

Sumathy Vs. Kamalamma

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Court : Kerala

Decided On : Jul-01-2013

Judge : Honourable Mr.Justice Antony Dominic

Appellant : Sumathy

Respondent : Kamalamma

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE ANTONY DOMINIC & THE HONOURABLE MR. JUSTICE P.D.RAJAN MONDAY,THE 1ST DAY OF JULY 2013 10TH ASHADHA, 1935 Mat.Appeal.No. 450 of 2009 () ----- AGAINST THE JUDGMENT IN OP 294/1997 of FAMILY COURT,THIRUVANANTHAPURAM DATED 29 10-2008 APPELLANT(S)/PETITIONERS: ----- * 1. SUMATHY, AGED 7 YEARS, D/O.LEKSHMI, PUTHUVAL VEEDU, MANICKAVILAKOM MANATHITTA, MUTTATHARA VILLAGE, THIRUVANANTHAPURAM. (DIED) * APPELLANTS 2 TO 4 RECORDED AS THE LRS OF DECEASED FIRST APPELLANT AS PER ORDER DT 14.9.2010 VIDE MEMO CF 102226/2010.

2. SARASWATHY,AGED 5 YEARS, S/O SUMATHY, PUTHUVAL VEEDU, MANICKAVILAKOM MANATHITTA, MUTTATHARA VILLAGE, THIRUVANANTHAPURAM.

3. SADHASIVAN, AGED 5 YEARS, D/O.KUNJUMON, PUTHUVAL VEEDU, MANICKAVILAKOM MANATHITTA, MUTTATHARA VILLAGE, THIRUVANANTHAPURAM.

4. ASOKAN, AGED 4 YEARS, D/O.KUNJUMON, PUTHUVAL VEEDU, MANICKAVILAKOM MANATHITTA, MUTTATHARA VILLAGE, THIRUVANANTHAPURAM. BY ADV. SRI.G.S.REGHUNATH .

RESPONDENT(S)/RESPONDENT: -----

KAMALAMMA, AGED 6 YEARS, BHARGAVI, PUTHUVAL VEEDU, MANALHITTA MUTTATHARA VILLAGE, THIRUVANANTHAPURAM. R,R BY ADV. SMT.K.KUSUMAM THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 24-05-2013, THE COURT ON 1-07-2013 DELIVERED THE FOLLOWING: acd ANTONY DOMINIC & P.D. RAJAN, JJ.

----- Mat. Appeal No.450 of 2009
----- Dated this the 1st day of July, 2013
JUDGMENT P.D. RAJAN, J.

This appeal is directed against the judgment in O.P.No.294/1997 of the Family Court, Thiruvananthapuram. The petitioners and respondent in the above O.P. are the appellants and respondent respectively in this appeal. The above O.P.was filed in the family court for declaration of status, setting aside a sale deed and for permanent injunction.

2. The brief facts are as follows:- The appellants are the legal heirs of deceased Kochuraman Kochukunju. The 1st appellant married deceased Kochuraman Kochukunju on 3rd Meenam 1123 (M.E.) as per the customary rites and in that wedlock, appellants 2 to 4 were born to them. On 17.4.1979 Kochuraman Kochukunju died and till his death, the appellants were living with him in the petition schedule property in Muttathara Village. It is stated that the respondent put forward a Mat. Appeal No.450/09 2 claim over the plaint schedule property and she executed a sale deed for 6 = cents by virtue of Sale Deed No.2487/80 in favour of one Musthafa. She has no right to do so and that deed is void ab initio. The appellants are residing in the plaint schedule property and being the legal heirs of the deceased, they are the absolute owners of the property. The 2nd

appellant had filed O.S.No.517/81 before the Munsiff's Court, Thiruvananthapuram for partition, impleading the respondent as the 2nd defendant as she claimed to be the wife of deceased Kochuraman Kochukunju. According to the appellants, in the circumstance, it was necessary to get a declaration that the 1st appellant is the wife of the deceased and appellants 2 to 4 are their children. The appellants also prayed for setting aside the sale deed and also for injunction against the respondent.

3. In the Court below, the respondent filed a written statement in which, it is contended that the appellants had no relationship with the deceased Kochuraman Kochukunju, but on the other hand, she was the wife of the deceased Kochuraman Kochukunju. The 1st appellant is the wife of one Nanukuttan, who is living in Kovalam, the other appellants are Mat. Appeal No.450/09 3 their children and they had no relationship with the deceased Kochuraman Kochukunju. After the death of Kochuraman Kochukunju, the 2nd appellant trespassed into the property of the respondent and filed a suit, O.S.No.913/1979 for partition. Thereafter, she filed another suit, O.S.No.517/81 and both cases were dismissed by the Munsiff Court. According to the respondent, the appellants have no right or possession in the plaint schedule property and the O.P. was barred by res judicata. It was contended that being the wife of deceased Kochuraman Kochukunju, the respondent inherited his right after his death. She executed Sale Deed No.2487/1980 after obtaining permission from the District Collector so as to raise money for the treatment of Kochuraman Kochukunju. That property was transferred to one 'Musthafa' and according to her the remaining 6 = cents are in her possession. Hence, she prayed to dismiss the petition.

4. Both parties adduced oral and documentary evidence in the trial Court. Their evidence consists of oral testimony of PWs 1 to 3 and CPW1 to CPW3 and documentary evidence of Exts.A1 to A11 and Exts.B1 to B18. The court Mat. Appeal No.450/09 4 below, after sifting and weighing the evidence on record, dismissed the suit. Aggrieved by this judgment, the appellants preferred this appeal.

5. The learned counsel appearing for the appellants contended that the observation of the court below that the marriage between the 1st appellant and the deceased Kochuraman Kochukunju was not proved, is illegal. According to him, in view of the documents produced in the case, the court below ought to have considered whether the case set up by the appellants is probable or not. He also contended that the observation that the question of marital status was not properly pleaded and decided in the earlier case is not correct, and that the conclusion that, it cannot grant the declaration sought for, is not proper. According to counsel, the appellants are entitled to the declaration regarding the validity of the marriage of the 1st appellant and cancellation of deed and injunction. The counsel for the appellant relied on the decisions in *Badri Prasad v. Dy. Director of Consolidation and others* [AIR 197.SC 1557], *Ranganath Parmeshwar Panditrao Mali and another v. Eknath Gajanan Kulkarm and another* [AIR Mat. Appeal No.450/0

1996. SC 1290], *Chowdegowda alias Dorji (dead) by Lrs. and others v. C. Nagaraju and others* [AIR 199.SC 3485], *Challamma v. Tilaga* [2009(3) KLT SN 5.(C.No.53) SC], *Sarojini v. Thankamma* [2003 (1) KLT SN 8.(Case No.123)], *Shri Inacio Martins v. Narayan Hari Naik and others* [AIR 199.SC 1756.6. The learned counsel for the respondent strongly resisted the above argument and contended that the respondent is the legally wedded wife of the deceased Kochuraman Kochukunju. According to her, the appellants are strangers and there was no marital relationship between the 1st appellant and Kochuraman Kochukunju. It was argued that the earlier suit was for partition, and in that suit the respondent was impleaded and that the claim of the appellants for their share was dismissed by the Munsiff Court and that all these contentions were raised in the earlier suit and therefore this suit is barred by the principles of *res judicata*, and is liable to be dismissed. The respondent is the legal heir of deceased Kochuraman Kochukunju and she has the right to transfer the property by virtue of sale deed and no circumstances are Mat. Appeal No.450/09 6 brought before the Court to set aside the sale deed. It was argued that the person, who purchased the property, was not arrayed as a party in the original suit, though he is a necessary party and that no reasons are highlighted by the appellants to interfere with the findings recorded by the court below.

7. In view of the aforesaid argument, the points that arise for consideration are as follows:- (1) Whether the 1st appellant is the legally wedded wife of the deceased Kochuraman Kochukunju entitling the appellants for a declaration as prayed for? (2) Whether the Sale Deed No.2487/1980 executed by the respondent is liable to be cancelled? (3) Whether the appellants are entitled to get an injunction against the respondent? If so, whether the judgment and decree passed by the trial court is sustainable in law? Point (1) 8. The 1st appellant approached the court below for a declaration that she is the legally wedded wife of deceased Kochuraman Kochukunju. Her attempt was to get a statutory Mat. Appeal No.450/09 7 recognition for her marriage in the guise of a declaratory relief. To prove that point, she was examined as a witness (PW1) in the trial court. The evidence of PW1 shows that deceased Kochuraman Kochukunju married her on 3rd Meenam 1123 (M.E.), thereafter, she lived with him till his death on 17.4.1979 in the petition schedule property. In their wedlock, appellants 2 to 4 were born to them and they resided together in that property. To prove the residence, Ext.A1 ration card and Exts.A2 and A2(a) copies of admission registers extract were produced in the trial court. Moreover, to prove the marriage, she obtained a certificate from KPMS, which was marked as Ext.A3 in the trial court. Exts.A4 to A11 documents were also marked in the trial court. Ext.A3 was issued only on 18.2.1980 by the Secretary, KPMS who had not participated in the marriage ceremony and had no knowledge about the ceremonies of the marriage. It is found that the organisation KPMS was constituted only after 1970 and none of the witnesses, who participated in the marriage ceremony of PW1 was examined in the family Court. Even though PW1 deposed that she married the deceased Kochuraman Mat. Appeal No.450/09 8 Kochukunju, what was their age at the time of marriage, what was the custom prevailing in their community, what ceremonies were followed in the marriage etc, were not pleaded and proved by the 1st appellant. The identity of persons who participated in the marriage is also not disclosed and none were examined. PW2 and PW3 are the daughter and son-in-law of the 1st appellant, who supported the evidence of PW1, but they did not have direct knowledge about the marriage. Thus, even though PWs 1 to 3 were examined, the evidence adduced by the 1st appellant did not show that a customary marriage between deceased Kochuraman Kochukunju and the 1st appellant was solemnized on 3rd

Meenam 1123 (M.E.) 9. The respondent who was examined as CPW1 deposed that she married Kochuraman Kochukunju on 1.1.1960, and as they had no off spring, they adopted a child by name 'Ambi'. Her evidence shows that in O.S.No.913/75, which was filed in the Munsiff Court, Thiruvananthapuram CPW1 was admitted as the wife of deceased Kochuraman Kochukunju, but the 1st appellant suppressed that fact in this Mat. Appeal No.450/09 9 case. According to CPW1, after her marriage with deceased Kochuraman Kochukunju, they were residing together in the petition schedule property. CPW2 admitted that her father purchased 6 = cents of land in Survey No.2615 in Muttathara Village from CPW1. CPW3 admitted that he had purchased 6 = cents of land from the respondent. CPW3 knew the respondent and her husband Kochuraman Kochukunju for about 40 years. According to him, at that time, Kochuraman Kochukunju and CPW1 were residing by the side of the river Parvathy Puthen in a hut and that subsequently, patta was obtained by Kochukunju from government and from that property, he purchased 6 = cents of land and that property was subsequently gifted to his daughter.

10. Now what is to be seen is whether the evidence of the above witnesses deserves to be accepted. The 1st appellant claimed that her marriage with Kochuraman Kochukunju was on 3rd Meenam 1123. She was 72 years at the time of filing this appeal in the year 2009. If that be so, she would have born in 1937. In 2009 when the appeal was filed, the corresponding ME was 1184. If so, their marriage Mat. Appeal No.450/09 10 should have been 51 years prior to 1184 ME, that is in the year 1958. But the evidence of CPW1 is found more probable than PW1. Her evidence shows that her marriage with the deceased Kochuraman Kochukunju was solemnized on 1.1.1960 and thereafter, she resided with the deceased husband in the plaint schedule property. To prove this, she produced Ext.B6 letter from Zila Sainik Welfare Office. Ext.B7 is the copy of SSLC Certificate. Ext.B14 is receipt issued by the respondent to one 'Subaida Beevi' for the advance received by the respondent in connection with treatment of Kochuraman Kochukunju. Ext.B16 is the copy of death certificate. Ext.B18 is the copy of identity card. CPW1 categorically stated that she sold the property to meet the treatment expenses of deceased Kochuraman Kochukunju. According to us, the trial court has correctly analysed evidence of both sides and reached an

acceptable conclusion with regard to the disputed marriage. Therefore, we are of the opinion that the appellants failed to prove that the 1st appellant is the wife of deceased Kochuraman Kochukunju and that the other appellants are their children. Mat. Appeal No.450/0

11. There is a presumption in favour of the validity of a marriage and the legitimacy of children, if from the time of marriage the parties are accepted by the relatives and other persons as wife and husband and if it is mentioned in any document thereafter. This presumption can be applied only when the formal requisites of a valid marriage ceremony are proved. At the same time, when a woman was living under the protection of a man, who jointly lived with her and acknowledged her children, that gives rise to a strong presumption that she is the wife of that man. However, this presumption of marriage also can be rebutted by proof of facts showing that no marriage could be taken place. In *Nirmala and others v. Rugmini and others* [AIR 199.Karnataka 247] it was held that the formalities and custom of a valid marriage are also presumed to have been performed and a presumption of marriage arises on long period of cohabitation. Here the evidence of PWs 1 to 3 is not sufficient to prove the performance of ceremonies and satisfaction of customs of a valid marriage. Circumstances leading to a presumption in favour of a valid marriage have been discussed by the the Mat. Appeal No.450/09 12 Apex Court in *Badri Prasad v. Dy. Director of Consolidation and others* [AIR 197.SC 1557.as follows: "For around 50 years, a man and a woman, as the facts in this case unfold, lived as husband and wife. An adventurist challenge to the factum of marriage between the two, by the petitioner in this special leave petition, has been negatived by the High Court. A strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy." In another decision *Bhaurao Shankar Lekhande and another v. The State of Maharashtra and another* [AIR 196.SC 1564]), the Apex Court held thus: "Prima facie, the expression 'whoever..... marries' in S.494. Penal Code must mean 'whoever.....marries validly or 'whoever.....marries and whose marriage is a valid one'. If the marriage is not a valid one, according to the law applicable to the parties, no question of its

being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally, give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife." 12. In view of the law settled by the Apex Court, it has to be held that if a man and a woman are residing together as husband and wife for a pretty long time under a roof, that will Mat. Appeal No.450/09 13 reasonably give rise to presumption of a legal and valid marriage and children born in that wedlock as their legitimate children. This presumption with regard to marriage is a rebuttable presumption and strong evidence is required to rebut such a presumption and the disputing parties must bring evidence to prove conclusively that there was no valid marriage and the possibility of a valid marriage should be completely ruled out through positive evidence. When there is no valid marriage and both parties lead evidence in support of their contention, then the Court will have to decide the question on the basis of the evidence placed before it. In such a case, the onus of proving their contention will shift from one to the other as and when points are proved by one party against the other. The Apex Court in *Moran Mar Basselios Catholicos v. Thukalan Paulo Avira and others* [AIR 195.SC 31.held that "the the question of burden of proof at the end of the case, when both parties have adduced their evidence is not of very great importance and the Court has come to a decision on a consideration of all materials." Insofar as this case is concerned, the appellants failed to produce reliable evidence Mat. Appeal No.450/09 14 to prove a legal and valid marriage between the 1st appellant with Kochuraman Kochukunju. On the other hand, evidence adduced by the respondent is more probable for drawing a presumption that she is residing in the plaint schedule property. In such circumstances, the trial court was justified in holding that the 1st appellant failed to prove her valid marriage and declined to grant the declaratory relief.

13. The appellants approached the court for getting a declaratory decree. According to Section 34 of Specific Relief Act, any person entitled to any legal character, or to any right in any property, has the right to institute a suit against any person denying, his title or right, and on such suit the Court may in its

discretion make a declaration. Therefore, the circumstance in which the discretionary declaratory relief can be granted, depends upon the particular facts of the case. The nature of the declaratory relief was discussed in the decision of Ashoka Sa and another v. Bidyadhar Patra and others [AIR 199. ORISSA 59 held that "On consideration of the aforesaid, the position that emerges is that law governing suits for bare declaration stands codified in Section 34 of the Specific Relief Act, 1963 (Section 42 of the old Act.) The object of Section 34 is to clear the Mat. Appeal No.450/09 15 cloud hovering the legal character of the plaintiff or on his right to property. The circumstances in which a declaratory decree should be awarded is a matter of discretion which depends upon facts peculiar to each case. A complete stranger whose interest is in no way affected by another's legal character or who has no interest in another's property is not entitled to maintain a suit under section 34." Here, though the 1st appellant claimed to be the wife of deceased Kochuraman Kochukunju, she did not produce any evidence to prove the solemnization of her customary marriage. The word 'solemnize', in connection with a marriage, means to celebrate the marriage with proper ceremonies and in due form. Therefore, unless the marriage is celebrated or performed with proper ceremonies, it cannot said to be solemnized. When 1st appellant failed to prove her legal character in the disputed fact, she is not entitled for a declaratory decree as claimed. A stranger or an outsider who is in no way connected with any legal character or right in any property is not entitled to institute a suit for declaration u/s 34 against the person holding title or possession in that property. The trial court considered this aspect and denied to grant the declaration sought for. We find no illegality in the conclusion reached by the court below. Mat. Appeal No.450/09 16 Points 2 &

14. In this backdrop, we have considered whether the sale deed No.2487/80 is null and void and is liable to be set aside. When any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable. In such situation, the court may, in its discretion, adjudge it and order it to be delivered up and cancelled. It is an admitted fact that the plaint schedule property is having an extent of 12 = cents and the respondent sold a portion to CPW3. According to CPW1, she is residing in the plaint schedule

property and she sold 6 = cents of property to CPW3 for meeting the treatment expenses of deceased Kochuraman Kochukunju. There was an earlier suit filed for an injunction which was dismissed as per Ext.B4 judgment. Exts.B1 and B2 are sale deeds, Ext.B3 and B4 are copies of the judgments in O.S.No.517/81 and A.S.No.368/88. Ext.B9 is the attested copy of decree and Ext.B10 is the attested copy of judgment in O.S.913/97. Ext.B14 is the receipt issued by the respondent to one Mat. Appeal No.450/09 17 'Subaida Beevi' for the advance received by her in connection with treatment of Kochuraman Kochukunju. Ext.B16 is the copy of death certificate and Ext.B18 is the copy of identity card. A perusal of the above documents produced in the evidence shows that the appellants failed to prove that they have any right in the disputed plaint schedule property. Ext.B1 shows that the respondent sold the property by sale deed No.2487/1980 for the purpose of treatment of deceased 'Kochuraman Kochukunju', after obtaining sanction from the District Collector.

15. Therefore, in a case of cancellation of instrument the 1st appellant has to establish that title is in favour of herself and it may be vexatiously used by the respondent if it is not cancelled. The trial court observed that the appellants have no right in the plaint schedule property. A perusal of the evidence shows that the appellants failed to prove their right in the alleged disputed property and in such a situation, the court below rightly declined to cancel the instrument. In this context, we may refer the Full Bench decision of the Madras High Court in Muppudathi Pillai v. Krishnanswami Pillai [AIR Mat. Appeal No.450/0

1960. MADRAS 1] where it was held thus: "The provisions of S.39 of the old Act corresponding to Section 31 of the Act of the 1963 make it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument:

- (1) The instrument is void or voidable against the plaintiff.
- (2) Plaintiff may reasonably apprehend serious injury by the instrument being left outstanding.
- (3) In the circumstance of the case the Court considers it proper to grant this relief of preventive justice."

16. Before parting with this judgment, we may observe that learned counsel appearing for the respondent contended that the suit was barred by the principle of 'res judicata'. The second appellant preferred O.S.No.913/79 in the Munsiff Court, Thiruvananthapuram for partition of the plaint schedule property and the suit was dismissed by the court below as not pressed. Again, O.S.No.517/1981 was filed seeking injunction and that suit was also dismissed, against which she again filed an appeal, which was also dismissed by the appellate court. Mat. Appeal No.450/09 19 The lower court observed that there was no finding with regard to the status of parties in the earlier suit and in the appeal and therefore the principle of res judicata is not applicable. It is clear that the question of marital status was not specifically pleaded as an issue in the earlier suit and no decision has been rendered with regard to that point. The principle of res judicata applies in a suit or issue, in which the matter is directly and substantially in issue, has been directly and substantially in issue in a former suit between the same parties or between parties litigating under the same title. Earlier suits were filed by the 2nd appellant in the Munsiff's Court, Thiruvananthapuram for partition and injunction. The lower court observed that in the above suits there was no finding with regard to the status of the parties and in both suits parties are different. On such observation, the family court rejected the contention of res judicata without framing any issue. We do not find any illegality in the above conclusion.

17. In this case since the appellants failed to prove their right in the plaint schedule property, the lower court declined to grant injunction. When the appellants failed to prove title Mat. Appeal No.450/09 20 and possession of the plaint schedule property, they are not entitled to get an injunction as prayed for. No circumstances are brought before us to interfere with the findings recorded by the court below. In the result, the judgment and decree passed by the courts below are confirmed. The appeal is accordingly dismissed. Parties are directed to bear their respective costs. ANTONY DOMINIC, JUDGE P.D. RAJAN, JUDGE. acd Mat. Appeal No.450/09 21 Mat. Appeal No.450/09 22 ANTONY DOMINIC, JUDGE P.D. RAJAN, JUDGE. acd There is a presumption in favour of the validity of a marriage and the legitimacy of children, if from the time of marriage the parties are approved by the relatives and other persons as wife and husband and mentioned in any document thereafter. This presumption can be applied only when the formal

requisites of a valid ceremony were proved. At the same time, when a Mat. Appeal No.450/09 23 woman was living under the protection of a man, who jointly lived with her and acknowledged her children raises a strong presumption that she is the wife of that man. However, this presumption of marriage can be rebutted by proof of facts showing that no marriage could have been taken place as alleged by the parties. In *Nirmala and others v. Rugmini and others* [AIR 199.Karnataka 247] held that the formalities and custom of a valid marriage are also presumed to have been performed, if a presumption of marriage arises on long period of cohabitation. The evidence of PWs 1 to 3 is not sufficient to prove the ceremonies and customs of the valid marriage in their case. Mat. Appeal No.450/09 24

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