

Bhargaviammal vs Paramu Achary

Bhargaviammal vs Paramu Achary

SooperKanoon Citation : sooperkanoon.com/1357779

Court : Kerala

Decided On : Apr-05-2023

Judge : Honourable Mrs. Justice M.R.Anitha

Appeal No. : RSA/697/2006

Appellant : Bhargaviammal

Respondent : Paramu Achary

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE M.R.ANITHA
WEDNESDAY, THE 5TH DAY OF APRIL 2023 / 15TH CHAITHRA, 1945
RSA NO. 697 OF 2006 AGAINST THE JUDGMENT AND DECREE IN
A.S. NO.31/1997 DATED 27.05.2005 OF ADDITIONAL DISTRICT
COURT, PATHANAMTHITTA AGAINST THE JUDGMENT AND
DECREE IN O.S. NO.39/1993 DATED 25.11.1996 OF MUSNIFF'S
COURT, ADOOR APPELLANTS/RESPONDENTS/PLAINTIFFS:

1 BHARGAVIAMMAL, W/O KRISHNAN ACHARY @ KITTAN ACHARY,
PULIMKAVIL VEEDU, LEKSHOM VEEDU KOLONY, MALLIKA MURI,
PANDALAM THEKKEKARA VILLAGE FROM PULIMKAVIL VEEDU,

PARRAKARA MURI, PANDALAM THEKKEKARA VILLAGE 2
KRISHNAN KUTTY, S/O. KRISHNAN ACHARY @ KITTAN ACHARY,
PULIMKAVIL VEEDU, LEKSHOM VEEDU KOLONY, MALLIKA MURI,
PANDALAM THEKKEKARA VILLAGE FROM PULIMKAVIL VEEDU,
PARRAKARA MURI, PANDALAM THEKKEKARA VILLAGE BY ADV
SRI.PHILIP M.VARUGHESE

RESPONDENTS/APPELLANT-RESPONDENT/DEFENDANTS:

1 PARAMU ACHARY, S/O VELU ACHARY (DIED) PULIMKAVIL
VEEDU, PARAKKARA MURI, PANDALAM THEKKEKARA VILLAGE.
(FIRST RESPONDENT DIED ISSUELESS. THE APPELLANT IS THE
LEGAL HEIR AND 2ND RESPONDENT REPRESENT THE ESTATE OF
DECEASED R1 AND HENCE NOBODY IS TO BE IMPEADED AS PER
THE ORDER DATED 05/04/2019 IN I.A. NO.1/2019) 2
RAMAKRISHNAN, S/O. NANU PULIMKAVIL VEEDU, PARAKKARA
MURI, PANDALAM THEKKEKARA VILLAGE. BY ADVS.
SRI.S.MOHANAN - R1 SRI.M.NARENDRA KUMAR - R2

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 05.04.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING: M.R.ANITHA, J *****

----- Dated this the 05th day of April,
2023

JUDGMENT

The Regular Second Appeal has been filed against the

judgment and decree in A.S.No.31 of 1997 on the file of

Additional District Court, Pathanamthitta which in turn arise out of the judgment
and decree in O.S.No.39 of 1993 on the file of Munsiff's Court, Adoor.

2. Appellants are the plaintiffs in a suit for declaration of title setting aside a
document and also for injunction. The trial court decreed the suit and the first

appellate court reversed the

judgment and decree passed by the trial court and dismissed the suit.

3. First plaintiff claimed to be the wife of Kittan Achari @

Krishnan Achari and 2nd plaintiff is the son born to them. The plaint schedule property was obtained by Kittan Achari as per release deed No.2214 /1960 executed by the first defendant, the brother of Kittan Achari on receiving consideration from the late Kittan Achari. Kittan Achari married the first plaintiff on 15.07.1971 as per customary rites at her residence at Cherunthana Village and thereafter executed Ext.A2 marriage agreement and registered at S.R.O Chengannur. Thereafter, they were residing in the small hut situated in the plaint schedule property along with the mother of Kittan Achari. On 10.03.1972, 2nd plaintiff was born. Kittan Achari died in the year 1973. Plaintiffs and the mother of Kittan Achari continued to reside in the house situated in the schedule property and while so, in the year 1978, the mother of Kittan Achari died. Thereafter, plaintiffs are the legal heirs of Kittan Achari and in possession and enjoyment of the plaint schedule property. Since the plaintiff could not maintain the hut situated in the plaint schedule property, it got perished and plaintiffs shifted their residence to

nearby 'Laksham Veedu Colony' and continued to cultivate in the plaint schedule property. Defendants are residing on the eastern side of the plaint schedule property. There is a boundary separating the property of the plaintiffs and 2 nd defendant. When the defendants made attempts to trespass into the plaint schedule property, the suit was filed.

4. Defendants 1 and 2 filed separate written statements.

First defendant denied the entire plaint averments and rights and possession of the plaintiffs over the plaint schedule property. The entire plaint schedule property belong to the first defendant and he obtained the same along with his brother Kittan Achari and mother as per gift deed No.193/1120 M.E. After the death of

Kittan Achari and mother, first defendant became the absolute owner in possession of the suit property. On 04.01.1993, he sold 15 cents out of 22 cents to 2 nd defendant. The release deed alleged by the plaintiff never came into existence. Even if the release deed is admitted, the first defendant, being the sole legal heir of deceased mother and Kittan Achari, is the absolute owner of the property. 2nd defendant is trying to grab remaining 7 cents also with the help of plaintiffs 1 and 2. The marriage between the first plaintiff and Kittan Achari is denied and their residence in the suit property is also denied. 2 nd plaintiff is not the son of Kittan Achari. Kittan Achari was suffering from diseases and died as bachelor. Hence the plaintiffs are not the legal heirs of Kittan Achari. She is living with her husband. The suit is filed at the instigation of the 2nd defendant.

5. 2nd defendant contended that he purchased 15 cents of

property from the first defendant on 04.01.1993 and he is in possession and enjoyment of the said property. He is a bona fide purchaser of 15 cents of property and paid consideration of Rs.25,000/- to the first defendant. He had no knowledge about the release deed No.2214/1960. First defendant was in absolute possession and enjoyment of the said property and the plaintiff had no occasion to take yield from the said property for the last 30 years. After the death of mother, first defendant became the

absolute owner of the property. All other allegations disputing the marriage of the plaintiff with Kittan Achari are reiterated as in the written statement of the first defendant. Amount of Rs.25,000/- paid by the second defendant was deposited by the first defendant in Co-operative Bank, Thatta. He filed a suit for restraining the first defendant from withdrawing the said amount as O.S.No.113/1993.

6. The plaint was subsequently amended in the year

1996 alleging that they came to know about the execution of Ext.B1 sale deed by the first defendant in favour of 2 nd defendant on 04.01.1993 from the written statement. It will not bind the plaintiffs. Hence a declaration is sought for declaring the said sale deed as void. For that, additional written statement was also filed by the first defendant denying the averments. Suit was tried along with

O.S.No.113/1993 taking O.S.No.39/1993 as the leading case.

7. PW1 to PW3 were examined and Exts.A1 and A2 were marked from the side of the plaintiffs. DW1 to DW3 were examined and Exts.B1 is marked from the side of the defendants.

8. After trial, learned Munsiff decreed O.S.No.39/1993

and dismissed O.S.No.113/1993. It has been found that there is long co-habitation and presumption in favour of marriage between first plaintiff and late Kittan Achari. The trial court also placed reliance on Ext.A2 and found that first plaintiff was living as wife of late Kittan Achari from 15.07.1971 till his death and found that she is legally wedded wife of late Kittan Achari and accordingly decreed the suit, as sought for. (No appeal was filed against the dismissal of O.S. No.113/1993).

9. A.S.No.31/1997 was filed against the judgment and decree in O.S. No.39/1993 before the Additional District Court,

Pathanamthitta and the appellate court reversed the judgment

and decree and found that the first plaintiff failed to prove that she is the legally wedded wife of deceased Kittan Achari and it is also found that since there is no valid marriage, the second plaintiff cannot claim benefit under Section 16(1) of the Hindu Marriage Act, 1955. It is also found that the first defendant is entitled to claim title over the entire plaint schedule property as the sole surviving heir of deceased Kittan Achari.

10. Aggrieved by the same, the appellants/plaintiffs in O.S.No.39/1993 came up in second appeal before this Court. Notice was issued to the respondent and both sides were heard. Appeal admitted on the following substantial questions of law:

1. Whether statement of late Kittan Achari in Ext.A2 agreement about the marriage will constitute valid marriage as per Section 32 (5 and 7) of Indian Evidence Act?

2. Whether non filing of appeal against the

judgment and decree in O.S. No.39/1993 would

estop the 2nd defendant from raising claim over the plaint schedule property in this appeal?

11. According to the learned counsel for the plaintiffs the trial court on a proper appreciation of law and facts came to a

conclusion about a valid marriage between 1 st plaintiff and late

Kittan Achari and 1st appellate court on a wrong appreciation of evidence and application of law in the field reversed the

judgment of the trial court and found that there is no valid

marriage between the 1st plaintiff and late Kittan Achari. He would contend that there is clear statement and admission by late Kittan Achari in Ext.A2 agreement about the marriage of himself and the 1st plaintiff on 15.07.1971 and that is admissible under Section 32 (5 and 7) of the Indian Evidence Act, 1872. He

would relies on Janaki Amma v. Rama Warier [1985 KLT 283] and would contend that based on which as per Ext.A2 and evidence adduced from the side of the plaintiffs trial court rightly found about valid marriage between the 1 st plaintiff and late Kittan Achari and that finding ought not have been interfered with by the 1st appellate court.

12. Indra Sarma v. V.K.V.Sarma [2014 AIR 2014 SC 309] was also relied on by the learned counsel to prove the aspect of legitimacy of the 2 nd plaintiff so as to inherit the

property of the deceased Kittan Achari. Parayankandiyal Eravath Kanapraavan Kalliani Amma and Ors. v. K.Devi and Ors. [AIR 1996 SC 1963] and Karuvankandy Narayani v. Nelliadan Aravindakshan [2005 KHC 1243] also placed

reliance. He would also contend that though the suit was decreed by the trial court, the 1st defendant alone filed the appeal against the judgment before the 1st

Appellate Court and the 2nd defendant did not challenge the appeal. It is also his contention that O.S. No.113/1993 filed by the 2nd defendant against the 1st defendant was tried along with O.S. No.39/1993 and it was dismissed but no appeal has been filed by the 2nd defendant against the dismissal. So, there is a bar under Section 11 of the Code of Civil Procedure, 1908 (in short 'Code') as against the 2nd defendant in contesting this appeal.

13. The learned counsel for the 2nd defendant on the other hand would contend that the findings of the trial court regarding

the validity of the marriage is without properly appreciating Ext.A2 and there is also finding by the trial court that if recitals in Ext.A2 is believed there is no previous marriage and it is also found that the marriage is not registered with Viswakarma Sabha though PW2 examined from the side was a Secretary of the Sabha. So even the trial court was also not prepared to accept

the evidence of PW2 and PW3 in the aspect of customary marriage but ultimately arrived at a conclusion regarding valid marriage placing reliance on Ext.A2 as well as presuming marriage on the basis of long cohabitation, which according to him is not legally sustainable.

14. The learned counsel placed reliance on *Kali v. Kamalakshi Amma* [1967 KLT 1063] to contend that Ext.A2

document will not in any way help the plaintiff to prove solemnization of marriage. He would also contend that the 2nd plaintiff cannot claim the benefit of Section 16 of the Hindu Marriage Act, 1955 since valid marriage between the 1st plaintiff and deceased Kittan Achari could not be proved by the plaintiffs. In this context learned counsel placed relies on *Jayachandran and Others v. Valsala and Others* [2016 (2) KHC 177] and *Karuvankandy Narayani v. Nelliadan Aravindakshan* [2005 KHC 1243] : [AIR 2006 Ker.26].

15. It is further contended that the question of resjudicata does not apply against the 2nd defendant because the suit filed by

him as O.S. No.113/1993 is against the 1st defendant for an injunction for restraining the withdrawal of money from the bank, which alleged to have been deposited by the 1st defendant received as sale consideration paid by him to the 1st defendant as per Ext.B1 sale deed by which 1st defendant sold 15 cents of property out of the plaint schedule property to the 2nd defendant.

16. From the rival contentions mainly the following points arise for consideration:

1. Whether there is any valid marriage between

the 1st plaintiff and deceased Kittan Achari and whether recitals in Ext.A2 udambady will enable the 1st plaintiff to seek the benefit of Section 32 (5 and 7) of the Indian Evidence Act?

2. Whether 2nd plaintiff is entitled to the benefit of Section 16(1) of the Hindu Marriage Act, 1955?

3. Whether the second appeal is barred by Section 11 of the Code? Point No.1

17. Trial court after extracting the relevant portion of Ext.A2 udambadi made the finding initially that if recitals in

Ext.A2 are believed there was no marriage according to customary rights. It is also found that the evidence of PW2 and PW3 does not inspire the confidence. But further the court found that Ext.A2 is a deed by which parties agreed to live together as husband and wife and the decision reported in Janaki Amma v. Rama Warier [1985 KLT 283] was relied on to presume the marriage when there has been cohabitation of spouses till the death of deceased Kittan Achari. Further the observation in the

judgment that when a statement is made in a document about

the relationship, it assumes great weight and sanctity and the statement in Ext.A2 of Kittan Achari that they decided to live as husband and wife since 15.07.1971 was relied on and found that there is long cohabitation and there is presumption in favour of marriage and accordingly it was found that 1st plaintiff was living as wife

of late Kittan Achari and ultimately found that 1 st plaintiff is the legally wedded wife of late Kittan Achari.

18. Ext.A2 document, no doubt is executed as a marriage udambady on 15.07.1971 between 1st plaintiff and late Kittan Achari. On going through the recitals in Ext.A2 it could be seen that it is styled as a marriage agreement.

19. It has been stated that the 1 st party Kittan Achari

decided to marry the 2nd party ie. 1st plaintiff and their family members and friends and relatives also decided that. It is further stated that there was an opinion for themselves and to the friends and relations that if marriage is conducted through a registered deed unnecessary loss and difficulties to either parties could be avoided and hence their marriage has been conducted through this deed and they have become husband and wife from the said day onwards and from that date onwards they will have right among each other with regard to the properties as well as in physical relations.

20. It is also stated that this agreement is executed to

extent the marital relationship life long with all bonafides. It has been consistently found by the court below that before the execution of Ext.A2 no customary marriage had taken place in the house of the 1st plaintiff as alleged. Evaluation of evidence of

the plaintiff and also PW2 and PW3 as rightly found by the courts below, there is no consistency with regard to the solemnization of marriage prior to the execution of Ext.A2. So the consistent finding that the plaintiff could not prove the solemnization of marriage before the execution of Ext.A2 is based on appreciation of the evidence of PW1 to PW3 and facts and circumstances by the courts below in a correct perspective and does not call for any interference.

21. The learned counsel for the plaintiffs/appellants was

also relying on recitals in Ext.A2 about the marriage by late Kittan Achari seeking aid of Section 32 (5) and (7) of the Indian Evidence Act. Section 32 of the

Evidence Act deals with the cases in which statement of relevant facts by person who is dead or cannot be found etc. were relevant. Sub section 5 provides that when the statement relates to the existence of any relationship by blood or marriage or adoption between persons as to whose relationship by blood, marriage or adoption, the person making the statement had special means of knowledge, when the

statement was made before the question in dispute was raised. Sub section 7 provides that when the statement contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13(a) it is relevant. Section 13(a) is relevant to be extracted which reads thus:

13. Facts relevant when right or custom is in question. -- Where the question is as to the existence of any right or custom, the following facts are relevant:-

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

22. It is the contention of the learned counsel that in Ext.A2 Kittan Achari stated about their marriage on 15.07.1971 and that they have become husband and wife as per that deed, would amount to a statement contemplated under Section 32

(5) since Kittan Achari is no more and hence is admissible to prove valid marriage between himself and 1st plaintiff.

23. He would also contend that the recitals about marriage in Ext.A2 would prove the customary marriage before the execution of that deed in between Kittan Achari and 1 st plaintiff as per Section 13(a) of the Evidence Act.

24. First of all the recitals in Ext.A2 which has been

described above would only state about the decision of 1 st plaintiff and late Kittan Achari and the friends and relations and family members to conduct the marriage of 1 st plaintiff and late Kittan Achari by the deed (Ext.A2) and it would further indicate that the marriage was conducted as per that deed and accordingly they

became husband and wife from that date onwards and thus they have rights in between them as husband and wife both physically as well as with respect to their properties. Whether the marriage so entered into between the 1st plaintiff and late Kittan Achari as per that deed and their statement that they have become husband and wife from that date onwards both physically and materially would amount to a proof of valid marriage as contemplated under the Hindu Law is crucial question for determination.

25. In Janaki Amma v. Rama Warier [1985 KLT 283]

a gift deed was executed by deceased Rama warier about 7 years prior his death and in that document it was specifically stated that Janaki Amma is his wife and there was also evidence of cohabitation of Janaki Amma with Rama Warier for above 10 to 20 years. In the circumstances, the statement in the gift deed by Rama Warier that Janaki Amma is his wife was placed reliance in that decision. The same has no application in the present case because it is as per Ext.A2 agreement that the marriage between the 1st plaintiff and deceased Kittan Achari has taken place and the statement in that document is being placed reliance by the first plaintiff to claim the benefit under Section 32(5) of the Indian Evidence Act.

26. It is relevant in this context to quote Kali v.

Kamalakshi Amma [1967 KLT 1063] cited by the learned counsel for the 2nd defendant wherein it has been held that the document will not solemnize the marriage between the parties and to marry a person with another they have to go through a form of marriage known to law and not merely to make an

averment in a document. In that case Narayanan Madavan who was an Ezhava and 1st plaintiff Kamalakshi Amma who belongs to Nair Community married as per Ext.P1 document which is a marriage agreement () was relied on by the plaintiff to establish marriage between herself and Narayan Madavan. The relevant portion of that document which is extracted in that

judgment reads as follows:

. . . .

27. Interpreting that document the Division Bench of this

Court found that Ext.P1 is an admission of cohabitation and a negation of marriage having taken place between the parties. It is further found that a document like Ext.P1 will not solemnize a marriage between the parties. To marry is to go through a form of marriage known to law and not merely to make an averment in a document like Ext.P1.

28. So in the present case, the recitals in Ext.A2

agreement will not in any way prove the solemnization of the marriage between late Kittan Achari and the 1 st plaintiff since as per Ext.A2 the parties to marriage as well as friends and relations decided to to conduct the marriage through that deed and agreed to live together as husband and wife from that date onwards both physically and materially.

29. Section 7 of the Hindu Marriage Act, 1955 deals with solemnization of Hindu Marriage which reads thus:

Ceremonies for a Hindu marriage - (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2)Where such rites and ceremonies include the saptpadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

30. A Division Bench of this Court in Chakki v. Ayyappan [1988 (1) KLT 556] had occasion to consider the essential requirement of Hindu Marriage under Section 5 and it has been

held that the essential requirements of a Hindu Marriage are (i)

invocation before the sacred fire, and (ii) Saptapadi, that is taking seven steps by the groom and bride jointly before the sacred fire.

31. In this case it has been already found that though

attempt was made by the plaintiff to prove customary marriage before the execution of Ext.A2, both courts below on appreciation of evidence came to a conclusion that evidence so adduced is not

admissible. The interpretation of Ext.A2 also leads to a conclusion

of not having solemnization of a customary marriage prior to that.

32. Indra Sarma v. V.K.V.Sarma referred above though

relied on by the counsel for the plaintiffs the question arose in that case in a different context while considering Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 and Section 5 of the said Act and interpretation of the word the relationship in the nature of marriage etc. and it has no application in the present case.

33. Though the trial court draw the presumption of the

marriage on the basis of Janaki Amma v. Rama Warier [1985 KLT 283] that has been rightly negated by the 1st appellate court since admittedly in this case the marriage was on

15.07.1971 and Kittan Achari died in the year 1973. So, cohabitation from 1971 to 1973 cannot also be taken as a period of long cohabitation and moreover in 1985 KLT 283 referred by the trial court, the period of cohabitation between the parties to marriage in that case was 10 to 20 years. It is contended by the learned counsel that they lived together till the death of Kittan Achari in 1973 and that can be taken for presuming the marriage. But the authorities states about long cohabitation for drawing presumption under Section 114 of the Indian Evidence Act. In Gokalchand v. Parvin Kumari [AIR 1952 SC 231] quoted in Janaki Amma's case referred above it has been held by

the Apex Court that continuous cohabitation for a number of years may raise the presumption of marriage. Here admittedly the cohabitation is from 15.07.1971 till death, 1973, (the month or date is not known) so much so a period of 2 and odd years if at all; is not sufficient to draw the presumption of marriage in view of the settled position of law. So the presumption of marriage drawn on the basis of long cohabitation is not in accordance with law and has been rightly negated by the 1st appellate court. So at any rate as rightly found by the 1st Appellate Court the 1st plaintiff failed to prove that she is the legally wedded wife of late Kittan Achari.

Point No.2

34. The next aspect is with regard to the right of

inheritance to the property of the deceased Kittan Achari by the 2nd plaintiff who is alleged to be the son born to the 1st plaintiff out of the marriage with Kittan Achari. The 1st Appellate Court while discussing Section 16(1) of the Hindu Marriage Act and the case law on the subject found that the 2nd plaintiff cannot claim the benefit of Section 16(1) of the Hindu Marriage Act, 1955 since solemnization of marriage is not proved.

35. In *Parayankandiyal Eravath Kanapraavan Kalliani*

Amma and Ors. v. K.Devi and Ors. [AIR 1996 SC 1963] the scope of Section 5 and 16(1) of the Hindu Marriage Act, 1955 (in short Act) came up for consideration. In that case appellants were wife and children out of the 2nd marriage and the respondents were wife and children out of the 1st marriage and the High Court found that 2nd wife and children are not entitled for the shares and the children out of the 2nd marriage approached the Apex court claiming the benefit under Section 16 of the Hindu Marriage Act and Apex Court held that appellants 2 to 6 who are the children born out of the 2nd marriage would be entitled for their due share as per Section 16(1) notwithstanding the fact that the marriage between their parents taken place at a time when there was a legislative prohibition on the 2nd marriage, children to be treated as legitimate, and therefore

inherit the properties of their father as per Section 16(3) of the Act.

36. In *Karuvankandy Narayani v. Nelliadan*

Aravindakshan [2005 KHC 1243] while dealing with Section 16 of the Act, a learned Single Judge of this Court found that children conceived and begotten out of a void or voidable marriage is entitled to get a share in the properties of the parents and Marriage Laws (Amendment) Act, 1976 applies with effect from the date on which the parent Act came into force ie. 18.05.1955.

37. The learned counsel for the 2nd defendant in this

context bring to my attention *Jayachandran and Others v. Valsala and Others* [2016 (2) KHC 177] where in while dealing with Section 16 of the Act, it has been held that in order to attract Section 16 of the Act, a ceremony of marriage, whether void or voidable, will have to be pleaded and proved.

38. On a detailed analysis of the provisions of Section 16 before and after the amendment and the case law in the filed

Division Bench concluded that Section 16 of the Act confers legitimacy of children of void and voidable marriages. Section 16(1) of the Act deals with marriage which is null and void under Section 11 of the Act and Sub Section 2 deals with voidable marriage annulable under Section 2 of the Act. It may be true that a void marriage does not exist in the eye of law. A voidable marriage operates with full vigour and has legal effect, if not annulled by taking recourse to Section 12 of the Act. These two marriages are dealt with in Section 16 of the Act and the intention of the Legislature must be found from the words used by the Legislature itself. It is also held that the object of the Act is to protect the children born to Hindus and once it is proved that they performed the ceremony of a marriage in whatever form although ultimately it may later turn out to be a void marriage.

39. It is also held that in order to have a legal effect to the expressions void occurring in Section 11 of the Act, voidable mentioned in Section 12 of the Act and divorce explained in

Section 13 of the Act in respect of a Hindu marriage, essentially there must be a marriage between two persons. So without proving a marriage though void or

voidable as contemplated under Section 11 and 12 ,the benefits under Section 16 cannot be resorted to.

40. In the present case it has been found already that the

1st plaintiff failed to prove that she is the legally wedded wife of late Kittan Achari or that the solemnization of marriage as per custom between the 1st plaintiff and late Kittan Achari was failed to be proved by the plaintiffs. It is also found that Ext.A2 will not solemnize the marriage between the parties and the statement in Ext.A2 with respect to marriage will not amount to the proof of solemnization of marriage. Since the marriage between the 1 st plaintiff and deceased Kittan Achari was not proved the 2 nd plaintiff alleged to be born to the 1 st plaintiff out of Kittan Achari is also not entitled to get the benefit of Section 16 (1) of the Act. Point so found against the plaintiffs.

Point No.3

41. According to the learned counsel for the plaintiffs,

since no appeal has been filed by the second defendant against the judgment and decree in O.S.No.39/1993, he is estopped from raising contentions against the plaintiffs in the second appeal since the decree as against him is not challenged. It is also his contention that O.S.No.113/1993 tried along with this suit though dismissed, is not challenged by the second defendant and hence it has become final. Hence, according to the learned counsel, the bar under Section 11 of the Code of Civil Procedure, 1908 would apply against the second defendant in defending the second appeal filed by the plaintiffs. To support his contention, learned counsel placed reliance on Raghavan Nambiar v. Sumathi Amma : 1991 (1) KLT S.No.7 (C.N.8); Thomas George v. A.T.Joseph & Ors. : 2016 (1) KLJ 339.

42. Learned counsel for the second defendant/respondent, on the other hand, would contend that O.S.No.113/1993 has been filed by the 2 nd defendant against the first defendant, in

which the plaintiffs are not parties and facts in issue in O.S.No.113/1993 and O.S.No.39/1993 are entirely different. So, the non-filing of appeal against the

judgment and decree in O.S.No.113/1993 will not in any way operate as res judicata as against the second defendant. He would also contend that the present appeal has been filed by the plaintiffs and not the second defendant and hence the non-filing of appeal against the

judgment and decree in O.S.No.39/1993 will not operate as res

judicata in defending his rights in the present appeal. 2 nd defendant/respondent placed reliance on Lonankutty v. Thomman and Another : AIR 1976 SC 1645 as well as Sheodan Singh v. Daryao Kunwar : 1966 KHC 607 : AIR 1966 SC 1332.

43. To answer the above rival contentions, it would be

necessary to note that O.S.No.113/1993 has been filed by the second defendant against the first defendant for a permanent injunction for restraining the first defendant from withdrawing the amount of Rs.25,000/- alleged to have been deposited by the first defendant in Co-operative Bank, Thatta which, according to him, is the sale consideration which he paid to the first defendant while purchasing 15 cents of property out of the plaint schedule property. Plaintiffs were not parties in that suit. The issue for consideration in O.S.No.113/1993 was also whether the injunction sought for by the second defendant for restraining the first defendant from withdrawing the amount of Rs.25,000/- deposited in Co-operative Bank, Thatta is allowable or not.

44. Where as O.S.No.39/1993 has been filed by the

plaintiffs against defendants 1 and 2 for declaring their rights as the legal heirs of late Kittan Achari and also for a permanent injunction for restraining the defendants from trespassing upon the suit property and committing any waste therein. The trial court tried both cases jointly and a common judgment was passed.

45. In the written statement filed by the second defendant in O.S.No.39/1993, he raised a specific contention of purchase of 15 cents of land out of plaint schedule property from the first

defendant. He also contended that the property was in the possession of the first defendant and plaintiffs had no occasion to take yield from the property and it was being taken by the first defendant and his brother Kittan Achari and their mother Lakshmi. After the death of mother and Kittan Achari, the first defendant became the sole owner of the suit property and it is also contended that plaintiffs 1 and 2 had no occasion to live with deceased Kittan Achari and further that even if anybody has any right over the suit property, it has been lost by adverse

possession of the first defendant. So, the 2nd defendant raised almost all the contentions in the written statement of 1st defendant refuting the averments in the plaint regarding the devolution of right over the property upon the plaintiffs.

46. An issue has also been raised as to whether the first

plaintiff is the legally wedded wife of Kittan Achari and whether plaintiffs are entitled to get declaration of right, title and possession and whether the second defendant is a bona fide purchaser of the plaint schedule property who is in possession of

plaint schedule property etc. The trial court, on evaluating the rival contentions, facts, circumstances and evidence decreed O.S.No.39/1993 and further found that the second defendant is a bona fide purchaser and entitled to get back Rs.12,000/- sale consideration from the first defendant. So, the contention raised by the second defendant in O.S.No.39/1993 claiming absolute right over the property upon the first defendant though was found against and the suit was decreed, he opted not to file any

appeal either against the judgment in O.S.No.39/1993. First defendant alone challenged the judgment and decree in O.S.No.39/1993 before the first appellate court. So, the question is whether bar under Section 11 of the Code would be applicable against the 2nd defendant.

47. Here, one thing need to be noted is that the second

defendant is not an appellant in the second appeal and he has been arrayed as the second respondent in this appeal. Pending the second appeal, first defendant

died and learned counsel for the appellant filed a verified petition after the death of first defendant stating that the first respondent died issueless and appellants are the legal heirs of first respondent and further it is stated that the second defendant/2 nd respondent represent the estate of the deceased Paramu Achari and hence nobody has to be impleaded in the second appeal. Anyway, it is a verified petition without any supporting affidavit by the party.

48. So, the crucial issue is whether the non-filing of appeal

against the judgment in O.S.No.39/1993 would estop the second respondent from defending the appeal since he has not filed any appeal against the judgment of the trial court in O.S.No.39/1993. In Thomas George referred above, while dealing with Order XLI Rules 4 and 13 it has been held by the learned Single Judge that a second appeal challenging the decision of trial court as confirmed in appeal is not maintainable at the instance of a defendant who did not challenge the decision of trial court in appeal.

49. The contention of the learned counsel for the appellants is that since the 2nd respondent who alone remains has

not filed appeal against the judgment and decree in O.S. No.39/1993 and it has become final as against him and hence he is not entitled to raise any claim with respect to the plaint

schedule property which has been denied as per the judgment

and decree of the trial court as against both defendants.

50. Learned counsel for the 2 nd defendant on the other

hand would contend that as per Order 41 Rule 3 and 33 of the Code the appeal filed against the judgment and decree by the 1 st defendant enure to his benefit of the second defendant also and

the appeal has been filed by the plaintiffs against that judgment

and decree passed by the 1st Appellate Court and hence there is no impediment under Section 11 to the 2nd defendant to defend his claim.

51. In *Thomas George v. A.T. Joseph & Ors.* [2016

(1) KLJ 339] relied on by the learned counsel for the plaintiffs

laid down the proposition that the second appeal challenging the decision of the trial court as confirmed in appeal is not maintainable at the instance of a defendant who did not challenge the decision of the trial court in appeal.

52. But that was a case in which the suit was filed by the

plaintiffs for damages against the defendants. Defendants 1 to 4 alone contested the suit and the trial court decreed the suit permitting to recover certain sum with interest from the defendants 1 to 5. 5th defendant did not challenge the decision of the trial court in appeal and the decision of the trial court was confirmed in appeal filed at the instance of defendant Nos. 1 to 4. There upon the defendants 1 to 4 did not challenge the decision further in 2nd appeal and 5th defendant who is the 2nd respondent in the 1st Appellate Court preferred the second appeal challenging the decision of the trial court as confirmed in appeal. It was in the said circumstances, the principles of law that the defendant who did not challenge the decision of the trial court as confirmed in appeal cannot challenge the same of the appellate Court in second appeal was laid down. It is to be noted that *P. Narasimham v. P.V. Narasimham* [AIR 1973 Andhra Pradesh 162] was cited before his Lordship while

considering the second appeal the suit was decreed against all the defendants on a common finding which was reversed in appeal by one of the defendants and in the said circumstances, it was held that the other defendants can certainly challenge

the decision of the appellate Court and decision was not held

applicable to the case in *Thomas George's* case because in *P. Narasimham's* case appellate Court varied the decision of the trial court and hence it was held that the

second appeal filed by a defendant who has not filed the first appeal is maintainable. But in Thomas George's case since the appellate Court only confirmed the decision of the trial court it was held that the second appeal filed by the 5th defendant is not maintainable, since the appeal filed by the defendants 1 to 4 would bind the 5th defendant who did not challenge the

judgment and decree of trial court.

53. In the present case, the suit was decreed by the trial court in favour of the plaintiffs and 1st defendant filed appeal which was allowed by the 1st Appellate Court and that decree allowing the appeal by the 1st Appellate Court would definitely enure to the benefit of the 2nd defendant also. Order 41 Rule 4

provides that when there are more plaintiffs or more defendants than one in a suit and decree in appeal from the suits on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants in an appeal from the whole decree and there upon the appellate court may reverse or vary the decree in favour of all the plaintiffs or the defendants. Rule 33 of Order 41 also enables

the Appellate Court to pass any decree and make any order

which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection

54. In this context the learned counsel for the 2nd

defendant placed reliance on Chandramohan Ramachandra Patil and Others v. Bapu Koyappa Patil (Dead) Through Lrs. and Others [2003 (3) SCC 552] where in while dealing with Order 41 Rule 4 and 33 it has been held that appellate court varied the judgment and decree of trial court against the defendants and grant relief in favour of non appealing plaintiffs as well, and make adverse order against

all defendants and in favour of all plaintiffs. It is also held categorically that dismissal of suit by trial court could not be deemed final between non-appealing plaintiffs and defendants. In para No.14 of the said

judgment the Apex Court following the dictum laid down Ratan

Lal Shah v. Firm Lalmandas Chhadammalal and Ors. [1969 (2) SCC 70:AIR 1970 SC 108] and Mahabir Prasad

v. Jage Ram [1971 (1) SCC 265:AIR 1971 SC 742] held

that the object of Order 41 Rule 4 is to enable one of the parties to the suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The court in such an appeal may reverse or vary the

decree in favour of all the parties who are in the same interest as the appellant. It is also held that in para No.14 that Order 41 Rule 4 has to be read with Order 41 Rule 33 which empowers the appellate court to do complete justice between the parties by passing such order or decree which ought to have been passed or made although not all the parties affected by the decree had appealed.

55. So in the present case, the decree passed in favour

of the plaintiffs by the trial court though was challenged in appeal only by the 1st defendant, the 2nd defendant who is making the very same contentions supporting the 1st defendant in the suit will also get the benefit of the decree passed by the Appellate Court, by which the decree passed by the trial court was reversed and the suit was dismissed. So, it is not open for the plaintiffs to contend that the 2nd defendant has not filed any appeal against the judgment and decree passed by the trial court and hence he cannot contest the case in the second appeal filed by the plaintiffs, since the decree passed by the 1st

Appellate Court in favour of the 1st appellant would also enure to the benefit of the 2nd defendant.

56. So the contention of the learned counsel for the

plaintiffs that the 2nd defendant cannot contest the appeal and raise any claim with respect to the plaint schedule property since he has not challenged the decree passed by the trial court is not sustainable either in law or on facts.

57. The learned counsel also raised bar under Section 11 since no appeal was filed by the 2nd defendant against the

judgment in O.S. No.113/1993 which is tried along with O.S.

No.39/1993. Section 11 bars entertainment of any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

58. In this context the learned counsel relies on

Raghavan Nambiar v. Sumathi Amma [1991 (1) KLT SN 7 (C No.8)] wherein while dealing with Section 11 a learned Single Judge held that when the decision between the parties has become final and the court is one having jurisdiction, it is immaterial whether there is a right of appeal or not. It is also

held there in that when two or more suits or appeals are jointly

heard and disposed of by a common judgment entering findings on issues in them, all the findings will bind the parties

separately and they will operate as resjudicata, if not challenged and corrected in appeal. If in such cases only the decision in one or some of them is or are appealed against on the impression that appeal against the other decisions is unnecessary because issues and findings are the same, the parties will be doing so at their peril. That is because the other decisions on identical issues will become final and they will operate as decisions in former suits, which prohibit trial in others.

59. The learned counsel for the 2nd defendant relied on Sheodan Singh v Daryao Kunwar [1966 KHC 607:AIR 1966 SC 1332] para No.20 of the said decision is highlighted by the learned counsel which reads thus:

20. A consideration of the cases cited on behalf of the appellant therefore shows that most of

them are not exactly in point so far as the facts

of the present case are concerned. Our

conclusion on the question of res judicata raised

in the present appeals is this. Where the Trial Court has decided two suits having common

issues on the merits and there are two appeals

therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the Trial Court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the Trial Court given on merits, and if that is so the decision of the appeal court will be res judicata whatever may be the reason for the

dismissal. It would be a different matter, however, where the decision of the appeal court does not result in the confirmation of the decision of the Trial Court given on the merits, as for example, when the appeal court holds that the Trial Court has no jurisdiction and dismisses the appeal, even though the trial Court might have dismissed the suit on the merits. In this view of the matter, the appeals must fail, for the trial Court had in the present case decided all the four suits on the merits including the

decision on the common issues as to title. The result of the dismissal on a preliminary ground of the two appeals arising out of suits Nos. 77 and 91 was that the decision of the Trial Court was confirmed with respect to the common issues as to title by the High Court. In consequence a decision on those issues became res judicata so far as appeals Nos.365 and 336 are concerned and S. 11 of the Code of Civil Procedure would bar the hearing of those common issues over again. It is not in dispute that if the decision on the common

issues in suits Nos.77 and 91 has become res

judicata, appeals Nos.365 and 366 must fail.

60. So, on going through the above decisions what could be gathered is that when two suits having common issues were decided on merits and appeal has been filed only against the

judgment and decree of one of them, the decision in the other

case will operate as resjudicata, since common issues on merits have been tried and decided finally in a common judgment. Like wise when two appeals in which common issues arouse are decided by common judgment and decree from one of the appeals alone is challenged, the decision in the other appeal will operate as resjudicata. So in order to apply the principles the prime elements is that the two suits should have common

issues.

61. In the present case, O.S. No.39/1993 has been filed by the plaintiffs for declaration of their right as legal heirs of

Kittan Achari and consequential relieves whereas O.S. No.113/1993 has been filed by the 2nd defendant for restraining the 1st defendant from withdrawing the amount of Rs.25,000/- alleged to have been deposited by the 1 st defendant in the Co-

operative Bank, Thatta out of the sale consideration he received by the sale of 15 cents of the property to the 2 nd defendant as per Ext.B1 document. Hence, there is no common issues to be decided in O.S. No.113/1993 and O.S. No.39/1989. So at any rate non filing of appeal against the judgment and decree in O.S. No.113/1993 will not operate as res judicata against the 2nd defendant in defending his claim in this appeal.

In view of the findings afore, there is no reason whatsoever to interfere with the judgment and decree passed by the 1st Appellate Court. In the result, appeal is found to be devoid of any merit and hence dismissed. In the facts and circumstances, parties shall bear their respective costs. Sd/- M.R.ANITHA, JUDGE jsr/SMF

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com