SUBRAMANI AND ORS. A

v.

M. CHANDRALEKHA

NOVEMBER 23, 2004

[ASHOK BHAN AND A.K. MATHUR, JJ.] B

Hindu Law :

Hindu Marriage Act. 1955:

C

Sections 11, 13 and 29(2)—Dissolution of Hindu marriage—Customary divorce—Hindu Vellala Gounder Community—Dissolution of marriage by mutual consent—Plaintiff was married to one 'K' and they separated after two years of marriage—After the death of 'K' plaintiff filed a suit for partition and possession of the properties of her deceased father-in-law— Plaintiff pleaded that she being the wife of his son, she was entitled to his share in the suit properties—Plaintiffs case was that under a registered maintenance release deed a recital was introduced that the marriage between the plaintiff and 'K' stood dissolved under the customary law prevalent in their community—Trial court and first appellate court dismissed the suit on the ground that the marriage stood dissolved under the custom prevalent in the community—But High Court decreed the suit—Correctness of—Held: A Hindu marriage can be dissolved only under the provisions of S.11 or S.13—Customary divorce must be specifically pleaded and established— Defendants failed to either plead the existence of a custom in their community to dissolve the marriage by mutual consent or to prove the same by leading cogent evidence—In the absence of such pleading, the marriage between the plaintiff and her husband cannot be dissolved by execution of a marriage dissolution deed—Customary divorce must be specifically pleaded and established. D E F

G

Words & Phrases:

"Customary divorce"—Meaning of—In the context of Section 29(2) of the Hindu Marriage Act, 1955.

The respondent-plaintiff was married to one 'K' and they separated H

A after two years of marriage. After the death of 'K' the respondent filed a suit for partition and possession of the properties of her father-in-1aw after he died. The respondent pleaded that she being the wife of 'K' was entitled to his share in the suit properties. The respondent's case was that she was driven out of the house and a registered maintenance B release dead was executed. However, the respondent came to know later that a recital had been introduced therein that the marriage between the respondent and 'K' stood dissolved under the customary law prevalent in their community viz., Hindu Vellala Gounder Community.

C The trial court dismissed the suit on the ground that in the community to which the appellants and the respondent belonged the marriage could be dissolved by executing a marriage dissolution deed by mutual consent and, therefore, the marriage between the respondent and 'K' stood dissolved. The first appellate court concurred with the findings of the trial court. But the High Court set aside the judgments D and decree passed by the courts below and decreed the suit filed by the respondent-plaintiff. Hence the appeal.

Dismissing the appeal, the Court

E HELD : 1. As per Hindu Law divorce was not recognized as a means to put an end to a marriage, which was always considered to be a sacrament with only exception where it is recognized by custom. Hindus after the coming into force of the Hindu Marriage Act, 1955 can seek to put an end to their marriage by either obtaining a declaration that the marriage between them was a nullity on the grounds specified F in Section 11 or to dissolve the marriage between them on any of the grounds mentioned in Section 13 of the Act, Section 29 of the Act saves the rights recognized by custom or conferred by special enactment to obtain the dissolution of marriage, whether solemnized before or after the commencement of the Act. [290-D-E-F]

G

2. Prevalence of customary divorce in the community to which the parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom. The High Court came to the conclusion that the appellants failed to either H plead the existence of a custom in their community to dissolve the

marriage by mutual consent or to prove the same by leading cogent evidence. [290-G-H; 291-A] A

3. The respondent-plaintiff had admitted the execution of the maintenance release deed but had taken the stand that there was no custom prevalent in their community to dissolve the marriage by mutual consent. But the appellants-defendants did not plead that in their community marriage could be dissolved under custom. They even failed to respond to the averments made in the plaint that no custom was prevalent in their community to dissolve the marriage under custom. [291-B; 291-F-G] B

4. The maintenance release deed had been signed only by the respondent and her late husband 'K' had not signed the same. In the absence of any pleadings that the marriage between the husband the wife could be dissolved in their community under custom and in the absence of any satisfactory evidence let in to prove the custom prevalent in the community or the procedure to be followed for dissolving the marriage it cannot be held that the marriage between the respondent and her husband stood dissolved by executing the marriage dissolution deed. It is not proved that the marriage dissolution deed is in conformity with the custom applicable to divorce in the community to which the parties belonged. [292-C-D-E] C D E

Yamanaji H. Jadhav. **v.** *Nirmala,* **[2002] 2 SCC 637, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3966 of 2003. F

From the Judgment and Order dated 2.11.2001 of the Madras High Court in S.A. No. 11 of 1991.

V. Prabhakar, R.S. Krishna Kumar and M.K.D. Namboodiri for the Appellants. G

V. Krishna Murthy and T. Harish Kumar for the Respondent.

The Judgment of the Court was delivered by

BHAN, J. : This appeal by grant of leave has been filed by the H

A defendants-appellants against the judgment and order of the High Court of Judicature at Madras in Second Appeal No. 11 of 1991. High Court by the impugned judgment has set aside the judgments and decree passed by the courts below and has decreed the suit filed by the plaintiff-respondent herein.

B

Facts relevant to resolve the controversy in this appeal are :

Perianna Gounder (who died during the pendency of the suit) had three sons, namely, Late Natessa Muthu @ Perianna Gounder, Subramani (appellant No. 1) and Kandasamy. Pongiammal and Rajeswari (minor) appellants 2 and C 3 are the wife and daughter of Late Natessa Muthu. Plaintiff-respondent M. Chandralekha is the wife of Kandasamy.

According to the plaintiff-respondent (hereafter referred to as the "respondent") there was a partition in the family in the year 1968 between D the father and his three sons. In that Perianna Gounder was allotted 'A' schedule property while his three sons were allotted 'B' schedule property. Subramani and Kandasamy in the year 1980 purchased 'C' schedule property. Thereafter, in the year 1983 Perianna Gounder settled 'A' schedule property in favour of Subramani and Kandasamy. 'D' schedule property which is an agricultural land was purchased again by the two brothers Subramani and E Kandasamy.

Respondent No. 1 was married to Kandasamy in the year 1981. They separated in the year 1983. Kandasamy died on 21.7.1986. Respondent filed the suit for partition and possession of schedule properties 'A', 'B' and 'D' F and also claimed mesne profits. It was pleaded that she being the wife of Kandasamy was entitled to the share of Kandasamy in the schedule properties. She claimed 1/2 share in 'A', 'C' and 'D' schedule properties and 1/3rd share in 'B' schedule property. That differences arose between the respondent and Kandasamy due to which the respondent was driven out of the house and all efforts to reunite them failed. A registered maintenance release deed, G Ex. B-1, came to be executed on 25.10.1984 in which the respondent on receipt of Rs. 14,000 released her claim towards maintenance. Later, respondent came to know that while writing Ex. B-1 a recital had been introduced therein that the marriage between the respondent and Kandasamy stood dissolved under the customary law prevalent in the community. It was H averred that parties belonged to Vellala Gounder Community and no custom

was prevalent in their community to dissolve the marriage under custom. Even if such a recital was there in the aforesaid document, the same did not have any legal effect and the relationship between her and Kandasamy continued to subsist.

Defendants contested the suit. Subramani filed the written statement which was adopted by appellant Nos. 2 and 3. It was contended that Natessa Muthu had died seven years prior to the filing of the suit and not twelve years as alleged in the plaint. That there had been oral partition of 'B' schedule property as between the appellants and Kandasamy in the year 1983 and therefore the question of enjoying the 'B' schedule property either jointly or in common did not arise. It was admitted that Kandasamy was married to the respondent. It was admitted that Schedule properties 'A' & 'C' had been purchased/settled in favour of Subramani and Kandasamy. It was denied that these Schedule properties had been purchased by them. It was pleaded by them that Kandasamy had borrowed Rs. 50,000 from Subramani and incurred debts to the tune of Rs. 90,000 from third parties. Kandasamy had directed his brother Subramani to discharge all his debts and in lieu thereof take his share in the properties, but before executing any deed to the aforesaid effect Kandasamy committed suicide on 21.7.1986. According to them, Kandasamy had given up his rights over the suit properties and was therefore not possessed of any properties at the time of this death. According to them, marriage between the respondent and Kandasamy had been dissolved as per dissolution deed (Ex. B-1) and the respondent could not take advantage of her own fraudulent act. According to them Kandasamy had committed suicide due to differences with the respondent and therefore the respondent had no right to seek partition. It was pleaded that respondent had no right to claim partition nor could she ask the Court to overlook the marriage dissolution deed (Ex. B-1).

The Trial Court after considering the oral and documentary evidence came to the conclusion that respondent was entitled to ½ share in 'A', 'C' and 'D' schedule properties and 1/3rd share in 'B' schedule property but dismissed the suit on the ground that in the community to which the parties belong the marriage could be dissolved under custom and the marriage between the respondent and late Kandasamy stood dissolved by the marriage dissolution deed Ex. B-1. The Judgment and decree passed by the trial Court was upheld in the first appeal. The first Appellate Court concurred with the

findings recorded by the trial Court.

Being aggrieved respondent filed the Second Appeal in the High Court. At the time of admission of the appeal the following substantial question of law said to be arising in the appeal was framed :

> "Whether Ex. B-1 dated 25.10.1984 can be construed as bringing about a divorce as contemplated under the provisions of the Hindu Marriage Act and would operate to extinguish the rights of the appellant in her husband's properties?"

The only point argued before the High Court was whether the document Ex. B-1 dated 25.10.1984 dissolved the marriage between the respondent and late Kandasamy. This is the only point argued before us as well.

It is not disputed before us that as per Hindu Law divorce was not recognized as a means to put an end to marriage which was always considered to be a sacrament with only exception where it is recognized by custom. Hindus after the coming into force the Hindu Marriage Act, 1955 (for short "the Act") can seek to put an end to their marriage by either obtaining a declaration that the marriage between them was a nullity on the grounds specified in Section 11 or to dissolve the marriage between them on any of the grounds mentioned in Section 13 of the Act. Section 29 of the Act saves the rights recognized by custom or conferred by special enactment to obtain the dissolution of marriage, whether solemnized before or after commencement of the Act. Section 29(2) of the Act reads :

> "Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu Marriage, whether solemnized before or after commencement of this Act."

It is well established by long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom. The High Court came to the conclusion that the appellants failed to either plead the existence of a custom in their community to dissolve the marriage by mutual consent or to prove the same

by leading cogent evidence. A

Counsel for the parties have been heard.

Respondent had admitted the execution of document Ex. B-1 but has taken the stand that there was no custom prevalent in their community to B dissolve the marriage by mutual consent. In para 5 of the plaint it was pleaded :

> "It is now understood that while so doing, it has been written in the said deed that the marriage between Kandasamy and the plaintiff was cancelled. The parties was Hindu Vellala Gounder Community. C There is no caste – custom of divorce with them. Hence, even it there is such a recital, it has no legal effect. Still, the marriage relationship of the plaintiff and Kandasamy is subsisting."

The above claim of the respondent was dealt with and answered by the D appellants in para 6 of their written statement wherein it was stated as under :

> "Plaint paragraph 5 is correct in so far as it relates to the dissolution of marriage between the plaintiff and the late Kandasamy, the dissolution deed, and the payment therefor. Now the plaintiff cannot E be allowed to take advantage of her own fraudulent act upon the late Kandasamy and especially after driving him to the brink of disappointment and desolation and finally suicide. The plaintiff has no tenable right to claim petition nor can she ask the court to overlook a substantial document of marriage dissolution deed." F

From a perusal of the above averments in the pleadings, it is clear that defendants-appellants did not plead that in their community marriage could be dissolved under custom. They even failed to respond to the averments made in the plaint that no custom was prevalent in their community to G dissolve the marriage under custom. In the absence of such pleadings the Trial Court rightly did not frame an issue as to whether the marriage in the community to which the parties belong could be dissolved under the custom prevalent in their community.

H

Though no issue was framed on this point the appellants did examine DWs. 2 and 5 to show that in their community marriage could be dissolved under the customary law. We have gone through the statements of these witnesses which have been reproduced verbatim after translation in the order of the Trial Court On perusal of their testimonies, it cannot be held that custom was prevalent in their community to dissolve the marriage by mutual consent. Neither of these witnesses has stated as to what is the procedure to be followed for dissolving a marriage under the custom prevalent in their community. It is not their case that marriage could be dissolved between the husband and wife in their community by executing a document in the form of an agreement. The agreement B-1 has been signed only by the respondent and her late husband Kandasamy has not signed the same. In the absence of any pleadings that marriage between the husband and wife could be dissolved in their community under custom and in the absence of any satisfactory evidence let in to prove the custom prevalent in the community or the procedure to be followed for dissolving the marriage it cannot be held that marriage between the respondent and her husband stood dissolved by executing the marriage dissolution deed Ex. B-1. It is not proved that the document Ex. B-1 is in conformity with the custom applicable to divorce in the community to which the parties belong. This Court in *Yamanaji H. Jadhav* v. *Nirmala,* [2002] 2 SCC 637, has held that custom has to be specifically pleaded and established by leading cogent evidence by the person propounding such custom. It was held :

> "The courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable to divorce in the community to which the parties belong. As per the Hindu law administered by courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. *Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and establish by the party propounding*

such a custom since the said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleading by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the Court."

(Emphasis supplied)

We respectfully agree with and follow the view taken by this Court in *Yamanaji H. Jadhav's* case (supra)

Accordingly, we find no merit in this appeal and dismiss the same with no order as to costs.

V.S.S. Appeal dismissed.