

Balamma Vs. Srinivas

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Court : Karnataka

Decided On : Sep-07-1992

Reported in : II(1993)DMC133; ILR1993KAR1061

Judge : N.D.V. Bhat, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 22; [Limitation Act, 1963](#) - Sections 5, 6 and 14; Karnataka Civil Service Rules - Rules 108, 208 and 294; Karnataka Government Servants (Family Pension) Rules, 1964 - Rules 3, 8 and 11

Appeal No. : R.F.A. No. 180 of 1985

Appellant : Balamma

Respondent : Srinivas

Advocate for Def. : R. Pushpahasa, Adv. for ;G. Raghuramachar, Adv.

Advocate for Pet/Ap. : M. Munivenkataramana, Adv.

Disposition : Appeal dismissed

Judgement :

N.D.V. Bhat, J

1. This Appeal is preferred against the judgment and decree dated 5.10.1984 passed by the II Additional City Civil Judge, Bangalore in O.S.No. 2074/1980. By the said judgment, the lower Court decreed the suit of the plaintiffs by declaring that plaintiffs-1 and 2 are the children of late S. Ramaswami and that they are together entitled to half a share in the Insurance amount, D.C.R.G., arrears of salary or any other amount apart from the pension amount payable on account of the death of S. Ramaswami. The prayer made for declaration that defendants-1 and 2 are not the wife and daughter of S. Ramaswami was negatived. Defendants-1 and 2 being aggrieved by that part of judgment which has gone against them have preferred this Appeal. The facts relevant for the disposal of this Appeal, briefly stated, are as under:

2. Plaintiff-3 is the wife of late Ramaswamy who was working in the Department of Agriculture of Government of Karnataka, the marriage have taken place on 27.8.1971 at Chowdeswari Temple, Bangalore. It is also stated that the marriage was solemnized in accordance with the Hindu rites and customs and that out of the said wedlock, the 1st plaintiff was born on 2.7.1973 and the 2nd plaintiff was born on 27.7.1974. It is stated that late Ramaswamy nominated the plaintiffs for purposes of his family pension and other benefits and despite all this, defendants-1 and 2 claiming themselves to be the wife and daughter of late Ramaswamy obtained Succession Certificate from the District Court, Bangalore in P & S.C.118/1974 to collect the monies payable to the heirs of late Ramaswamy without any notice to the plaintiffs and after they came to know about it, they sought in P & S.C. 94/1975 the revocation of the grant made in P & S.C.118/84, but that petition came to be rejected on the ground that the plaintiffs could agitate their rights elsewhere and that revocation was not the proper remedy. Plaintiffs, therefore, had sought for declaration before the lower Court that defendants-1 and 2 are not the wife and daughter of late Ramaswamy but the plaintiffs are entitled to succeed to the assets left by late Ramaswamy despite Succession Certificate granted in P & S.C.118/1974.

3. Defendants-1 and 2 resisted the suit of the plaintiffs, Among other things, they contended that plaintiff-3 is not the wife of late Ramaswamy and that plaintiffs 1 and 2 are not the children of late Ramaswamy. They also raised the other

contentions which are summarised in para-2 of the judgment passed, by the lower Court. On the basis of these pleadings, the lower Court has raised the following issues :

- 1) Whether the plaintiffs prove that they are the children of D-3 and deceased Ramaswamy born out of lawful wedlock?
- 2) Whether the plaintiffs prove that D-3 is the wife of Ramaswamy?
- 3) Do the defendants 1 and 2 prove that D-1 is the wife of Ramaswamy and D-2 is their child born out of lawful wedlock?
- 4) Is the suit valued properly and the Court fee paid is correct?
- 5) To what reliefs are the parties entitled to?
- 6) What order and decree?

The lower Court examined 11 witnesses on behalf of the plaintiffs and two witnesses on behalf of the defendants. The lower Court also got marked Ex.P1 to P33 for the plaintiffs and Ex.D1 to D18 were got marked for the defendants.

4. The lower Court on a consideration of the evidence on record both oral and documentary and for the reasons reflected in its judgment, answered issue Nos. 1, 3 and 4 in the affirmative and answered issue No. 2 in the negative. In the result, the lower Court decreed the suit of the plaintiffs in the way and manner as stated earlier. As pointed out earlier, the Appeal is preferred by defendants-1 and 2.

5. It is necessary to point out here that the plaintiffs being aggrieved by that part of the judgment have preferred Cross-Objections under Order 41 Rule 22 CPC along with an application for condoning the delay in preferring the Cross-Objections. It is necessary to point out here that the Appeal was filed on 6.2.1985 and it is also seen that the vakalath is shown to have been filed on behalf of the respondents on 22.11.1985 and the Cross-Objections is shown to have been filed on 11.4.1988, It is with reference to this delay that an application for condoning the delay is filed on behalf of the respondents. The application for condoning the delay is resisted by the other side.

6. I have heard the learned Counsels appearing on either side with reference to the merits of the Appeal and the Cross-Objections including the application for condoning the delay.

7. In the light of the submissions made at the Bar, the following Points arise for Consideration:

1) Whether the 1st defendant is the legally wedded wife of late Ramaswamy and the 2nd defendant is the daughter born out of the said wedlock?

2) Whether the marriage of late Ramaswamy with the 3rd plaintiff was in accordance with the Hindu Rites and whether plaintiffs-1 and 2 are born out of the said wedlock?

3) What is the status of plaintiffs-1 and 2 in relation to the deceased Ramaswamy?

4) Whether the respondents show sufficient cause for not filing the cross-objections in time?

5) If there is sufficient cause for condoning the delay in filing cross-objections, whether there is any merit in their cross-objection?

POINT NO.1

8. Under this Point, it is required to be seen as to whether the 1st defendant is the legally wedded wife of late Ramaswamy and the 2nd defendant is the daughter born out of the said wedlock. In fact, this aspect is dealt with by the lower Court while dealing with this aspect has, among other things, mainly relied upon the admission of deceased Ramaswamy. The lower Court, in particular, has relied on Ex.D13 which is a petition filed by late Ramaswamy under Section 9 of the Hindu Marriage Act in H.M.Misc.No. 65/1961 against the 1st defendant. It is significant to notice here that in the said petition viz., H.M.Misc.No. 65/1961 filed by late Ramaswamy during his lifetime, he had described defendant (appellant-1) as his legally wedded wife and that they were married on 30.5.1957 at Eldore, Srinivasapur Taluk, Kolar District. It is further significant to notice here that a reference is also made in the said petition to the notice issued on his behalf on

24.4.1961 to the instant defendant-1 that is to say, the present appellant-1. It is further seen that Ex.D14 marked before the lower Court is the objection filed by Ramaswamy to the application filed by defendant-1 under Section 24 of the Hindu Marriage Act. In the said objection, Ramaswamy had asserted that he was prepared to take her back and that the payment made to her would only result in encouraging her to stay away from him. It is further seen that there was an application which is marked as Ex.D16 before the lower Court which was filed by Ramaswamy in the said proceeding under Section 26 of the Hindu Marriage Act, seeking interim order directing his wife to hand over the custody of their minor daughter Padmavathi that is to say, appellant-2 to him and Ex.D.17 was also an affidavit filed by him wherein he had clearly stated that he was very much desirous and anxious to have his wife and child with him and that he has been completely neglected. It is significant to notice here that Padmavathi referred to in the said affidavit is none other than the 2nd defendant (appellant-2) in this case. It is also necessary to bear in mind that at that point of time that is to say, when the said proceeding was going on as between Ramaswamy on the one hand and the present defendant-1 on the other, there was no love lost between the two. Notwithstanding the same, it is seen that in the different applications and objections filed by late Ramaswamy, he had clearly admitted that Balamma was his wife. Apart from the admission of Ramaswamy during his lifetime, it is seen that there is also the evidence of D.W.1 and D.W.2. It is necessary to point out here that D.W.2 who was examined is a practising lawyer and he was actually examined with a view to get marked the different Exhibit 'D' series, including those documents which are already referred to earlier. The evidence of D.W.1 would go to show that she has stated as regards her marriage with Ramaswamy and other details.

9. It is seen that the lower Court has mainly relied on the admission of Ramaswamy during his lifetime with reference to his status vis-a-vis defendant-1. The lower Court while reaching the conclusion which it did with reference to this aspect has relied upon the Decisions referred to in paras-13 and 14 of its judgment. In para-14, in particular, the lower Court is shown to have relied on the Decision in BASANT SINGH v. JANAKI SINGH AND ORS. : [1967]1SCR1 wherein it is stated that the admission by a party in the plaint signed and verified

by him in a proper suit is an admission within the meaning of Section 17 of the Indian Evidence Act and may be proved against him in other litigations. It is also significant to notice here that in the said case, the Supreme Court did not agree with the view of the Bombay High Court expressed in the Decision in RAMABAI SRINIVAS NADGI v. GOVT. OF BOMBAY, A1R 1941 Bombay 414. The Bombay High Court had taken a slightly contrary view. In view of the unequivocal observation made by the Supreme Court in the Decision referred to hereinabove, it is not necessary to dilate on this aspect with reference to the admissibility or otherwise of statement reflected in the plaint in the previous proceedings. In my view, the lower Court has correctly reached a conclusion with reference to the relationship between Ramaswamy on the one hand and defendants-1 and 2 on the other. I may also point out here that there are no circumstances warranting a conclusion that defendant-2 was not born to Ramaswamy and defendant-1. Under these circumstances, I have no hesitation whatsoever in agreeing with the findings of the lower Court on this aspect. The learned Counsel for the plaintiffs respondents has not been able to show as to how the finding given by the lower Court with reference to this aspect is correct. Though the learned Counsel for the plaintiffs-respondents submitted to the Court that the lower Court has not properly appreciated the evidence on record, I am not satisfied with his submission, having regard to the fact that he has not been able to pin point as regards as to where and how the lower Court has committed a mistake. Under these circumstances, without any further elaboration I proceed to answer Point No. 1 in the affirmative.

10. If that be so, the next Point for the Consideration of this Court is as to whether the marriage of late Ramaswamy with the 3rd plaintiff is proved. I may point out here that defendants have taken a contention that as pointed out earlier, plaintiff-3 was not a married wife of late Ramaswamy. The question as to whether plaintiff-3 was actually married to late Ramaswamy would obviously assume significance particularly to decide the status of plaintiffs-1 and 2 in relation to the deceased Ramaswamy. It is in that context, that this aspect covered by this point assume importance. The lower Court has considered this aspect at paras - 16 to 21 of its judgment. The lower Court has, among other things, relied, apart from the oral evidence, on the documents like, Ex.P1 - the marriage invitation card dated 27.8.1971, Ex-P2 - a receipt issued by the Temple Authority, Ex.P3 an issue of

Andhra Prabha Daily Newspaper dated 29.8.1971 where there is a news item at Ex.P3(a) relating to the marriage of plaintiff-3 with Ramaswamy. The lower Court has also relied on Ex.P4, 5 and P11 to P14 which are the photographs which are stated to have been taken in connection with the said marriage. PW-8-Narayan is the photographer who has sworn that he has taken those photographs. In Ex.P4, P11 and P12 both Ramaswamy and plaintiff-3 are seen in their marriage dress. An observation is made by the lower Court that the learned Counsels on either side before the Court did not raise any dispute with reference to the identity of the photos. It is further seen that the lower Court has also referred to the evidence of PW-4 Munichowdappa, Pujari at Chowdeswari Temple, Srirampuram. Similarly, the lower Court has relied upon Ex.P21 which is the duplicate of Ex.P2. I may point out here that it is observed by the lower Court that PW-4 had issued the receipt at Ex.P2 and that the same has not been challenged in the course of the cross-examination of the said witness. The lower Court by relying upon these documents along with the oral evidence which is adduced in the case, reached a conclusion that the marriage between Ramaswamy and plaintiff-3 was in fact performed. In so far as this aspect is concerned, the evidence relevant for consideration is that of PW-1 - Shakunthala in the first instance. She has in the course of her evidence stated that her marriage with Ramaswamy took place on 27.8.1971 at Chowdeshwari Temple at Srirampur, Bangalore. She has also stated that Subrahmanya Sastry and Narayana Sastry acted as Purohits. She has also referred to the invitation card that was printed in connection with their marriage. She has also referred to the other details particularly with reference to the documents referred to earlier. I have carefully gone through her evidence including her cross-examination.

Sri Pushpahasa, learned Counsel for the respondents has not been able to show anything worthwhile in the course of cross-examination of PW-1 which would render incredible her evidence. Under these circumstances, I am of the view that the evidence of PW-1 is acceptable. Further it is also necessary to point out here that the oral evidence of PW-2 is said to have attended the marriage of PW-1. PW-3 Narasimha Bhat who is said to have acted as a Purohit, has in the course of his evidence stated that at the time of the marriage of plaintiff-3 with Ramaswamy he was present and the marriage took place in the year 1971. He has also stated that

the father of plaintiff-3 engaged him as a purohit in that marriage, and in that marriage Pyeha, Antharapata, Jirigebella, Kankana Darane, Muhurtha and Mangalyadarna and Home Sapthapathi rituals were performed. He has also referred to Ex.P4 which is the photo of plaintiff-3 and Ex.P4(a) which is the photo of Ramaswamy. He is cross-examined by the other side and I have no hesitation in holding that the cross-examination of this witness has not brought-forth anything which would taint his evidence.

11. PW-4 Munichowdappa is a witness who is examined on behalf of the plaintiffs. He has also spoken as regards the marriage between plaintiff-3 and deceased Ramaswamy. It will suffice if it is stated that his evidence in part corroborates the evidence of PWs-1 and 3. PW-5 - D. Joseph who was working as a Driver in the Agricultural Department, where late Ramaswamy was also working, has also spoken as regards the marriage with Ramaswamy. He has stated that the invitation was made as per Ex.P1. He has also referred to the photos at Ex.P4 and P12. He has further spoken as regards the death of deceased Ramaswamy. He has further stated that the body of Ramaswamy was cremated at Bangalore near the opposite of bus stand of Srirampuram, and the cremation was made by the 3rd plaintiff, her father and her brother. He has also referred to plaintiffs-1 and 2. His cross-examination also does not disclose any infirmity so as to dub his evidence as being not reliable. It is not necessary to refer to the details of the evidence of Subramani - PW-6 who has printed the invitation cards.

12. The lower Court has also pointed out as to how the discrepancies referred to in the evidence of PW1 with reference to the name of the Purohit are not significant. The lower Court has also relied upon the documentary evidence which would go to show that late Ramaswamy was mentioned as the father of the children that is to say, plaintiffs 1 and 2. In this connection, the evidence of PW7, who is the Doctor in K.C.General Hospital, would go to show that the 3rd plaintiff was admitted in the Hospital on 1.7.1973 and she delivered a male child on 2.7.1973 and, as per the records, the name of the husband of the 3rd plaintiff was given as Ramaswamy. Further, the evidence of PW10 who is another Doctor of Srirampuram Maternity Home, would go to show that the 3rd plaintiff gave birth to a female child that is to say, plaintiff 2 on 27.7.1974. It is also in her evidence that the record would go to

show that Ramaswamy was described as the husband of the 3rd plaintiff-Shakunthala. The lower Court, in fact, has relied on this evidence in conjunction with the other evidence referred to immediately hereinabove. In addition to the same, it is seen that the evidence of PW11 who was a Deputy Director, Agricultural Department during the relevant period also has been relied upon by the lower Court. His evidence would go to show that deceased Ramaswamy had signed nomination papers as per Ex.P28 and P28a. This, in short, is the gist of evidence referred to by the lower Court in reaching the conclusion which it did, in answering point 2 in the affirmative. On a perusal of the evidence of these witnesses relied on by the lower Court, with reference to the aspect relating to Point 2, I am of the view that the finding given by the lower Court cannot be found fault with. In fact, the learned Counsel for the defendants-appellants has not been able to show as to how the evidence relied on by the lower Court suffers from any infirmities. Under these circumstances, I have no hesitation whatsoever in answering Point 2 in the affirmative.

POINT NO. 3

13. Under this point, it is required to be seen as to what is the status of plaintiffs 1 and 2 in relation to deceased Ramaswamy. The lower Court had taken the view that though the marriage of Ramaswamy with plaintiff 3 - Shakunthala, as a fact, is established by acceptable evidence, the said marriage is void abinitio having regard to the fact that Ramaswamy had already a lawfully married wife living at that point of time. Under Section 11 of the Hindu Marriage Act any marriage solemnized after the commencement of the Hindu Marriage Act shall be null and void. Therefore, the lower Court, relying upon the said Section, reached the conclusion that the marriage of plaintiff 3 with Ramaswamy was void. However, the lower Court had taken the view that, though the marriage of Shakunthala with Ramaswamy was void under Section 11 of the Hindu Marriage Act, the evidence on record would go to show that children that is to say, plaintiffs 1 and 2 were born out of the wed-lock between plaintiff-3 and deceased Ramaswamy. I may point out here that the lower Court has, on the evidence placed before it, reached the conclusion that these children were actually born out of the wed-lock. The evidence already referred to earlier viz., the evidence of PW1- Shakunthala, and

the documentary evidence, particularly, relating to the name of the father given in respect of Hospital records in relation to plaintiffs 1 and 2 and other circumstances relied on by the lower Court would unmistakably go to show that these children, plaintiffs 1 and 2 were born to Ramaswamy out of plaintiff-3, Shakunthala. If that be so, as rightly pointed out by the lower Court, the provisions of Section 16, of the Hindu Marriage Act would confer legitimacy on plaintiffs 1 and 2. Section 16, Hindu Marriage Act, provides that notwithstanding that a marriage is null and void under Section 11, any child - of such, marriage who would have been legitimate, if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Law (Amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of a marriage under this Act and whether or not marriage is held to be void otherwise than on a petition under this Act. The lower Court has taken the view that, in view of the said Section, plaintiffs 1 and 2 will have to be deemed to be the children legitimately so called and that therefore, their status will have to be construed and considered accordingly. I do not find anything wrong with reference to the reasoning adopted by the lower Court to reach the conclusion which it did in this behalf. Under these circumstances, Point No. 3 is answered by holding that plaintiffs 1 and 2 are the children of deceased Ramaswamy.

POINT NOS. 4 & 5:

14. These two Points can be taken up together since they are inextricably mixed up with each other. Under Point No:4, it will have to be seen as to whether Cross-objections filed is barred by time and if so, respondents who have filed' the Cross-Objections have shown sufficient cause for having not filed the Cross-Objections in time. Under Point No:5, it will have to be seen as to whether there is any merit in the Cross-Objections filed by the respondents.

15. The Cross-Objections filed by respondents mainly pertain to the finding given by the lower Court with reference to Family Pension allowable to the members of the family of deceased Ramaswamy. In fact, Sri Pushpahasa, learned Counsel for respondents, submitted to the Court that his cross-objections is limited only to that aspect and nothing more. Before considering the merits of the matter, it is required

to be seen as to whether the Cross-Objections is barred by time and if so, whether there was sufficient cause for not filing the Cross-Objections within the stipulated time reflected in Order 41, Rule 22, CPC. At this juncture, it is necessary to state that the Appeal is filed by the appellants on 6.2.1985. It is further seen that the vakalath was filed on behalf of the respondents on 22.11.1985. It is also seen that the Cross-Objections has been filed by the respondents on 15.4.1988. If therefore, 22.11.1985 itself is taken as the date on which the date of the notice has been served upon the respondents and even if that is taken as the starting point for the time to file the Cross-Objections, it is clear that Cross-Objections ought to have been filed within one month next after the date that is to say, from one month from 22.11.1985. However, it is seen that the Cross-Objections is filed on 15.4.1988. It is therefore, clear that the Cross-Objections is filed after about 2 years and 8 months on a rough estimate. The question for consideration is as to whether there was sufficient cause for the respondents for not filing the Cross-objections in time. In this connection, an application at I.A.2 is filed on behalf of the respondents purporting to be one under Section 5 read with Section 14 of the Limitation Act, praying for condoning the delay in preferring the Cross-Objections. The said application is accompanied by an affidavit. The pith and substance of the affidavit is that the instant respondents were prosecuting a Petition for Review against the Judgment which is now challenged in this Appeal and that ultimately, the Petition for Review was dismissed for default and that another application for restoration of the same was filed in Misc.No:92/86 and the said Misc.No:92/86 was also dismissed on 3.3.1968 on the ground that the Advocate had not filed the affidavit. It is pointed out that the respondents took up the matter relating to the same in CRP 1756/88 and that the same was not admitted and was dismissed on 28.3.1988. It is stated that on these grounds, the delay was occassioned by the respondents with reference to the filing of the Cross-Objections. In para 6 of the affidavit accompanying the application at I.A.2, it is asserted that respondents have got a good case with reference to points raised in the Cross-Objections. The other side that is to say, instant appellants have objected to the same by their lengthy affidavit. In short, the contentions raised on behalf of the appellants with reference to the application at I.A.2 is that, there is no valid ground for condoning the delay. It is stated that respondents were very much aware about the filing of

the appeal and the grounds raised by them are not at all tenable. In sum, appellants have prayed for the dismissal of the application at I.A.2 Sri Pushpahasa, Counsel for the respondents submitted that the time spent in prosecuting the Review Petition referred to earlier will have to be excluded in the light of the language reflected in Section 14 of the Limitation Act. I am unable to agree with the submission made by the respondents' Counsel. Section 14 of the Limitation Act reads as under:

'(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908, the provisions of Sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature.'

A perusal of the same would go to show that the exclusion referred to there does not apply to the time to prefer the Appeal. It is also significant to notice here that whereas Section 5 refers to appeal and application both, Section 14 does not apply to appeal at all. It is no doubt true that appeal for some purposes, is a continuation of the suit. However, the provisions of Section 14(1) of the Limitation Act cannot be stretched to the extent of holding that the same would apply even in respect of filing of an appeal. I have also checked up as to whether the

respondents could have recourse to provisions of Section 6 of the Limitation Act. Ordinarily, Section 6 of the Limitation Act which relates to the period, during disability, can be availed even in those cases where a guardian is actually in existence with reference to a minor. The wordings of Section 6 in juxtaposition with the wordings of Section 5 would go to show that Section 6 has got application only in relation to a suit and application and not in relation to an appeal. Under these circumstances, I am of the view that even Section 6 of the Limitation Act can be availed of to save the Limitation prescribed for preferring the Appeal in a given case. The only provision therefore which can be availed of by the respondents is the provisions reflected in Section 5 of the Limitation Act or the provisions of Order 41, Rule 22 itself. Under these circumstances, the only point that is required to be seen by the Court is as to whether sufficient cause is shown. The reasons which, according to the plaintiff-respondent, would constitute sufficient cause are already alluded to earlier and it is not necessary to risk a repetition here. The question is as to whether the fact that respondents were prosecuting a Review Petition before the Court which passed the Judgment would be a sufficient ground for the delay in preferring Cross-Objections. It is seen that the respondents were made aware of the filing of the Appeal on 22.11.1985 itself when their advocate put in his appearance before the Court. However, the Cross-Objection is actually, filed on 15.4.1988. There was no impediment whatsoever, more so, when the Advocate has actually appeared for respondents. Sri Pushpahas, respondents' Counsel however contended that, had he preferred the Cross-Objections even during the pendency of the Review Petition, his Review Petition would have been rendered infructuous and that therefore, he could not have had recourse to the Cross-Objections earlier than what the respondents have now done. Having regard to the wording of Order 47 Rule 1, CPC, I do not find any merit in this submission. Further, this Court is required to be guided by the contents of the affidavit accompanying the application at I.A.2. Looked at from that point of view, I do not find any good ground to condone the delay. Even otherwise, assuming for the time being that the delay can be condoned, this Court would like to see as to whether there is any merit in the Cross-Objections put in on behalf of the respondents.

16. As pointed out earlier, the Cross-Objections relates to the Family Pension conferred by the Karnataka Civil Service Rules (KCSRs) and/or the Karnataka Government Servants Family Pension Rules, 1964 (for short, the 1964 Rules). Sri Pushpahasa, learned Counsel contended that having regard to the provisions referred to in Section 294(vi) of the KCSRs, it was competent for late Ramaswamy to effect nomination in favour of plaintiffs 1 and 2 and accordingly, he did effect nomination as per Exhibits P28 in Form VI. It is pointed out by Sri Pushpahasa that, having regard to the language referred in Section 294(v), the amount will have to necessarily go to the nominees as reflected in Ex.P28. The submission made by Sri Pushpahasa will have to be examined from a correct perspective.

17. At this juncture, it is necessary to point out here that Family Pension under the KCSRs is covered by Section III of Chapter XIX of KCSRS. However, it is necessary to notice here that by a Notification. No. FD 17 SRS 64 dated 10th February, 1965, issued under Article 309 of the Constitution of India, the Government of Karnataka issued what is known as the Karnataka Government Servants (Family Pension) Rules, 1964. To whom all the said Rules referred to in the said Notification would apply is made clear in Rule 3 of the said Rules. Rule 3 of the said Rules reads as under:

'3. These rules shall be applicable to:

(i) all Government servants appointed regularly to pensionable posts on or after 1st December 1964:

(ii) all Government servants who held pensionable posts on 1st December 1964 having been appointed regularly to the same before that date and who are governed by the Pension Rules contained in the Karnataka Civil Services Rules, provided they exercise an option in favour of these rules or fail to exercise any option in favour of these rules within the time allowed as provided for in Rule 11 of these Rules:

(iii) all Government Servants who held pensionable post on 1st December, 1964 having been appointed regularly to the same before that date and were governed by the Old Pension Rules of the Mysore Services Regulations, the Hyderabad Civil

Services Rules, the Bombay Civil Services Code where under they did not have the benefit of family Pension and Death-cum-Retirement Gratuity, provided they exercise an option in favour of these rules as provided for in Rule 11 of these Rules.'

At this juncture only, it is in fitness of things to refer to Rule 11 of the said Rules. Rule 11 reads as under:

'11 (a) Government servants in service on 1.2.1964 who are governed by the Pension Rules in Karnataka Civil Services Rules or by the Family Pension Scheme contained in Appendix A of Mysore Services Regulations or in B.C.S.Rs, H.C.S.Rs., Liberalised Pension Rules of C.S.Rs. will have an option to elect this scheme in substitution of the existing Family Pension benefits as admissible under those Rules or to retain their existing benefits. The option shall be exercised on or before 30th June 1970 in Form A. Persons who fail to exercise the option within the stipulated period will be deemed to have elected the scheme of Family Pension contained in these rules. Option once exercised shall be final.

(b) Those who are governed by the old Pension Rules of M.S.Rs., Madras Pension Code, B.C.S.Rs., H.C.S.Rs., or the C.S.Rs., in toto where no family pension benefits were available, will not be entitled to the benefit of this Scheme unless they opt in favour of the Pension Rules contained in the KCSRs in toto and also of these rules. Hence, they will be allowed a fresh option to avail themselves of the benefits of this Scheme. This option shall also be exercised on or before the 30th June 1970 in Form B. Those who fail to exercise the option within the stipulated period will not be entitled to the benefits of this Scheme.

A perusal of Rule 3 and 11, of Family Pension Rules, in conjunction would only go to show that if a Government servant does not opt for the old Rules within the stipulated time, by a legal fiction, he is deemed to have opted for the said Rules that is to say, Karnataka Government Servants (Family Pension) Rules, 1964. It is therefore, necessary to see as to whether in the instant case, the Government servant late Sri Ramaswamy had opted for the old Rules or whether he was deemed to have opted for the 1964 Rules. It is not disputed that Ramaswamy was very much alive and he was in service at the time when these Rules came into

force. My attention is invited to Ex.P28 by the learned Counsel for the respondents to contend that, an option for old Rules was, in fact, exercised by Ramaswamy in August, 1974 at Bangalore. However, it will suffice if it is noted that the said nomination is said to have been made under Rule 294 of KCSRs, presumably under Rule 294(vi). It is necessary to point out here that the same cannot be deemed, by any stretch of imagination, as an option deemed to have been exercised by Ramaswamy in terms of Rule 11 of the 1964 Rules. It is also necessary to remember here that option required to be exercised under Rule 11 of the said Rules was required to be exercised within the stipulated time, that is to say, on or before 30th June 1970 in Form A. It is not brought to my notice either by the appellants' Counsel or by the respondents' Counsel that the last date stipulated in Rule 11(a) has ever been extended by the Government. Under these circumstances, it is clear that the Government Servant late Ramaswamy was required to exercise his option on or before 30th June 1970. It is not shown that Ramaswamy had ever exercised this option either on that date or before that date. In that view of the matter, the legal fiction will come into being, with the result, Ramaswamy is deemed to have opted for the said Rules. If that be so, it will have to be seen as to who are the persons entitled to receive the payment conferred by the 1964 Rules. At this juncture, it would be indeed convenient to juxtapose the two provisions namely, the provisions reflected in Section 294 (v) of the KCSRs and the provisions reflected in Rule 8 of the 1964 Rules. Rule 294(v), KCSRs reads as under:

'Rule 294(v): Except as may be provided by a nomination under Sub-rule (vi) -

(a) a pension sanctioned under this Section will be allowed -

(i) to the surviving widow or if there are more widows than one; to all of them in such manner as Government may deem fit, if the deceased is a male Government servant or to the husband if the deceased is a female Government servant;

(ii) failing a widow or husband, as the case may be, to the eldest surviving son;

(iii) failing (i) and (ii), to the eldest surviving unmarried daughter; (iv).....

Rule 8 of the 1964 Rules reads as under;

'Family pension admissible under these rules shall be sanctioned to the family of the deceased Government servant in the following order:

a. Where the Government servant dies leaving him or her surviving a widow or widower to such widow or as the case may be widower, of the Government servant.

b. Where the Government servant dies leaving him or her surviving no widow or widower, to the eldest minor son or daughter, If any, of the Government servant. c.'

A comparison of the two Rules referred to hereinabove would go to show that the Family Pension admissible under Rule 294(v), KCSRs is subject to the nomination under Sub-rule (vi). However, the family pension admissible under Rule 8 of the 1964 Rules does not make the Family Pension admissible subject to any such nomination. It is needless to say that whether it is KCSRs or whether it is the 1964 Rules, they are the Rules framed under Article 309 of the Constitution of India. They have statutory force, Therefore, when the payment is required to be made, the payment will have to be made in accordance with the Rules and not de hors the Rules. In the instant case, I have already taken the view, for the reasons stated earlier, that the Government servant concerned, viz., deceased Ramaswamy, the father of plaintiffs 1 and 2 should be deemed to have opted for the 1964 Rules. Once when it is held that he opted for 1964 Rules, it is clear that Family Pension available to the family members of deceased Ramaswamy will have to be distributed strictly in accordance with Rule 8 of the said Rules.

18. Sri Pushpahasa, Counsel for the respondents submitted to the Court, with reference to Rule 208, KCSRs, that Pension includes Gratuity and except where the term Pension is used in contradiction to death-cum-retirement gratuity, pension includes death-cum-retirement gratuity also. The submission made by the learned Counsel for the respondent is not tenable having regard to the fact that Family Pension referred to above in the aforesaid Rules obviously does not include Gratuity. Inclusive definition reflected in Rule 208, KCSRs will have to be

understood in the context in which it is defined. It is needless to say that the same cannot be stretched to a situation like the one in hand to contend that the provisions relating to nomination referred to with reference to gratuity elsewhere in KCSR can be roped in even in the context of 1964 Rules. This submission is fallacious on its face and that therefore, it is not necessary to enter into an elaborate discussion in this behalf.

19. Sri Pushpahasa, learned Counsel for the respondents has, however, invited the attention of this Court to Form A at Ex.P28 which is dated, Thursday, August 1974. With reference to the same, Sri Pushpahasa would like this Court to infer that late Ramaswamy had opted for the old Rules. In my opinion, it is not at all possible to agree with the submission made by the respondents' Counsel. It will suffice if it is reiterated that unless and until it is shown to the satisfaction of the Court that deceased Ramaswamy, before the stipulated date that is to say, before 30th June 1970, in Form A had actually opted for the old Rules, it is not at all possible to infer that he did opt for the old Rules. As I have already pointed out earlier, the legal fiction would come into being in case it is not shown that he had opted for the old Rules. Under these circumstances, it would follow that it is the 1964 Rules that would apply. Once when it is held that 1964 Rules that would apply, it is Rule 8 of the said Rules which would hold the field: Accordingly, it is the wife who would supercede all other heirs in point of priority. In that view of the matter, I have no hesitation whatsoever in holding that the conclusion reached by the lower Court in this behalf cannot be said to be wrong. I hasten to add here that this conclusion is reached only as an alternative assuming for the time being that the delay in filing the Cross-Objections can be condoned. However, I have already held that even the delay in filing the Cross-Objections does not deserve to be condoned. In any event, it is clear that the contentions raised on behalf of the respondents with reference to the finding given by the lower Court in relation to pension available to the family members of late Ramaswamy cannot be found fault with. For the reasons stated hereinabove, it is clear that the findings given by the learned Addl. City Civil Judge are in order on every point. It would therefore follow that the Appeal and the Cross-Objections filed by the respective parties are liable to be dismissed.

20. In the result, the Appeal and Cross Objections are hereby dismissed. In the facts and circumstances of the case, I make no order as to costs.

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