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Court : Karnataka

Decided On : Nov-25-1986

Reported in : AIR1987Kant209; ILR1987KAR15

Judge : Chandrakantaraj URS and ;Murlidher Rao, JJ.

Acts : Hindu Adoptions and Maintenance Act, 1956 - Sections 18(2); Code of Civil Procedure (CPC), 1908 - Order 41, Rule 33

Appeal No. : First Appeal Nos. 80 of 1976 and 38 of 1977

Appellant : Bhadra Reddy

Respondent : Shanthamma

Advocate for Def. : V. Krishnamurthy Sr. Adv. ;for K. Ramasubbaiah, Adv.

Advocate for Pet/Ap. : S.K. Venkataranga Iyengar Sr. Adv. for ;Varadaraj and ;Nalina Logan, Adv.

Judgement :

Chandrakantaraj Urs, J.

1. These two appeals are disposed of by the following common judgment, as they arise out of the single judgment of the Court below in O.S.No. 67/1974dated 30-3-1976. In fact, the first of the appeals is by the defendants while the second of the

appeals is by the Plaintiffs. The defendants have prayed in their appeal that the judgment and decree of the trial Court under appeal be set aside while the plaintiff in the second of the appeals has sought for enhancement of the maintenance awarded to her by the trial Court.

2. For convenience, we proposed to refer to the parties by the rank assigned to them in the trial Court.

3-4. The plaintiff Shanthamma filed O.S.No. 67/1974 in the Court of the Additional Civil Judge, Bangalore, under S. 18(2) of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as the Act), inter alia alleging that she was the legally wedded wife of the 1st defendant P. Bhadra Reddy, the marriage having taken place on 18th August, 1967 at Arembur Village in Collereddy's residence. Athibele Hobli, Anekal Taluk. She further alleged that she lived with her husband at Andenahalli for some time after the marriage quite happily with the lst defendant, and, the husband, began to ill-treatment the plaintiff and she was subjected to cruel treatment day after for no valid cause or justification. Nevertheless, the plaintiff endured all the ill-treatment and the hardship as becomes a dutiful and obedient Hindu Wife. She further alleged that on 3-1-1971 the 1st defendant, the husband, unceremoniously drove her out of his house, and thereafter took a second wife who was also of the name of Shanthamma (daughter of one Muniveerappa of Muthanallur). She therefore contended that she was entitled to maintenance from the 1st defendant and also to separate residence.

5. She impleaded defendant-2 the father of her husband as they were members of undivided Hindu Joint Family and maintenance awarded to her was required to be charged to the joint family properties.

6. The defendants filed a common written statement pleading the following facts.

Having admitted that plaintiff was the legally wedded wife of the 1st defendant, they denied in the written statement that the first defendant drove the plaintiff out of his family house or that he was ill-treating her at any time. They also denied that he had taken another woman as his second wife as alleged by the plaintiff. They further asserted that without any cause or justification the plaintiff left their house

without the permission of the 1st defendant ostensibly in the company of her maternal uncle by name Narayana Reddy and in spite of repeated requests and reminders and a panchayat, she had chosen not to return to the house of the defendants. It was further asserted that the plaintiff had deliberately stayed away from the house of the defendants though she was under an obligation as a Hindu wife to render conjugal rights to the 1st defendant.

The defendants further expressed that the 1st defendant had not treated her cruelly and he was willing to maintain the plaintiff in his house in consonance with his income and social status. They asserted that the claim of Rs. 1,000/- per mensem was excessive and that the 1st defendant had no other income except his salary.

7. On such pleadings the following five issues are framed by the trial Court.

(1) Whether 1st defendant is living with Shanthamma, daughter of Muniveerappa?

(2) Whether the 1st defendant ill-treated the plaintiff and drove her out of the house?

(3) Whether plaintiff is entitled to separate maintenance and separate residence? If so, to what amount she is entitled?

(4) Whether plaintiff is entitled to pass maintenance of Rs. 18,200/-?

(5) Whether plaintiff is entitled to a charge against the schedule properties for payment of maintenance?

On Issue No. 2, the trial Court found in favour of the 1st defendant. The conclusion in that behalf by the trial Court is as follows : -

'The evidence on record does not show that the defendant has either abandoned the plaintiff and wilfully neglected to maintain her.'

8. There is no appeal or cross-objection filed by the plaintiff in regard to that finding recorded by the trial Court.

9. But in regard to Issue No. 1, the learned Judge, found in favour of the plaintiff. Therefore, on Issue No. 3, he held that she was entitled to maintenance and separate residence under Cl. (b) of sub-sec. (2) of S. 18 of the Act, and not Cl. (d) as pleaded by the plaintiff.

Before we discuss the arguments advanced before us and the evidence on record, we must notice that the plaintiff's Counsel made a concession that Cl. (d) of sub-sec. (2) of S. 18 of the Act was not attracted to a case of second marriage after the coming into force of the Hindu Marriage Act, 1956. Therefore, the learned trial Judge, awarded maintenance and separate residence under Cl. (e) of the Act, having arrived at the conclusion that the plaintiff had failed to prove the second marriage and even if proved it being void, the fact that Shantamma, daughter of Muniveerappa, living with the 1st defendant in the house of the 2nd defendant and having borne a male child to 1st defendant had been proved and she should be deemed to be a concubine.

Sri S. K. Venkataranga Iyengar, learned Senior Counsel appearing for the appellant, has strenuously contended before us that the learned trial judge after coming to the conclusion that there was no cruelty on the part of the 1st defendant, ought not to have embarked upon examining the alleged second marriage which on the evidence could not be held to have taken place. He also contended that the evidence adduced on behalf of the 1st defendant ought to have been accepted to hold that the plaintiff had left the company of the 1st defendant on her own accord and had failed to return to her husband's home. It was further, asserted by the learned counsel that, there was a conspiracy hatched by the maternal uncle of the plaintiff, viz. P.W. 5, who bore ill-will towards the 1st defendant on account of certain police complaints and, therefore, his evidence, as also the evidence of other plaintiff's witnesses ought not to have been relied upon.

10. He has also addressed an argument in regard to Cl. (d) of sub-sec. (2) of S. 18 read with S. 4 of the Act, to which we will refer later.

11. The evidence on record both for the plaintiff and the defendants may be summarised as follows :

The plaintiff has examined as many as six witnesses and got marked one document. While the defendants in support of their case, examined two witnesses and got marked six documents, exhibits D-1 to D-6.

P.W. 1 is one Aswathanarayana Sharma who is stated to have performed the marriage of Shanthamma, daughter of Muniveerappa at Venkatanarayanaswamy temple at Nandi Village at the foot of Nandi Hills on 5-7-1972. This witness has spoken the following facts. That his occupation is 'Archana Vrutti' and also to officiate as priest at marriages. At the very commencement of his evidence, he admitted to have officiated at the wedding of one Bhadra Reddy and one Shanthamma. But he could not re-collect to which place that Bhadra Reddy belonged, nor did he remember to which place the said Shantamma belonged. He admitted having been examined as a Witness in C.C. No. 1488/1972 in the Magistrate's Court and that case was in regard to the second marriage of Bhadra Reddy and Shanthamma. He also admitted that they were present in the Court in the criminal proceedings when he gave evidence in the criminal Court. But earlier he had failed to identify the defendants 1 and 2 to be the persons whom he had seen before. He had stated, 'I do not remember if I have seen defendants 1 and 2'. In that circumstance the Counsel for plaintiff moved the Court to treat P.W. I as hostile witness and it was permitted gild the plaintiff's counsel cross-examined the witness. He has clearly admitted later in the course of his evidence about performing the marriage of the 1st defendant and Shantamma daughter of Muniveerappa of Muthanallur. He has denied the suggestion that the 1st defendant had approached him 2 or 3 days before giving evidence. He has, however, stated that he could not remember other details of the marriage nor, identify the persons, who actually attended the marriage. But in the course of cross-examination by the defendants, it was elicited that there was no document regarding the marriage except the Lagna Patrika that was written on the previous night, the marriage having taken place in the early hours of the following morning. He had maintained a book in which he had noted the marriage he performed, but that book had been lost.

P.W. 2, was one Muniyappa, who was the employee of the temple at Nandi village at the foot of Nandi Hill. He claims to be the Drummer attached to the temple. He

admitted to have known P.W. 1. He stated P.W. 1 was the priest in the temple, that he performed marriage at the temple. He said that if marriages are performed at Bhoga Nandiswara temple fee would have to be paid and receipt obtained. He admitted that there is the Venkataramana Swamy temple where also fee was charged for the performance of marriages; about three years before the date of evidence, which was on 19-9-1975 there was no fee required to be paid at Venkataramana Swamy Temple. He further studied that he had seen defendants 1 and 2 about three years back on the occasion of the marriage of the 1st defendant. That the marriage took place at Venkataramana Swamy temple. He played on the drum at this marriage. He stated that the marriage took placed about 5-30 A.M. About five persons had come to the marriage. He was informed that the bride came from Harenoor. He did not remember the exact name of the bride. He however, stated that the bride's mother had come. In the cross-examination nothing very useful was elicited by the defendants from this witness.

The 3rd witness was one Muniswamy, Reddy, who was an agriculturist residing at Anandenahally, the place of the defendants. He was examined for the sole purpose of proving the probable income of the defendants. We do not attach much importance to his evidence, which is no more than some guess estimates.

P.W. 4 was a close relative of both the plaintiff and the defendants. He, apart from speaking to the income of the plaintiff spoke about Shantamma, daughter of Muniveerappa of Mudanallur living with the 1st defendant in the house of the 2nd defendant at Andenahalli and also her having borne a male child to the 1st defendant. He spoke about the marriage of which he heard from his sisters. He, however, admitted that he was neither present at the marriage nor had any direct knowledge of the marriage. He only claimed to have been the child borne by Shantamma, the 2nd spouse taken by the 1st defendant. He spoke of his being a resident of Mudanallur where his father had the house adjoining that of Munivenkatappa the father of Shantamma the second spouse. He also stated that the said Shantamma, was now living at Andenhally. He however, admitted in cross-examination that he was not in the habit of visiting Shantamma's parents at Mudanallur. He however, gave the details of Muniverappa's family at Mudanallur. He also spoke about the income of the family of defendants 1 and 2.

12. The 5th witness for the plaintiff was none other than the plaintiff's maternal uncle C. Narayana Reddy. He is an agriculturist by profession. He deposed about the marriage of the plaintiff Shantamma to the 1st defendant. He spoke about the defendants sending away the plaintiff from their house in 1971. He also spoke about the events that followed some time in 1972. When he heard about the proposed marriage of the 1st defendant to Shanthamma, daughter of Muniveerappa, he claimed to have made some investigation by going to Dodda Tirupathi where he thought the marriage would take place and of his having engaged a taxi in that connection. He also spoke about his making a trip to Nandi on information that the marriage was to take place there. He therefore contacted P.W. 1, who performed the marriage and made enquiries and learnt about the marriage that had been performed. After obtaining a statement from P.W. 1, he returned having spoken to P.W. 2. In the cross-examination specific question was put to him asking him whether he was inimically disposed towards the defendants. He denied the same. He admitted the criminal proceedings that had been initiated by the plaintiff in the criminal Court prosecuting the lst defendant for an offence under S. 494, IPC (Bigamy) and spoke about the defendants, Shantamma, daughter of Muniveerappa the so-called second spouse. The, revision filed by the plaintiffs in this Court also did not succeed against that discharge. The matter rested there.

The last witness for the plaintiff was the plaintiff. She spoke of her marriage-which took place on 18-6-1967. She spoke of the treatment she received in her husband's house. She deposed about having seen Shantamma, daughter of Muniveerappa who was living in Andenhally with 1st defendant. She spoke about the manner in which she came to know about the marriage and the way her uncle had investigated the second marriage. However, she emphasized the motive for the cruelty to have been practised on her by stating, the defendants 1 and 2, suddenly demanded her to get dowry by demanding her share from her parents.

13. We do not give much importance to this part of the evidence as the learned trial Judge discarded that part of the evidence. There is nothing else in her evidence which furthers her case farther than what has been done.

14. We will refer to document Exhibit Pl, while we take up the appeal filed by the plaintiff.

The Court below has generally accepted the evidence of PWs. 4 and 5 to come to the conclusion that Shantamma, daughter of Muniveerappa has been living in the house of the defendants at Andenahalli and that she has borne a male child to the 1st defendant. In paragraph 19 of his judgment, the learned trial Judge, relied upon the oral testimony of P.W.4 and held as follows :

'His evidence would show that Shantamma has been living in the defendants house and that she has also given birth to a baby. The defendants have not examined any witness of their village to rebut the evidence of P.W. 4 about Shantamma living with the 1st defendant at Andenahally. When we bear in mind the evidence of PWs. 1 and 2 the, evidence of P.W. 4 in this respect would not appear to be improbable.

He has further discussed the evidence, in regard to the criminal case. The defendants in their oral testimony did not deny that they were all represented by a common Counsel. He therefore drew an inference that Shanthamma, daughter of Muniveerappa, the so-called second spouse being one of the accused, if she was stranger to the family of the defendants as claimed by them would not have been represented by the Counsel representing the defendants also. The inference together with the evidence adduced by the plaintiff as well as failure on the part of the defendants to lead any rebuttal evidence in regard to the presence of Shantamma's daughter of Muniveerappa in their house and her having borne a child to the 1st defendant, he came to the conclusion that the residence of Shantamma, as a concubine was proved. Having regard to the fact that the second marriage was void by operation of law, he held that Shantamma's (daughter of Muniveerappa) residence in the defendant's house was in the status of a concubine and, therefore, came to the conclusion that Cl. (e) of sub-sec. (2) of S. 18 of the Act was attracted, and therefore, the plaintiff was entitled to separate residence and maintenance.

Mr. Venkataranga Iyengar, learned Senior Counsel has strenuously contended that the trial Judge, erred in placing reliance upon the evidence of PWs. 4 and 5.

He urged that they were interested parties being relatives of the plaintiff and that both were hostile to the defendants. P.W. 4 nourished grudge against the 2nd defendant on account of some theft of fodder in the village as was suggested in the course of cross-examination of that witness. P.W. 5 had lodged criminal complaints against the 1st respondent (defendant). He was behind the prosecution for bigamy stated to have been committed by the 1st defendant. He had even given financial assistance. He was managing the properties of the plaintiff's father who was disabled due to some illness. He was none other than the brother of the Plaintiff's mother and, therefore, his evidence, as well as that of P.W. 4 could be taken as tainted testimony.

15. All these facts attributed to P.Ws. 4 and 5 were in the form of suggestion at the cross-examination. Suggestions have been denied. No independent evidence, besides the assertion on oath by the defendants themselves in their testimony has been led to substantiate those suggestions made in the course of the cross-examination of the witnesses. Therefore, we must decline to hold that the evidence of P.Ws. 4 and 5 should be rejected.

16. In matters like this where there is no clear documentary evidence of the marriage, whatsoever oral evidence is on record should be taken not disjointedly, but in regard to the agreement in respect of material details that emanates from the combined reading of evidence of the witnesses. If any other course is adopted to appreciate the evidence on record then it would be impossible to rely upon oral evidence, adduced in Court, particularly in disputes of the kind with which we are now dealing.

As pointed out by the learned trial Judge, the defendants who live in Andenahally, admittedly ought to have led evidence of their neighbours or other residents of the village who are independent witnesses and who could have spoken to support whatever the defendants themselves has asserted in the witness box on oath. It cannot be that the entire village is inimically disposed towards the defendants and none would come forward to speak the truth concerning the fact that there was no person by name Shantamma, daughter of Muniveerappa living with the 1st defendant in the defendant's house. When no effort whatsoever has been made by

the defendants to rebut, the learned Judge, was correct in summing up of the evidence and probabilising the events leading to the second marriage and the living of Shantamma, daughter of Muniveerappa living with the 2nd defendant ostensibly as second wife.

17. We therefore do not propose to accede to the arguments of Shri Venkataranga Iyengar.

18. He however, pointed out that, Cl. (e) is not attracted having regard to the language employed in the statute. In order to appreciate this argument, we extract sub-sec. (2) of S. 18 of the Act, which is as follows:

'18(2). A Hindu Wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance.

(a) If he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her;

(b) If he has treated her with such cruelty as to cause reasonable apprehension in her mind that it will be harmful or injurious to live with her husband :

(c) If he is suffering from a virulent form of leprosy;

(d) If he has any other wife living;

(e) If he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) If there is any other cause justifying her living separately.'

There is some substance in the argument. The requisite factors to attract Cl. (e) is that the concubine and wife, both must be living in the house of the husband which alone would entitle the wife to claim separate residence and maintenance. Here, on the pleadings, it is clear that the plaintiff was living in the house of her parents in the village, when Shantamma, admittedly, was married subsequently after the

alleged expulsion of the plaintiff from the house of the defendants. Therefore, at no point of time the concubine resided jointly with the plaintiff and the 1st defendant.

19. However, though Clause (e) is not attracted, in our opinion the judgment and decree of the trial Court need not be set aside. We find that the legislature in its wisdom has taken precaution to provide in Cl. (g) a general provision which includes within its ambit what may have been excluded in other clauses which would justify the plaintiff's right to live separately and claim maintenance.

20. If we accept, the fact that Shantamma, daughter of Muniveerappa is living in the house of the 1st defendant ostensibly as his wife and has borne a child to him, then despite the offers made by the defendants to take back the plaintiff, if she is willing to join them, it would amount to cruelty of a kind which is now recognised as such and plaintiff should not be subjected to the indignity of living with another woman (concubine) in the same house. That is very essence of the ground provided for in Cl. (e). Therefore, we find that there is a justifiable cause made out on the facts of this case for this Court to sustain the judgment and decree of the trial Court despite the fact that cl. (e) is not attracted. We exercise our power under R. 33 of 0. 41, C.P.C., and direct that appropriate decree be drawn under Cl. (g) and not under Cl. (e).

21. Subject to this modification the judgment and decree of the trial Court shall stand confirmed.

We however, notice that Shri Venkataranga Iyengar, relied upon some authorities in regard to appreciation of oral evidence. In the case of Shivamurthyswamy v. Agodi Songanno, AIR 1969 Mys 12, a learned single Judge of this Court dealt with the question of the manner in which permission ought to be given to treat one's own witness as hostile witness. It was said that a witness should be regarded as adverse and liable t6 cross-examination by the party calling him only when in the opinion of the Court, he bore hostile animus to the party calling him and further that a hostile witness in the real sense was one from the manner in which he gave evidence showed that he was not desirous of telling the truth.

Similar is the view expressed by the Supreme Court in case of R. K. Day v. State of Orissa, : 1977 CriLJ173 . Their Lordships of the Supreme Court have held that before a witness could be declared hostile and the party examining the witness is allowed to cross-examine such a witness there must be some material to show that the witness was not speaking the truth or had accepted an element of hostility for whom he was deposing.

22. On the basis of these decisions, it is contended that P.W. 1's evidence should be rejected in toto, as the trial Court erred in law in permitting him to be cross-examined by the plaintiffs counsel. We have given much thought to this contention. But, we fail to see how the case cited assist the argument put forward for the defendants. While summarising the evidence of P.W. 1, we have pointed out that at the very initial stage he denied having seen the defendants before, despite the admission that he had seen them as accused when he deposed a month earlier in the criminal proceedings. It was this statement which was ex facie not true which compelled the trial Court to come to the conclusion that he was hostile to the plaintiff. Therefore, that discretion so exercised cannot be subjected to further discretion by the appellate Court taking a contrary view. It is now well settled law both in this Country as well as in England that discretion exercised should be final unless it is ex facie perverse or without any foundation at all. The doctrine, the discretionary power exercised is subject to the discretion of the appellate authority as well is not the correct doctrine in all matters of discretion; there may be two or even three views possible and that the appellate Court would not have permitted a witness to be treated hostile in the same circumstance cannot take away the discretion of the trial Court to grant that permission, if it believed for a valid reason to permit the treatment of a particular witness as a hostile witness. Even otherwise, we found that from the evidence that the witness subjected to cross-examination by both sides no useful fact is elicited to favour the defendants. Therefore, no injustice has resulted on account of the treatment of P.W. 1 as a hostile witness.

23. We must hold that the appellants cannot succeed in this appeal.

Now to the appeal of the plaintiff viz. Appeal No. 38 of 1977. This appeal is confined to the quantum of maintenance awarded. The maintenance awarded is Rs. 125/- per mensem and past maintenance is granted at Rs. 1,500/-being one year's maintenance relatable to the date of suit.

The evidence in regard is the income is not made clear. P.W. 3 and P.W. 4, as already noticed in disposing of the other appeal, have made some estimates regarding the income from the dry land and the income from the wet land and the possible income from the casurina grove owned by the defendant. There is no other material except their statements which supports the assertion that there could be any larger income. Admittedly, the 1st defendant is a teacher drawing a salary. That salary is established at Rs. 525/- as per Exhibit P-1. In regard to the agricultural income this Court as well as the trial Court can only make a rough estimate on the probable income from the dry land having regard to the area in which they are situated as well as the income from the wet land and the gardens. In the absence of cogent evidence contrary to the estimated income from the land at Rs. 6,000/- the quantification made by the trial Court should, he accepted by us.

24. Similarly, the salary income on the relevant date was Rs. 6,000/- per annum. On Rs. 12,000/- per annum income, he has awarded approximately 10 per cent of that income which we find to be reasonable. If for any reason now, the income to the defendants either by virtue of the increase in salary and dearness allowance of teachers or on account of the improved agricultural income of the family, the income of the family has risen considerably the plaintiff is free to move the trial Court under S. 25 of the Act which provides for alteration subsequently the maintenance awarded if there is a material change in the circumstances justifying such alteration. With that liberty reserved this appeal also is dismissed.

In the result, both the appeals are dismissed and the parties are directed to bear their own costs in this Court.

25. Appeals dismissed.

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