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Edamma Vs. Hussainappa

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Court : Andhra Pradesh

Decided On : Aug-12-1964

Reported in : AIR1965AP455; 1965CriLJ712

Judge : Sharfuddin Ahmed, J.

Acts : Hindu Marriage Act, 1955 - Sections 29(2); Code of Criminal Procedure (CrPC) , 1898 - Sections 438, 439 and 488

Appeal No. : Criminal Revn. Case No. 637 of 1963 and Case Referred No. 72 of 1963

Appellant : Edamma

Respondent : Hussainappa

Advocate for Def. : L. P. Sahgal, Adv.

Advocate for Pet/Ap. : M. H. Farooqui, Adv.;Asst. Public Prosecutor

Judgement :
ORDER

(1) This revision arises out of the reference made by the Sessions Judge, Mahboobnagar, dated 13th September 1963 made in Crl. Revision Petition No. 15 of 1963 for setting aside the order of the learned Magistrate of Alampur in M. C. 5/63 on his file. That was a petition by wife under S. 488, Cr. P. C. for

maintenance of herself and her minor son aged about 4 years with the allegation that the husband had ill-treated her and was refusing to maintain her and her child. It was stated by the wife that marriage had taken place about 15 years prior to the application and that she had been living with the husband all these years, but later he had driven her away and had not been maintaining her. with the result that she had taken shelter with her parents at Budhipad. The plea of the husband was that though there was a marriage, it was never consummated and the petitioner had ceased to be his wife as there was a divorce between them effected by the elders of the village. He also attributed unchastity to the wife and denied paternity of the child. It was urged on his behalf that having regard to the divorce and the unchastity to the wife and denied paternity of the child. It was urged on his behalf that having regard to the divorce and the unchastity of the wife she was not entitled to any maintenance.

(2) The learned Magistrate on a consideration of the evidence adduced came to the conclusion that the custom of divorce pleaded by the husband in the community to which he belongs, viz., Koravas was not satisfactorily proved. He also of the view that under S. 29 of the Hindu Marriage Act, the of divorce cannot be upheld on the basis of custom. On the other issues he held that the allegations against the chastity of the wife were unfounded and in that view, directed the husband to pay a sum of Rs. 20 per month by way of maintenance to the wife and child.

(3) The husband went in revision to the learned Sessions Judge, Mahabubnagar in Crl. Revn. Petition No. 15/63. The wife was unrepresented before the learned Judge. On a consideration of the evidence and the arguments advanced the learned Judge held that the opinion of the Magistrate that divorce on the basis of custom could not be held valid in view of the provisions of Hindu Marriage Act is not according to law. Even otherwise, he held that there was divorce between the parties. In that view, he directed that reference should be made to the High Court under S. 438, Cr. P. C. for setting aside the order of the Magistrate.

(4) No doubt as observed by the learned Sessions Judge the view taken by the Magistrate that the custom in regard to divorce could not be considered in view of

the Hindu Marriage Act is not according to law. The matter is covered by a decision of this Court in Are Lachiah v. Are Raja Mallu, (1963) 1 Andh WR 295, wherein it has been laid down with reference to S. 29(2) of the Hindu Marriage Act.

'Nothing contained in this Act shall be deemed to affect any right recognised by custom or recognised by any special enactment to obtain dissolution of a Hindu Marriage, whether solemnised before or after the commencement of the Act. Thus, the Act does not disturb the position which a customary divorce occupied before the enactment of the Act. What has to be found as a fact for this exception to operate is, whether there had been as a fact such customary divorce or dissolution of a Hindu marriage.'

(5) In view of s. 29(2) and the case referred to above the opinion of the Magistrate that the husband could not be heard to say that there has been a divorce according to custom cannot be sustained. But the question is whether the alleged divorce according to customary divorce has been satisfactorily established. The learned Magistrate who had the opportunity of examining the witnesses adduced on behalf of the husband and the wife has come to the conclusion that the existence of such custom has not been satisfactorily proved. Further, on facts he has found that the evidence adduced to substantiate the allegation of divorce is not sufficient to justify a conclusion in favour of the husband. It appears that the contention of the husband was that a divorce deed was executed and that some witnesses examined on his behalf have corroborated his statement, but the document has not been filed. it was stated that it was lost in the house collapse sometime before the filing of the petition by the wife. The learned Magistrate has found some of the witnesses to be unbelievable. In regard to R. Ws. 2, 5 and 7, however, he has not made any specific observation but the trend of his opinion seems to be that all these witnesses have supported the husband merely as they happened to be of the same village where the husband resides. Even in regard to the custom he has observed that the evidence adduced by the husband is not trustworthy and the existence of the custom has not been satisfactorily proved. In his own words :

'But the respondent has failed to prove that the custom is ancient and certain and reasonable and excepting the base-word of these witnesses, there is nothing in the evidence to show that there has been such a custom prevalent in the community since time immemorial.'

(6) Then the factum of divorce also according to the learned Magistrate has not been established. The learned Sessions Judge in para 4 of the order under reference has stated that there is clear evidence in the case showing that there was divorce between the parties and he has referred to the evidence of R. Ws. 2, 4 and 7 whom he found to be respectable witnesses who had taken part in the mediation, But, in regard to R. W. 7, the observation of the Magistrate is that his previous statement and, as observed above, the document said to have been signed by him has not been exhibited and no attempt has been made to secure the document from the possession of the wife if a copy of such document existed in her possession.

(7) I think, so far as the appreciation of evidence is concerned, the view taken by the trial Court is entitled to more weight. Therefore, even if the learned Magistrate has placed incorrect interpretation on S. 29(2) of the Hindu Marriage Act, the reference cannot be accepted. The reference is accordingly rejected.

(8) Reference Rejected.

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