

Shankarappa Vs. Basamma

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Court : Karnataka

Decided On : Jun-12-1963

Reported in : AIR1964Kant247; AIR1964Mys247; (1964)1MysLJ183

Judge : A.R. Somnath Iyer, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 9; Hindu Marriage Act - Sections 4, 5, 5(1), 9, 11, 17, 19 and 29; Specific Relief Act - Sections 54; Indian Penal Code, 1860 - Sections 494 and 495; [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 198

Appeal No. : Civil Revn. Petn. No. 61 of 1962

Appellant : Shankarappa

Respondent : Basamma

Advocate for Def. : M.A. Gopalaswamy Iyengar, Amicus Curiae

Advocate for Pet/Ap. : Appa Rao and ;V.S. Kulkarni, Advs.

Judgement :

ORDER

1. The question arising in this revision petition is whether a suit brought by a person claiming to be the wife of the defendant for an injunction restraining the defendant from contracting a second marriage is cognisable by a civil court.

2. The material facts are these: In the court of the Munsiff of Gulbarga, the plaintiff claiming to be the wife of the defendant instituted a suit on May 6, 1961 and the prayer portion of the plaint reads as follows:

'Hence it is prayed that the plaintiff's suit be decreed against the defendant with cost as follows:

1. That the defendant be perpetually restrained from marrying one Sitamma D/o Gundappa R/o of Pada Taluk Gulbarga or any other girl or woman;

2. Any other relief which the court deems fit be awarded.'

In para 1 of her plaint it was stated that the plaintiff was married to the defendant 12 years before the date of the institution of the suit and that she was the second wife of the defendant. In para 3 of the plaint she complained of ill-treatment on the part of the husband. In paras 4 and 5 it was stated that the defendant had been instigated to take a third wife and that since such marriage would amount to bigamy, the plaintiff had a right to ask for an injunction restraining the defendant from contracting that marriage. The prayer, as can be seen from the portion extracted from the plaint, was that the court should issue an injunction restraining the defendant from contracting any such marriage.

3. In the written statement produced by the defendant, it was pleaded that about 7 years before the institution of the suit the plaintiff had been divorced and that such divorce was permissible by a custom in his community. He also pleaded that the only remedy available to the plaintiff was to seek a declaration under the provisions of The Hindu Marriage Act after the proposed marriage was solemnized, that the marriage between the defendant and the woman whom he proposed to marry was a void marriage, and that the suit brought by the plaintiff in the civil court was not maintainable. The court below tried the issue relating to jurisdiction as a preliminary issue and found no difficulty in coming to the conclusion that the objection to jurisdiction was groundless. The petitioner contests the correctness of this conclusion reached by that Court.

4. It is true as contended by Mr. Kulkarni, the learned Advocate for the defendant, that the Hindu Marriage Act is a complete and exhaustive Code on all the matters regulated by it. That law is a law to amend and codify the law relating to marriage among Hindus. Section 4 states the overriding effect of the Act and provides that all texts, rules or interpretation of Hindu law and all customs or usages as part of that law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter, for which provision is made in the Act. It further provides that every other law in force immediately before the commencement of the Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the Act.

Section 29 however which is in the nature of an exception to the provisions of Section 4 declares that a marriage solemnized between Hindus before the commencement of the Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belong to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste. It again provides that nothing in the Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of the Act. There are (other?) similar provisions in that section to which it would be unnecessary to make any reference in the course of this order.

The next section to which reference should be made is Section 19 which provides that every petition under the Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together. It is clear from the provisions of these three sections of the Act and particularly from the provisions of Section 4 that the only statutory provisions which cease to have effect after the enactment of the Hindu Marriage Act are those which relate to matters for which provision is made in the Hindu Marriage Act or which are inconsistent with any such provisions. Section 29 is in the nature of an exception to what is contained in Section 4, and what is clear from Section 19 is that the only jurisdiction which is created by that section is the jurisdiction conferred by that section in regard to

petitions which may be presented under the provisions of the Hindu Marriage Act.

5. Now one important provision which was made by the Hindu Marriage Act which has relevance to the present case is that contained in Section 5(i) of the Act which reads:

5. 'Conditions of a Hindu marriage - A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely,- (i) neither party has a spouse living at the time of the marriage;.....'

Section 11 declares that any marriage solemnized after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any of the conditions specified in Clause (i) (iv) and (v) of Section 5. Section 17 of the Act declares that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a living spouse, and that such person who contracts such marriage renders himself liable to punishment under Sections 494 and 495 of the Indian Penal Code.

6. What made it possible for the plaintiff to institute the suit in the present case is the introduction of the system of monogamy by Section 5(i) of the Hindu Marriage Act and Section 11 which declares that a bigamous marriage is a void marriage.

7. The short question arising in this case is whether the plaintiff could not bring her suit when she discovered, according to her allegation, her husband embarking upon an act of bigamy, to restrain him from transgressing the provision of the Hindu Marriage Act by committing an offence punishable under Section 494 of the Indian Penal Code.

8. Before proceeding to consider this question, I must place on record my expression of thanks to Mr. M.A. Gopalaswamy Iyengar who has assisted me with his argument in this case since unfortunately no one on behalf of the respondent was present to afford any such assistance. Mr. Gopalaswamy Iyengar urged that this is a case in which no one could say that the civil court has no jurisdiction to entertain a suit like the one brought by the plaintiff since that suit is one clearly

permitted by the provisions of Section 54 of the Specific Relief Act under the provisions of which the plaintiff could ask for a perpetual injunction restraining the defendant from committing a breach of an obligation existing in her favour.

9. The answer to this argument supplied by Mr. Kulkarni was that the Hindu Marriage Act being an exhaustive code regulating all matters arising out of a marriage between two Hindus, the only course which was open to the plaintiff in this case was to wait until the defendant had committed an act of bigamy and then to make an application for a declaration that the marriage was void or to prosecute the defendant for an offence punishable under Section 494 of the Indian Penal Code. It was also submitted that in effect the plaintiff's suit was a suit for a decree for restitution of conjugal rights for which provision has indeed been made by Section 9 of the Hindu Marriage Act, which excludes the jurisdiction of a civil Court in regard to that matter.

10. The argument that the plaintiff's suit is one for a decree for restitution of conjugal rights may be briefly disposed of. Nowhere in the plaint has Mr. Kulkarni been able to point out any reference to any restitution of conjugal rights, nor does the plaint contain any prayer for any such restitution. The prayer portion of the plaint which has been, extracted makes it clear that the only prayer made by the plaintiff was a prayer for a perpetual injunction restraining the defendant from committing an act of bigamy. In that view of the matter, Section 9 of the Hindu Marriage Act is not what can exclude the jurisdiction of the civil court.

11. Now turning to the question whether the perpetual injunction sought by the plaintiff could not be granted by the court below in a suit brought for that purpose, it should be pointed out that the suit brought by the plaintiff for that injunction was one which clearly fell within Section 9 of the Code of Civil Procedure under the provisions of which every civil court can exercise jurisdiction in all suits of a civil nature except in suits whose cognizance is expressly or impliedly barred.

That the suit brought by the plaintiff is a suit of a civil nature is what is perfectly plain. The question therefore which remains is whether its cognizance is expressly or impliedly barred. Mr. Kulkarni had to admit that the Hindu Marriage Act does not expressly bar the institution of a suit like the one brought by the plaintiff and that

there is no other law which so expressly bars it. It is equally clear that even under the provisions of Section 54 of the Specific Relief Act the right to seek a perpetual injunction against the defendant restraining him from committing an act of bigamy did accrue to her. The relevant portion of Section 54 reads:

'Subject to the other provisions contained in, or referred to, by this Chapter, a perpetual injunction may be granted to prevent the breach of obligation existing in favour of the applicant, whether expressly or by implication.X X X X X X X X'

It was said that the obligation the breach of which could be prevented by an injunction should be demonstrated to be an obligation, arising out of a contract and that no such obligation could arise or ever existed between the plaintiff and the defendant in this case since their marriage was not the off-spring of a contract but was in the nature of a sacrament. It may be that the marriage between the spouses in this case was not a contractual marriage but. was a Samskara. But I do not find it possible to place upon the provisions of Section 54 the limited construction which Mr. Kulkarni asks me to place and to say that the obligation referred to in this part of Section 54 is an obligation arising out of a contract. The expression 'obligation' occurring in that section has wide import and that that is so is clear from the fact that in the second para of Section 54 the reference is to an obligation arising from a contract as contrasted with the obligation referred to in the first para of that section which makes no reference to any contract.

12. But the question is whether the defendant was likely to commit any breach of an obligation in favour of the plaintiff since Section 54 authorises the prevention of a breach of an obligation 'existing in favour of the applicant.'

13. Now the purpose of Section 5 of the Hindu Marriage Act was to introduce monogamy and if Section 11 or, that Act authorised the presentation of a petition for a declaration that a bigamous marriage was void by the spouse complaining against it, and if Section 17 of that Act makes: an act of bigamy an offence punishable under Sections 494 and 495 of the Penal Code cognizance of which could be taken as provided by Section 198 of the Code of Criminal Procedure only upon a complaint made by a person aggrieved by such offence who could only be one of the two spouses affected by the act of bigamy, what in my opinion cannot

be controverted is that the purpose of Section 5(1) of the Hindu Marriage Act was to create an obligation between the two spouses each of whom was prohibited against taking another wife or husband as the case may be while there is a spouse living. The obligation created by Section 5(1) is in favour of that living spouse and that obligation is that so long as that spouse is living neither the wife nor the husband as the case may be shall take another. I am therefore disposed to take the view that the plaintiff in this case when she sought the injunction in her suit was seeking the prevention of the breach of an obligation existing in her favour and therefore entitled to seek that injunction under Section 54 of the Specific Relief Act.

14. It being thus clear that the suit brought by the plaintiff was not only cognizable under the provisions of Section 9 but also maintainable under the provisions of Section 54 of the Specific Relief Act, and it being also equally clear that its cognizance was not expressly barred, what remains to be considered is whether its cognizance is impliedly barred.

15. Mr. Kulkarni's argument is that such implied ban could be deduced from Sections 4 and 19 of the Hindu Marriage Act. But it seems to me that he cannot succeed in this endeavour. Section 4 repeals only those laws or statutory provisions or texts or rules of Hindu Law having the operation of Hindu law which regulate matters for which provision is made by the Hindu Marriage Act or which are inconsistent with such provision.

If it was possible for me to say that the Hindu Marriage Act contained a provision for the prevention of an act of bigamy by an application or a petition permitted by it for that purpose, Mr. Kulkarni would of course be on firmground and would be right in his contention that the only course open to the plaintiff in this case was the commencement of a proceeding under such provision. But as pointed out by Mr. Gopaldaswamy Iyengar the Hindu Marriage Act contains no provision to that effect. What indeed is authorised by that Act is the presentation of an application under Section 11 after the act of bigamy is committed for a Declaration that the bigamous marriage is void. It being thus clear that that application could be presented only after the act of bigamy is committed, Mr. Kulkarni would not be right in his

submission that any remedy is made available by the Hindu Marriage Act before the solemnization of the bigamous marriage for its prevention. Since Section 11 operates only after the solemnization of that marriage and so also Section 19 which makes the provisions of Sections 494 and 495 applicable to it, the Hindu Marriage Act, it is clear, provides no remedy to a person who seeks the prevention of the commission of what is not only prohibited by Section 5(i) but also made an offence by Section 19 of that Act.

That being so this is a case in which Mr. Kulkarni can derive no assistance in support of his argument from Clause (a) of Section 4. He can also derive no assistance from Clause (b) since there is nothing in the Hindu Marriage Act the provisions of which can be regarded to be inconsistent with the provisions of Section 9 of the Code of Civil Procedure or Section 54 of the Specific Relief Act.

16. What remains to be disposed of is the argument resting on Section 19. That section confers jurisdiction on the District Judge to hear and dispose of those petitions which could be made under the Act. There are many petitions which could be presented under the Act, but the petition for restraining a bigamous marriage is not one such. Section 19 can therefore have very little relevance to the matter arising in this Revision Petition.

17. In my opinion the conclusion reached by the court below that the plaintiff's suit was cognizable by it is open to very little criticism and the principle on which my view rests is also that expressed by the Full Bench of the High Court of Bombay in *Sitabai v. Ramchandra*, : AIR 1958 Bom 116 , with which I respectfully agree. This revision petition fails and is dismissed. But in the circumstances I make no order as to costs.

18. Petition dismissed