2005-2/L.W.158.

11. This Court paid its anxious consideration to the above said submission made by the learned Counsel for the Appellants. This Court also

perused the relevant portion of the pleadings and evidence in order to find out whether any finding of fact could be termed perverse. The attraction

of the observation made by the Honourable Supreme Court in the above said judgment cited by the learned Counsel for the Appellants was also

considered by this Court. Upon such consideration, this Court comes to the conclusion that the facts of the case which went before the Supreme

Court are somewhat different from the facts of the case on hand. In the said case before the Supreme Court, a document styled as divorce deed

was accepted by the court without considering the question whether there was any custom recognizing extra judicial divorce. The said mistake was

not corrected till the matter went upto the Supreme Court. That is the reason why the Honourable Supreme Court in the said case, made an

observation that the trial court ought to have framed a specific issue regarding the existence of such a custom and decided that issue.

12. But, in the case on hand, the existence of the custom was pleaded by the Appellants herein and the same was denied and disputed by the

contesting Respondents, namely Respondents 1 and 2. The trial court, no doubt, failed to frame a specific issue regarding the said plea.

Nevertheless it chose to discuss the pleading and evidence while answering issue No. 1 in both the cases, namely issue regarding the question of

legal heir ship of the deceased Ponniah. There are empty number of judgments in which it has been held that the non framing of an issue may not

affect or vitiate the Judgment, provided the parties went for trial knowing fully well what their rival pleadings are and what are the points in dispute

are and that in such a case, the said defect would be only an irregularity that can be corrected by the first appellate court or second appellate court.

In this case, though the trial court did not frame an issue regarding the plea of the Appellants that there existed a custom granting extra judicial

divorce, the parties knowing fully well that the same was the main issue involved in this case, let in evidence to the full extent and the said issue was

decided by the trial court based on the said evidence. When the matter was taken up on appeal to the lower appellate court, the lower appellate

court framed a specific point for determination and decided the same on the strength of the evidence both oral and documentary, that had been

adduced on either side. Therefore the said irregularity stands cured by the judgment of the lower appellate court. No longer, the said plea on the

basis of non-framing of a specific issue is available to the Appellants. Hence, the first question sought to be projected as a substantial question of

law cannot be accepted as a substantial question of law involved in this case.

13. The next contention of the learned Counsel for the Appellants is to the effect that the finding of the courts below negative the plea of the

Appellants that there exists a custom of getting extra judicial divorce is perverse and hence, this Court should interfere with the judgment of the

lower appellate court in this regard. It is also the contention of the learned Counsel for the Appellants that the further finding of the courts below

that such extra judicial divorce as per Ex.A7-divorce deed was not factually substantiated is also perverse, since the courts below took into

consideration the evidence adduced on the side of the Appellants alone and omitted to consider the evidence adduced on the side of the contesting

Respondents, namely Respondents 1 and 2. Approaching the court for dissolution of marriage is the recognized mode of getting such relief.

Permitting to have extra judicial divorce based on custom which has acquired the force of law is only an exception to the general principle.

Whoever pleads such a custom, which is an exception to the general principle, is bound to give strict proof of the same. To prove a custom, one

should let in evidence to the effect that there existed such an usage from time immemorial and due to continuous adoption of such usage and

practice, it has acquired the force of law and in fact, it has been recognized to be a part of law. To be successful in substantiating such a plea of

custom, continuous and frequent instances without any deviation should be proved.

14. In this case, it is not the evidence of the Appellants that the members of the community to which the parties belong never approached the court

for divorce and they were adopting a practice of having extra judicial divorce obtained in Panchayat. It is also not the case of the Appellants that

no one in the community of the said district had ever chosen to challenge the existence of such a custom. It is also an admitted fact that so far, there

is no case in which the existence of such a custom in the concerned community is recognized in a judicial proceedings by a court of law. Apart

from that, there is also lack of evidence citing instances showing unbroken routine practice of getting extra judicial divorce. All these aspects were

considered by the courts below in proper perspective and upon such consideration, the courts below have come to a correct and concurrent

conclusion that the existence of such an alleged custom was not proved by the Appellants herein. The said finding cannot be termed either

defective or infirm, much less perverse. The same deserves no interference.

15. Since it has been held supra, that the Appellants had miserably failed to substantiate their case that there was a custom in their community

under which extra judicial divorces are obtained, even if it is assumed that there was an understanding between Ponniah and Sumathi at the

intervention of Panchayatdars which resulted in the execution of Ex.A7-divorce deed, the same shall have no legal effect and it would not have the

effect of dissolving the marriage between them. On that score alone, the Appellant's contention that Sumathi was no longer the legally wedded wife

of Ponniah should be discountenanced. Even assuming that the Appellants were able to show that there was a custom prevailing in the said

community, the Appellants were not successful in proving that actually there was a divorce. Customary divorce cannot be equated with a divorce

deed. The Appellants have produced Ex.A7 as a divorce deed. The Respondents 1 and 2 have categorically denied and disputed the genuineness

of Ex.A7-divorce deed and they have also contended that in fact no such divorce ever took place. When such is the contention, the burden of

proving the same shall lie heavily on the Appellants. The learned trial Judge as well as the learned first appellate Judge, after analysing the evidence,

came to the conclusion that Ex.A7 could not be true. The courts below have also, on appreciation of evidence, arrived at a conclusion that the oral

or documentary evidence adduced on the side of the Appellants were not enough to substantiate their contention that actually such an extra judicial

divorce took place. When the onus is heavily on the Appellants, there is nothing wrong in the courts below discussing the evidence adduced on the

side of the Appellants and give a finding that the onus has not been discharged as the evidence is not sufficient. In the case on hand, besides

discussing the evidence adduced on the side of the Appellants, the courts below have also discussed the evidence adduced by the first Respondent

herein as D.W.1 and arrived at a conclusion that the above said plea of the Appellants was not proved. This Court is not able to find any defect or

infirmity in the said finding. The said finding, being a finding of fact, cannot be interfered with by the second appellate court unless such a finding is

proved to be perverse. As pointed out supra, there is no defect or infirmity in the said finding of the courts below. Therefore, there is no question

of stamping it as perverse. Accordingly, this Court comes to the conclusion that the attempt on the part of the Appellants to project the same as a

substantial question of law has also ended in failure.

16. For all the reasons stated above, this Court comes to the conclusion that the Appellants have not proved that any substantial question of law is

involved in these second appeals and that hence both the second appeals are bound to be dismissed at the stage of admission itself.

17. In the result, the Second Appeals are dismissed .No costs.