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Kuppa Ramoki Vs. Kuppa Kameswari

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Court : Andhra Pradesh

Decided On : Apr-26-1974

Reported in : AIR1975AP3

Judge : Alladi Kuppuswami and ;Lakshmaiah, JJ.

Acts : Hindu Adoption and Maintenance Act, 1956 - Sections 18(2); Hindu Marriage Act, 1956 - Sections 9(1)

Appeal No. : A.A.O. No. 291 of 1970, Tr. A. No. 438 of 1971 and C.M.P. No. 8820 of 1973

Appellant : Kuppa Ramoki

Respondent : Kuppa Kameswari

Advocate for Def. : A.L. Narayana Rao, Adv. in C.M.P. No. 8820 of 1973 and ;K.V. Ayyappa Sastry, Adv. in A.A.O. No. 291 of 1970 and Tr. A. No. 438 of 1971

Advocate for Pet/Ap. : A.L. Narayana Rao, Adv. in A.A.O. No. 291 of 1970 and Tr. A. No. 438 of 1971 and ;K.V. Ayyappa Sastry, Adv. in C.M.P. 8820 of 1973

Disposition : Appeals allowed

Judgement :

Alladi Kuppuswami, J.

1. These two appeals are preferred against a common judgment of the learned Subordinate Judge, Vijayawada, in O, P. No. 130 of 1968 and O. S. No. 250 of 1968 respectively. O. S. 250/68 was filed by the respondent in these appeals against her husband for maintenance at the rate of Rs. 75/-P. M. from the date of suit and for arrears at the the same rate and for Rs. 500 for separate residence. O. F. No. 130/68 was filed by the the first appellant in the transferred appeal and the sole appellant in the C. M. A. for a declaration that the marriage between him and the respondent was a nullity or in the alternative for restitution of conjugal rights.

2. The parties will be referred to as the husband and wife as has been done in the Court below.

3. The wife filed the suit formaintenance with the following allegations.

4. The marriage was solemnised on 1-5-1966 at Palakol West Godavari District and consummated on 8-5-1966. The wife was taken to her husband's house at Vijavawada on 9-5-1966. She staved there till about 15-6-1966 and she returned to her irarents1 house. She again Joined the husband in his family residential house at Vijayawada on 23rd July, 1966 and staved till 30th September. 1966. During these short periods of stay thehusband and other members of the family treated her with cruelty and beat her several times mercilessly. The husband and his parents made preparations for gettnig him married to a second wife. Finally, they prove her out on 30-9-1966. The husband married a girl by name Kameswari daughter of one Adusumill Venkatappaiah on 30th March. 1967 at Avanigadda. The husband is living with the second wife who was in an advance stage of pregnancy on the date of the suit. Subsequently, a son was born to them. The husband filed a written statement denying any cruelty on his part or on the part of his parents. He stated that it was found that his wife was incapable of sexual intercourse and unfit for matrimonial life. He got her medically examined and treated but it was of no use. This fact was intimated to the wife's father who came and took her away in June, 1966. The wife returned and joined him in July 1966, but even after her return, she was found unfit for cohabitation. She refused to get herself medically examined and treated. He also denied that he ever contemplated or made attempts to marry a second wife. The allegation that he married one

Kameswari on 30-3-1967 was false. The plaintiff was not driven out from her house on 30-9-1966, but because she expressed her unwillingness to live with her husband, she was taken away by her father saying that his daughter was not willing to live with her husband and he will try once again and set her cured and send her back.

5. On practically the same allegations the husband filed O. P. 130/68 for a declaration that the marriage was a nullity or in the alternative, for restitution of conjugal rights. After the filing of the petition, the wife was examined by a lady doctor in Guntur Medical Hospital. The lady doctor issued a certificate saying that there was nothing to suggest that the wife was incapable of sexual intercourse. In view of this certificate, the husband save up the ground of his wife's impotencv and did not press for the relief of declaration of the nullity of the marriage, but pressed only the relief of restitution of conjugal rights.

6. The Court below after consideration of the evidence held that the second marriage of the husband was not proved and therefore, the wife was not entitled to claim separate maintenance and residence on that ground. It however, held that as the wife was found not to be suffering from any disability as alleged by the husband, it followed that the husband was responsible for sending the wife away on the imaginary ground of impotency. The wife was sent away without any fault on her part and without any justifiable cause. In the result, the Court below held that the wife was entitled to maintenance as claimed by her, and awarded at the rate of Rs. 40/-p. m. from the date of suit and Rs. 200/-towards separate residence. It decreed the suit accordingly. For the same reason it dismissed O. P. No- l30/68.

7. The husband and his father who was also made a party to the suit preferred an appeal to the District Court, Krishna, against the decree in the suit and the husband preferred the C. M. A, against the dismissal of his O. P. The appeal in the District Court has been transferred to this Court and numbered as Tr. A. S. No. 438 of 1971. The two appeals which arise out of the common judgment have been heard together.

8. On behalf of the wife, it has been contended that the finding of theCourt below against her that the second marriage has not been proved is not correct. If that contention is accepted there can be no doubt that she is entitled to separate maintenance. It is therefore, convenient to consider that question first.

9. The case of the wife as stated in the plaint is that the second marriage took place on 30-3-1967 at Avanigadda. The wife examined herself as R. W. 1. She has no personal knowledge of the marriage and her evidence in this respect of hearsay. Her father, who was examined as R. W. 2 also has no personal knowledge. He says that he made enquiries and came to know that his son-in-law married one Kameswari. He stated that even at the time of the evidence his son-in-law was residing at Avanigadda with Kameswari in the house of one Viswanadha Sastry P. W. 3- In cross-examination he admitted that he filed a suit against Viswanadha Sastry which was dismissed. Though in the plaint it is stated that the marriage took place on the 30th March, 1967, in his evidence he deposed that the marriage took place in the first week of March, 1967. Though he started by deposing that his son-in-law married one Kameswari he stated later that the whole world knows that he is openly living with Sharda whom he remarried. He admitted that no notice was given to Sharada. Thus, it is clear that he is not certain about the lady with whom the son-in-law contracted a second marriage. R. W. 3 is the Viyyanka of the husband's father. He stated that he knows Venkatappaiah, who died about eight years ago. His daughter Kameswari was given in marriage to P. W. 1 and the marriage took place in the house of P. W. 3. He is not personally aware of this as he did not attend the marriage. but he said that his son and daughter-in-law attended the marriage, P. W. 2 the father of P. W. 1 himself came to his house to extend the invitation to attend the marriage. He wrote letters, Exs. B-12 and B-14 to the girl's father. In Ex. B-14 it is stated that the marriage took place at Dwaraka Tirupati on 10th or llth March. He admitted that the statement in Ex. B-14 is not correct. He stated that at the time of the marriage, he was not in Avanigadda and by the time he returned, the bride and bride-groom had already left the village and so he could not meet them. He met P. W. 3 on the second day of his return, that is on 3rd or 4th April and P. W. 3 told him that the marriage took place in his house and he wrote Ex. B-14 immediately after coming to know of the marriage. If that is true, there cannot be such a glaring mistake about the place of

the marriage. R. W. 4 is the son of H. W. 3. He deposed that he and his wife attended the marriage and he wrote the post-card. Ex. B-24 informing R. W. 2 that the marriage had taken place. He stated that the couple lived in the village for about 20 days; whereas his father. R. W. 3 deposed that by the time he returned to the village two or three days after the marriage, the couple had left. From the evidence of R. W. 4 it is clear that he and R- W. 3 were on inimical terms with P. W. 4 the husband's father. This is also borne out by Ex. A-15 addressed to hid wife. The evidence of these two witnesses and the letters purported to have been written by them are. as observed by the Court below full of contradictory and inconsistent statements. Their evidence cannot be accepted, especially as it is found that they are inimically disposed towards the husband's father. On the other hand. Viswanadha Sastry in whose house the second marriage is stated to have taken place and is examined as P. W. 3 stated that no such marriage was ever performed in his house. We are inclined to agree with the finding of the Court below that the second marriage has not been proved to have taken place.

10. A petition C. M. P. No. 8820 of 1973 under Order 41. Rr. 27 and 28, Civil p. C. was filed on behalf of the respondent. It is stated in that petition that in order to prove the second marriage hand over summons was taken to Inkollu Ramabrahman. the brother of late Venkatappiah, the father of the second wife who had been adopted to Inkollu family and who had performed the 'Kanya-danam', as the father was not alive to Adusumillu Kamalamma. wife of late Venkatappaiah and to R. W. 2 and R. W. 4. As the hand over summons could not be served on these witnesses, the respondent filed a petition to issue summons to the said witnesses. While R. W. 3 and 4 gave evidence after receiving summons. Inkollu Ramabrahmam and Kamalamma refused to receive summons. The said refusal was attested by Mopidevi Karnam as the village Karnam was not present at that time. Thereafter, an oral request was made to the Court below to issue warrant to these witnesses, but the Court did not accede to this request and the evidence was closed. Hence, these two witnesses could not be examined. If they were examined they would have deposed that the second marriage was performed. It is also stated in this petition that the first appellant kept one girl of goldsmith caste, named Sharada and treated her as his wife, and the appellants suppressed the fact and performed the marriage between the appellant and the

respondent. It is also alleged that the birth of a son by the second wife was not entered in the records by the village Munsiff. Subsequently another son also was born to the first appellant as a result of the second marriage. The appellant manaeed to see that the birth of the son was not entered in the records. It is therefore prayed that the lower Court may be directed to record the evidence of Inkollu Ramabrahman and Adusumilli Kameswari. This application is opposed by the appellants.

11. We do not think a case is made out for taking additional evidence in this case and for examining Inkollu Ramabrahmam and Adusumilli Kameswari. Even assuming that when the Court issued summons to these persons to appear as witnesses, they did not choose to come and give evidence, it was open to the respondent to take coercive steps. No application was made requesting the Court to issue warrants. It cannot be believed that an oral request was made to the Court to do so. R. Ws. 3 and 4 were examined on 2-1-1970. Thereafter, the case was adjourned to 7-1-1970. 12-1-1970 and the judgment was pronounced on 19-1-1970. The respondent had ample opportunity to take steps to examine the said witnesses, but she did not examine by taking any coercive steps. The application was made at late stage when the appeal was being argued. The appeals have been pending since 1970 and 1971 and if this application is bona fide, it could have been filed much earlier- We therefore, see no reason to grant this request to direct the lower Court to record the evidence of these two witnesses to prove the alleged second marriage of the first appellant. We agree with the finding of the Court below that the alleged second marriage has not been proved.

12. The allegation as to the second marriage with Sharada is totally inconsistent with the case of second marriage with one Kameswari as stated in the pleadings. No mention of Sharada was ever made until the wife's father gave evidence. In the petition for additional evidence, it is stated that the husband had already been married to Sharada and this fact was suppressed at the time of the marriage with R. W. 1. This case is made out for the first time and we have no hesitation in rejecting the case sought to be introduced, namely that the husband had married another person. Sharada, belonging to goldsmith's caste.

13. Though the Court below held that the second marriage has not been proved, it granted the decree for separate maintenance on the ground that thewife was sent awav without any fault on her part and without any justifiable cause. The reason for coming to the conclusion given by the Court, is that the husband's case is that the wife was physically unfit for cohabitation and therefore her father took her away in September, 1966 with a promise to send her back after setting her medically treated and cured of her disability. It is now found that the wife was not suffering from any disability by the lady doctor of Guntur Medical Hospital who examined her after the proceedings started and the husband has accepted that position and did not choose to press his case for a declaration that the marriage was a nullity on the ground of his wife's impotency. It is observed by the Court below that when once it is found that the wife was not suffering from any disability it follows that the husband was responsible for sending away the wife on the imaginary and false ground of her impotency. The only inference that can be drawn from the circumstances is that having found her life miserable and impossible in husband's family house, the wife was compelled to leave the house and to come away to her parent's house. We are unable to agree with this reasoning of the Court below. The case of the wife is that the husband and his parents made her life miserable, tortured her and beat her several times mercilessly caus-ine reasonable apprehension in her mind that it will be harmful and injurious to live with her husband. Secondly it is stated that the husband has married a second time. It is only on these grounds that the wife claimed separate maintenance. It was not her case that the husband sent her away on the pretext that she was impotent and was incapable of sexual intercourse. The claim for separate maintenance of the wife has to rest on the case set forth in her pleadings, namely, cruelty and bigamy. The Court below was not right in our view in surmising that the husband sent her away allening that his wife was impotent. Even In the evidence, the wife or her father did not say that the husband sent her away saving that she was impotent and incapable of sexual intercourse.

14. The Court below has not given any specific finding that the husband treated the wife cruelly as alleged by her. We have gone through the evidence and we are not satisfied that the case of cruelty has been made out. It appears from the evidence that after the marriage at Palakol. the wife went to the husband's place at

Vijayawada on 9-5-1966 and stayed there for some time. Thereafter, she returned to her father's place and again went to her husband's place on 23rd July. 1966 where she staved till 30-9-1966, Exhibit B-l is a letter written by the husband's father on 18-5-1966 in which he states that the health of his daughter-in-law is not good. From the time she came to her husband's place she was saving daily that she will so to Palakol and be in her father's house for some time and come back. It was also stated that blood is coming alone with urine and she was feeling pain in her private parts. He suggested therefore that her physical condition may be improved. On 28-5-1966 the wife's father wrote to the husband's father saying that he will take back the girl to their place on the 1st of June and it appears that she was accordingly taken back. These letters would show that the health of the girl was not alright and she was taken back by the father to his place for treatment. Thereafter several letters were written by the girl's father to the husband's father during the period she was staying with him. All these letters indicate that the wife's father was at pains to point out that there was nothing seriously wrona with the girl's health and that steps are being taken to see that she is cured. Ultimately she was sent to the husband's place on 23-7-1966 where she stayed until she left that place on 30-9-1966. In none of these numerous letters, is there any whisper of cruelty on the part of the husband. No complaint is made by the wife's father that his daughter was treated with cruelty. One letter Ex. B-9 dt. 16-6-1966 stated to have been written by one Kala Subrah-manyam to the wife's father was relied upon. In this it is stated that she was being beaten by her mother-in-law and on the day when the letter was written she was pushed inside the house, door was closed and was beaten badly with a stick. He says that he got this information from a resident of the house opposite to the house of the husband and has suggested to the girl's father to come and take back the girl: otherwise things may become worse and she may even die. The Court below rightly did not attach importance to this letter, as the person who wrote this letter was not examined. In this Court in C. M. P. No. 8820/73 which has already been referred to a request is also made to direct the Court below to examine son of Kala Venkata Subrahmanyam who wrote this letter as Kala Venkata Subrahmanyam is no longer alive and his son may be in a position to prove the hand-writing. The particulars of the son are not given. All that is stated is that the son of Kala Venkata Subrahmanyam may be directed to

be examined. Further, Kala Venkata Subrahmanyam was alive at the time when the case was heard in the lower Court. Though it is now stated that he was laid up with serious illness at the time of trial it is not admitted. We see no reason to accede to the request of the respondent to examine the son of late Kala Venkata Subrahmanyam. Thus, except the interested testimony of R. W. 1 there is no direct evidence of cruelty. It is true that it is difficult to set witnesses to speak about cruelty by the husband or his parents against the wife and very often the only evidence available is that of the wife. The wife deposing as R. W. 1 says that her parents-in-law and sisters-in-law and her husband all used to beat her as they wanted 'katnam'. She stated that even during the period of her first stay she was ill-treated by her husband and his parents, but as has already been stated, in none of the letters written by the father after she returned after the period of first stay, any complaint was made that she was ill-treated. She admitted that she and her father did not give out in their replies to the letters of P. W. 1 that her husband and his parents cruelly treated her. We are therefore unable to hold on the evidence that the husband or his parents treated the wife cruelly or beat her.

15. It is then contended that even assuming that there is no proof of physical cruelty as alleged by the respondent, the unjustifiable imputation of impotency on the part of the wife by the husband amounts to legal cruelty. In the plaint or in the counter to the O. P. it was not alleged that the allegation of impotency amounts to legal cruelty. In order that cruelty may be a ground for claiming separate maintenance it must be of such a nature as to cause reasonable apprehension in the mind of the wife that it would be harmful or injurious for her to live with her husband. The question whether an unfounded allegation of impotency amounts to legal cruelty so as to justify a claim for separate maintenance, would involve consideration of question of fact viz., whether in those circumstances a reasonable apprehension would be created in the mind of the that it would be injurious or unsafe to live with her husband. In the absence of any pleading to the effect that the allegation of impotency amounted to legal cruelty we do not think we will be justified in permitting the respondent to contend before us for the first time in appeal that it affords a sufficient ground for claiming separate maintenance. The learned counsel for the respondent relied on the decision in C. Jagannadham v. C. Savithramma, : AIR 1972 AP377 where even though the plaintiff herself had not

stated in the plaint that she was entitled for separate residence and maintenance on the ground of unfounded allegation of unchastity made against her husband that around was permitted to be urged in appeal in the High Court. But in that case the matter was put in issue by the husband himself and the husband had also attempted to prove the allegation that the plaintiff was unchaste and the lower Court had also observed that the husband had deliberately attributed unchastity to the wife, and further attempted to prove that she was living in adultery. In view of the fact that the matter was put in issue and evidence had been let in and a finding adverse to the defendant had been given, it was rightly felt that the point could be urged even though it had not been raised in the plaint. Moreover, even from the evidence, we are not satisfied that the fears of the husband were totally unfounded. The letters disclosed that soon after the wife joined her husband, it was found that blood was coming along with urine and she was having pain in her private parts. It therefore appears, probable, at any rate that the wife was having some difficulty in having sexual intercourse, even though perhaps she was not totally incapable of sexual intercourse. The wife's father also wrote to the husband's father that he will get her examined by an M. B. B. S. doctor. It is true that after the O. P. was filed when she was examined by a lady doctor at Guntur Medical Hospital, it was found that she was not unfit for sexual intercourse but that may be because she was treated and the defect was cured during the interval. The husband might have filed the petition for a declaration of nullity having regard to his experience immediately after the marriage and would not have known about the fact that his wife was cured at the time of the petition when the lady doctor certified that she was not unfit for sexual intercourse.

In our view the husband very properly did not press his prayer for a declaration of nullity, but only prayed for restitution of conjugal rights. His letters Exs. B-6, B-7 and B-8 written in August, 1967 to his wife's father show that the husband was anxious to take his wife back and was even prepared to take up a separate residence, if necessary. We are therefore, not willing to agree that the imputation of impotency to the wife in the circumstances amounted to legal cruelty.

16. It was finally argued that even if there is no cruelty, having regard to all the circumstances that had happened, it is clear that the husband and wife cannot live

together happily as man and wife and therefore in any event, the petition for restitution has to be dismissed even though the wife may not be entitled to claim separate maintenance. It was submitted that under Section 9(1) of the Hindu Marriage Act, the husband is entitled to ask for restitution of conjugal rights when the wife has withdrawn from his society without reasonable excuse. Even circumstances falling short of Cruelty may afford a ground for withdrawing from the society of the husband. On the other hand, it was contended on behalf of the husband that under Section 9(2) of the Act. nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce. Section 10 sets out the ground on which judicial separation can be prayed for. One of the grounds is that the petitioner has been treated with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. Section 11 sets out the grounds for declaring a marriage null and void. Similarly Section 13 sets out the ground on which a decree for divorce may be obtained. Reading these sections with Section 9(1) and (2) of the Act it was submitted that the reasonable excuse referred to in Section 9(1) must be of such a nature that it would form a ground for judicial separation or for nullity of marriage or for divorce. Though there are some decisions which held the view that the conduct of a spouse which fell short of cruelty or any other matrimonial offence would afford reasonable excuse for leaving or withdrawing from the society of the spouse and be a defensive to a suit for restitution, this Court in Annapurnamma v. Apparao, : AIR 1963 AP312 held that reasonable excuse contemplated by Section 9(1) must be one which would afford a ground either for judicial separation or for nullity of marriage or for divorce.

17. Apart from this we are of theview that there is no reasonable excuse for the wife to withdraw from the society of her husband in this case. We have already held that there is no proof of physical cruelty on the part of the husband or his parents as alleged by the wife. The alleged second marriage also has not been proved. It is true that the husband in his petition for restitution alleged that the wife was impotent, but we cannot say that this was wholly unjustified, as there is evidence to show that at the time when the wife lived with her husband between 8th May, 1966 when the marriage was consummated and 30th September when

she left her husband's house she was experiencing difficulty in having sexual intercourse. When she was examined after the petition it was found that there was no such difficulty, the husband properly did not press his claim for nullity and prayed only for restitution of conjugal rights. Earlier also he was making bona fide attempts to see that she returned to him and they lived together. We are therefore of the view that in this case it has not been proved that there is reasonable excuse for the wife to withdraw from the society of the husband.

18. For the above reasons, the appeals are allowed. The parties will bear their own costs here and in the Court below.

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