

Pavitri Vs. Katheesumma

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Court : Kerala

Decided On : Jan-06-1959

Reported in : AIR1959Ker319

Judge : Koshi, C.J. and; Vaidialingam, J.

Acts : Muhammadan Law; Hindu Law

Appeal No. : Second Appeal No. 768 of 1955 (M)

Appellant : Pavitri

Respondent : Katheesumma

Advocate for Def. : B. Pocker, Adv.

Advocate for Pet/Ap. : C.K. Viswanatha Iyer, Adv.

Disposition : Appeal dismissed

Judgement :

Vaidialingam, J.

1. The short point for decision in this Second Appeal is as to whether an illegitimate daughter of a Mohammadan is entitled to get maintenance from the assets of her putative father in the hands of his heirs.

2. The suit was for recovery of a sum of Rs. 60/- being the amount due as arrears of maintenance to the plaintiff and for costs from the defendants who are the heirs of the plaintiff's father, one C.P. Moosan Moopan. According to the plaintiff, her mother Kalliani was the wife of Moosan Moopan and the plaintiff was a child born of that union. The deceased Moosan Moopan was maintaining the minor plaintiff and her mother till his death in about September 1951. The first defendant is another wife, and the second defendant is a daughter of the said Moosan Moopan. Defendants 3 to 6 are the sisters of Moosan Moopan. The defendants, who are the heirs of Moosan Moopan, have not paid any maintenance to the plaintiff after the death of Moosan Moopan, though they are admittedly in possession of the self-acquired properties of Moosan Moopan. The plaintiff claimed maintenance at the rate of Rs. 15/- per month with a charge on the assets of her father, Moosan Moopan.

3. Defendants 3 to 6 remained ex parte and defendants 1 and 2, the widow and daughter of Moosan Moopan alone contested the suit. The defence was (a) that the plaintiff's mother was not the wife of Moosan Moopan; (b) that the plaintiff was not a child born of Moosan Moopan and the plaintiff's mother; and (c) that the plaintiff is not entitled in law to claim maintenance from the assets of Moosan Moopan, as illegitimacy is not recognised in Mohammadan Law. Contentions were also raised regarding the rate of maintenance, claimed by the plaintiff.

4. Though the plaintiff's case was that her mother Kalliani was the legally wedded wife of the deceased Moosan Moopan it appears to have been conceded before the trial Court on behalf of the plaintiff that the plaintiff's mother is not the legally wedded wife of Moosan Moopan, but the latter was only cohabiting with her till the time of his death. This concession has been recorded in paragraph 6 of the judgment of the trial Court.

5. But on the question as to whether the plaintiff was a child born of the union of Moosan Moopan and Kalliani, the trial Court held that Moosan Moopan, a Mohammadan was cohabiting with the plaintiff's mother, Kalliani who is a Harijan woman belonging to the Pulayan community and it also held that the plaintiff was a child born of that union.

Regarding the right of the plaintiff to claim maintenance the trial Court held :

'A Muslim father who has sufficient means, is under an obligation to maintain his legitimate or illegitimate children who are unable to maintain themselves.'

Excepting this statement in the judgment, we do not get any further assistance in the judgment of the trial Court as to the principle on which the trial Court came to this conclusion.

6. After making the observations extracted above, the trial Court considered the question of the rate of maintenance and came to the conclusion that the plaintiff's claim is a reasonable one and it also held that the defendants, who are in possession of the assets of Moosan Moopan are bound to pay maintenance to the plaintiff. In this view, the trial Court decreed the suit as prayed for.

7. On appeal by defendants 1 and 2, the learned Subordinate Judge of Tellicherry, reversed the decree and judgment of the trial Court. Even before the learned Judge the position that Kalliani was not the legally wedded wife, but only a concubine, was not challenged by the plaintiff as will be seen from the observation of the learned Subordinate Judge in paragraph 7 of his judgment to the effect:

'There is no dispute that the plaintiff's guardian who is a Harijan is not the legally wedded wife, but only a concubine'.

The learned Judge held that concubinage is not recognised under Mohammadan law and child born to a Muslim by a concubine is only an illegitimate child. The learned Judge further held that under Islamic law, an illegitimate child does not inherit properties of its putative father or his relations and from this it would follow that an illegitimate child cannot claim maintenance from the assets left by its putative father and which are in the hands of the heirs of the putative father.

8. The learned Judge held that Section 488 of the Cr. P. C. imposes a statutory obligation on a Muslim father to maintain his child even illegitimate. The appellate Court further held that this right gets extinguished on the death of the putative father and does not attach itself to the assets left by him. In this view, the learned Subordinate Judge differed from the view of the trial Court and held that the

plaintiff, being only an illegitimate child born of concubinage, is not entitled to maintain the action for recovery of maintenance from the assets of her putative Muslim father and as such dismissed the plaintiff's suit.

9. The plaintiff has come up to this Court in Second Appeal challenging the view taken by the learned Subordinate Judge. Mr. C.K. Viswanatha Iyer, learned counsel for the plaintiff-appellant, has contended that the view taken by the learned Judge that the plaintiff is not entitled to recover maintenance from the assets of the putative father is not Sound in law. According to the learned counsel, the plaintiff will be entitled to maintenance under the general law, on the ground that a party who is responsible for the birth of a child is also bound to provide maintenance.

The learned counsel further contended that if the father is bound to provide maintenance, that obligation will also attach itself to the properties left by him on his death, and as such, the persons who are in possession of those properties are bound to provide maintenance. Mr. C.K. Viswanatha Ayyar also contended that the findings of the two Courts that the plaintiff's mother was not the legally married wife of Moosan Moopan are not also correct in law. According to the learned counsel, in Mohammadan law, there can be marriages, valid (Sahih) or Irregular (Fasid) or void from the beginning (Batil) and the lower Courts erred in not investigating under what category the marriage between the plaintiff's mother and Moosan Moopan came.

10. On the other hand, Mr. Pocker, learned counsel for defendants 1 and 3, contended that the plaintiff is not entitled at all to claim maintenance from the assets of the putative father. Whatever may be the position under the Criminal Procedure Code during the life-time of Moosan Moopan, a bastard is not recognised in Mohammadan law and a bastard is not entitled to claim any maintenance from the assets left by a Mohammadan putative father.

He also contended that under Section 2 of the Shariat Act -- Central Act XXVI of 1937, questions regarding the several matters mentioned therein, including maintenance, are to be decided in accordance with the Muslim Personal Law (Shariat) where the parties are Muslims, In this case, Moosan Moopan was a

Muslim and a right by the plaintiff is claimed against the estate of Moosan Moopan. Muslim law does not recognise illegitimacy and therefore, the plaintiff who is an illegitimate child, is not entitled to claim maintenance from the estate left by Moosan Moopan under the Muslim Personal Law.

11. The learned counsel also contended that decisions have laid down that in such circumstances, the illegitimate child will be governed by the personal Law of its mother. In this case, the plaintiff's mother is a Harijan woman and governed by Hindu law. Whatever may be the position regarding the rights of illegitimate sons in Hindu law to get maintenance under certain circumstances, Hindu law does not recognise the right of an illegitimate daughter to claim maintenance from its putative father. When that is so, it follows that the plaintiff will not be entitled to claim maintenance from the assets left by the putative father. Mr. Pocker finally contended that the plaintiff is not entitled to claim maintenance, whether the Hindu law by which she is governed, applies or whether the Mohammadan law by which Moosan Moopan was governed applies. In either view, the suit is not maintainable.

12. The learned counsel also attacked the findings of the lower Courts that the plaintiff is a child born of the union of the plaintiff's mother and Moosan Moopan.

13. Before we consider the question of law that arises, we shall dispose of the arguments of Mr. C.K. Viswanatha Ayyar and also of Mr. Pocker challenging certain findings of fact recorded by the lower Courts.

14. In our opinion, the contention of Mr. C.K. Viswanatha Ayyar that the plaintiff's mother was a legally married wife of Moosan Moopan cannot be accepted. Both the Courts have considered the evidence in the case and come to the conclusion that the plaintiff's mother, who was a Harijan lady, was only a concubine kept by Moosan Moopan, a Mohammadan. It is not necessary to consider this aspect any further, because the trial Court has recorded in its judgment, that it was conceded that the plaintiff's mother is not the legally wedded wife of Moosan Moopan.

Therefore, it was really unnecessary for the lower Courts to consider whether there was a marriage between the plaintiff's mother and Moosan Moopan and whether it was a valid or irregular or void marriage. The question about the nature

of the marriage does not at all arise in this case, because We also accept the finding of both the lower Courts) that the plaintiff's mother was not the legally wedded, wife of Moosan Moopan and that she was only a concubine of Moosan Moopan.

15. Similarly, we can also, dispose of the contention of Mr. Pocker that the findings of the lower Courts that the plaintiff was born to Moosan Moopan and the plaintiff's mother are not supported by the evidence in the case. We have been taken through the evidence on this point, and we are satisfied that both the Courts have adverted to the material evidence bearing on this matter. We are also satisfied that the findings recorded by the two Courts that the plaintiff was a child born of the union of Moosan Moopan and the plaintiff's mother are justified by the evidence on record. Then the question arises as to whether the plaintiff, who is an illegitimate daughter of Moosan' Moopan, a Mo-hammadan is entitled to claim maintenance from the assets left by her putative father and which are in the hands of the heirs Of the putative father.

16. At the outset, we may state that Mr. C.K. Viswanatha Ayyar was not able to controvert the position in law that illegitimacy is not recognised in Mohammadan Law. As this position has not been challenged, it is really unnecessary for us to investigate this matter further. However, we may refer to an extract in Tyabji's Mohammadan Law, 3rd Edition page 512 where the learned author observes as follows :

'Mohammadan law appears to impose no burden upon the natural father of an illegitimate child, It would, therefore, be seen that an illegitimate child is not entitled to maintenance from either parent under Shia law; and only from its mother under Hanafi law.'

This is why Mr. C.K. Viswanatha Ayyar was at pains to show that under the general law, his client will be entitled to claim maintenance not only from Moosan Moopan himself but also from the assets left by him. The learned counsel relied upon a decision of the Calcutta High Court in support of his contention that in general law, an illegitimate; child is entitled to claim maintenance from its putative father. He also relied upon a decision of the Madras High Court to show that an

illegitimate daughter of a Hindu will be entitled to claim maintenance from her putative father, even on the assumption that the plaintiff, in this case, is governed by the Hindu law. The decision of the Calcutta High Court relied upon by the learned counsel is that reported in *Ghana Kanta Mohanta v. Mt. Gerela*, ILR 32 Cal 479.

In that case, the parties were governed by Hindu law. The suit was by the plaintiff, through her father for recovery of maintenance for her illegitimate minor child alleged to have been begotten by the defendant. It is not very clear from the judgment as to whether the illegitimate minor child for whom maintenance was sought to be recovered in that case was a son or a daughter. The learned Judges, Chose and Pargiter, JJ., overruled the objection raised on behalf of the defendant that an order for maintenance passed by a Magistrate under Section 488, Cri. P. C. bars a civil suit. The learned Judges further held that an illegitimate child is entitled to claim maintenance under Hindu law. Finally, the learned Judges observed at page 482 as follows :

'But apart from the Hindu law we should think that, upon general principles the defendant, having begotten the child, is bound to provide for its maintenance, if that is necessary'.

There is no discussion in the judgment, it would may say so with respect, of what are the 'general principles' which the learned Judges had in mind in making those observations. The learned counsel places very strong reliance upon these observations in support of his contention that an illegitimate child, is entitled to claim maintenance on general principles, apart from the personal law of the parties. As stated earlier, it is not clear from the decision as to whether the illegitimate child in that case, for whom maintenance was claimed, was a son or a daughter. Hindu law does recognise the right of an illegitimate son under certain circumstances to claim maintenance from his putative father.

17. The observations extracted above from the Calcutta case have not been accepted even in that Court itself as will be seen from the decision reported in *V.J. Walter v. M.J. Walter*, AIR 1928 Cal 600, where the learned Judges held that the Code of Criminal Procedure provides a mode of compelling a father to maintain

his infant children, The learned Judges also held that where there is no specific provision in the Statute, the Court has to act in accordance with the principles of justice, equity and good conscience and the rules of the Court of Chancery in England may form a safe and useful guide. But even the Courts in England do not make such an order unless the minor possesses a clear fund or income applicable to that purpose and the minor must have a vested interest in the fund, Referring to the earlier decision of the Calcutta High Court the learned Judges observe at page 604 as follows :

'The broad proposition that under general principles the father of a child is bound to provide for its maintenance such as was suggested in the case of ILR 32 Cal. 479 has hardly any foundation.'

The broad proposition laid down in ILR 32 Cal. 479 and referred to above, has not been accepted even by the other High Courts.

18. In *Philomena Mendoza v. Dara Nusserwanji* AIR 1943 Bom. 338 Mr. Justice Chagla, had to consider the right of a Parsi illegitimate child to get maintenance from its putative father. The learned Judge held that there was no Code of Law which governs the Parsis in India. The learned Judge also held that under the English common law the father of an illegitimate child, so long as it remains illegitimate, is not recognised by the law of England for civil purposes and that such a father is under no obligation to provide for such a child.

The learned Judge also held that even a legitimate child has no right under the English common law to claim maintenance from its father. The learned Judge also held that there is no doubt that the illegitimate child before the court, had a statutory remedy given to it under Section 488 Cr. P. C. to, claim maintenance and that apart from that Statute,' there is no right under the common law to claim maintenance. The learned Judge, in dealing with the observation of the Calcutta High Court in ILR 82 Cal 479 observes as follows at p. 340 :

'With great respect to the learned Judges, apart from the fact that this particular observation is obiter, it is difficult to understand what are the general principles which they had in their mind. In a later decision of the same court in ILR 55 Cal.

730 : (AIR 1928 Cal 600) these observations of the court of Appeal in ILR'32 Cal 479, have been doubted. Mukerji, J. says (p. 741 of ILR Cal) : (at p. 604 of AIR): 'The broad proposition that under general principles the father or a child is bound to provide for its maintenance such as was suggested in ILR 32 Cal 479 has hardly any foundation'.

19. Though an appeal was made to the learned Judge in the Bombay case to consider the case of the party sympathetically on principles of justice, equity and good conscience, the learned Judge declined to accede to the request on the ground that such general principles cannot be invoked when the common law was the other way.

20. In *Minor Sarojini v. Ramanarayana Menon* 58 Cochin 542, a Full Bench of the Cochin High Court has also declined to accept the general observations made in ILR 32 Cal 479. Though there was difference of opinion in the Cochin case as to the maintainability of a declaratory suit of the nature mentioned therein, still all the learned Judges were unanimous in disapproving the wide observations made by the learned Judges in ILR 32 Cal 479. At page 551 of the said report it is observed as follows :

'No doubt in that judgment there is an observation that apart from everything else on general principles of equity the defendant, having begotten the child, is bound to provide its maintenance if that is necessary. If this observation is correct, then of course it amounts to saying that apart from the Criminal P. C. and the personal law governing the parties, an illegitimate child is entitled to maintenance from its putative father on general principles of equity alone. With great respect to the learned Judges who said so, I am of opinion that the above proposition is incorrect. As far as India is concerned, an illegitimate child has no right of maintenance as against a putative father on the grounds of equity alone. This court has never recognised such a principle, and as far as I am aware, apart from the above observation occurring in the above Calcutta decision, there is no authority in British India as well'.

My Lord the learned Chief Justice, who was also one of the learned Judges constituting the Full Bench in the Cochin decision, observes at page 555 as

follows :

'I may also add that I concur in the view that the broad proposition enunciated in ILR 32 Cal 479 that under general principles the father having begotten the child, is bound to provide for its maintenance, is not well founded in law. The observation made by the learned Judges in that case to the effect that a father is so liable is mere obiter and in AIR 1928 Cal 600 two learned Judges Mukherji and Graham JJ., of the same court doubted the correctness of the said observation. The whole question has been thoroughly examined in a recent decision of the Bombay High Court reported in AIR 1943 Bom 338. I respectfully agree with the view taken by the learned Judge (Chagla, J.) in that case and the reasons therefor. The head-note of that case so far as it is relevant for our present purpose is in these words : The only duty of a father to maintain such (illegitimate) children is merely a moral obligation or a duty of imperfect obligation. A civil suit for maintenance for such a child is not maintainable even on general principles of justice, equity and good conscience'.

21. Again the Travancore-Cochin High Court in the decision reported in Chakko Daniel v. Daniel Joshua, 1952 Ker LT 595 : (AIR 1953 Trav-Co. 61), consisting of my Lord the Chief Justice and Mr. Justice Govinda Pillai, had occasion to consider the observations in the Calcutta case. The learned Chief Justice, who 'delivered the leading judgment, reaffirmed the views expressed about the Calcutta decision in 38 Cochin 542. This decision also shows that in such cases the illegitimate child will be governed by the personal law of its mother and the question will have to be considered whether the personal law of the mother allows illegitimate children to claim maintenance.

22. To a similar effect is the decision in Lingappa Goundan v. Esudasan, ILR 27 Mad 13. In that case, a Hindu father had an illegitimate child by a Christian woman and the learned Judges held that the illegitimate son in that case could not be regarded as a Hindu by birth, as his mother was a Christian and that in consequence, he was not governed by Hindu law and was not entitled to maintenance. The suit was for recovery of maintenance out of the assets of the deceased father who was a Hindu Sudra and the said right was negatived. The

learned Judges (Benson and Bashyam Ayyengar, JJ.) also held that an illegitimate child is entitled to claim maintenance from its father under Section 488 of the Cr. P. C. Such claim can only be enforced during the lifetime of the father and the right terminates with his death.

23. With great respect to the learned Judges who made the observations in ILR 32 Cal 479 we are not able to subscribe to the view, that apart from the personal law of the parties, an illegitimate son will be entitled to claim maintenance on general principles that a person having begotten the child is bound to provide for its maintenance, if that is necessary. In our opinion, apart from any rights conferred upon such a child by Statute or the personal law, there is no scope for falling back upon any general principles as laid down by the learned Judges of the Calcutta High Court. In this case, the plaintiff is governed by the personal law of its mother namely, Hindu law. The question is whether under Hindu law the plaintiff who is an illegitimate daughter, is entitled to claim maintenance from her putative father's assets.

24. Mr. C.K. Viswanatha Ayyar relied upon the decision of Mr. Justice Kumaraswami Sastry reported in *Natarajan v. Muthiah Chetty*, AIR 1926 Mad. 261. In that case, the illegitimate sons and daughters of a Hindu claimed maintenance from their putative father. The third plaintiff in that case was the daughter and we are only concerned with the decision regarding her rights. Though it was contended that there is no rule of Hindu law under which maintenance can be awarded to an illegitimate daughter, the learned Judge overruled this contention and held that even an illegitimate daughter can be considered to be a member of the family of an illegitimate father.

The learned Judge further held that if the illegitimate daughter could be considered to be a member of the family of the illegitimate father, under general law, she would be entitled to claim maintenance. In this view, the learned Judge held that there is no reason, either in justice or equity, to hold that illegitimate daughters are entitled to no right against the putative father and awarded maintenance to the illegitimate daughter till she attains the age of 18 or is married, whichever is earlier.

This decision need not detain us very much because the award of maintenance by this learned Judge to an illegitimate daughter was set aside on appeal, by Krishnan and Odgers, JJ, in the decision reported in *Vellaivappa Chetty v. Natarajan* AIR 1927 Mad 386. The learned appellate Judges confirmed the decision of Mr. Justice Kumarswamy Sastry regarding the award of maintenance to the illegitimate sons, but set aside the decree of the learned Judge in so far as it granted maintenance to an illegitimate daughter under Hindu law. At page 889, Mr. Justice Krishnan observes as follows :

'As to the question of the claim for maintenance by the illegitimate daughter, the 3rd plaintiff, it seems to me that there is some difficulty in the matter. The learned trial Judge has given her also maintenance on the ground, so far as I can make out that she is a member of the joint family. The learned Judge says- that the father being bound to maintain his illegitimate daughter, the coparceners who take his property by survivorship are equally bound to do so. It seems to me that there is no legal basis in Hindu Law for the view that the father is bound to maintain his illegitimate daughter; he is under no more than a personal obligation to do so under the Criminal Procedure Code. An illegitimate daughter gets no kind of right against her father's property so far as I can make out. There is no text in her favour, the Mitakshara being expressly confined to sons.'

Again on the same page the learned Judge further observes :

'It seems to me that whether the child is legitimate or illegitimate, it has got a personal right of maintenance against its father only during its minority when it is unable to look after itself and that the right under the Hindu law to get maintenance out of the 'father's estate in lieu or a share in it is a different right. It is not possible to postulate that the illegitimate daughter of a person is a member of the joint family to which he belongs.'

Finally after referring to certain decisions the learned Judge winds up the discussion as follows at page 390 :

It would follow from this that she had no right of maintenance either, which is something given in lieu of the right of succession.'

25. The other learned Judge, Mr. Justice Odgers, after discussing the right of an illegitimate daughter to get maintenance finally concludes at page 391 as follows :

'There is no case that has been cited to us where an illegitimate daughter has been held entitled to maintenance from the joint family property of which the father was a member. I do not think we shall be justified on the general ground that the father should provide for his infant children or by some generality of language that an illegitimate daughter is a member of the family ingrafting a further exception in Hindu law in her; favour.'

In the end, Mr. Justice Odgers agreed with Mr. Justice Krishnan in setting aside that part of the judgment of Mr. Justice Kumaraswami Sastry awarding maintenance to the illegitimate daughter, who was the third plaintiff in that litigation.

26. We may also observe that there was a further appeal to the Privy Council against the decision of the appellate Judges confirming the decision of Kumaraswamy Sastry, J. granting maintenance to the illegitimate sons. The decision of the Privy Council is reported in *Vellaiyappa Chetty v. Natarajan* AIR 1931 PC 294. The whole controversy before the Privy Council again was only regarding the award of maintenance to the illegitimate sons. The judgment of the High Court was affirmed by the Privy Council in that respect, though for slightly different reasons. But the point is, that the negating of the right of the illegitimate daughter to get any maintenance was not challenged before the Privy Council by the party aggrieved and the Privy Council had no occasion to consider that question, as it was not the subject of dispute before the Privy Council.

27. The following decisions of the Nagpur and Orissa High Courts also are to the effect that an illegitimate daughter is not entitled to claim maintenance under Hindu Law from her putative father. -- (See *Champabai v. Raghunath Rao Govinda Rao* AIR 1946 Nag 253; *Pandurang v. Mt. Sonabai* AIR 1949 Nag. 159 and *Sm. Padmavatj v. Ramachandra* AIR 1951 Orissa 248. All these decisions have accepted the principles laid down by the Madras High Court regarding illegitimate daughters in the decision reported in AIR 1927 Mad 386.

28. In our opinion, whether the principles of Hindu law apply or whether the principles of Mohammadan law apply, the plaintiff in this case who is an illegitimate daughter, is not entitled to claim maintenance from the putative father or from his assets left by him apart from any rights that may have been conferred on her by Statute. In this litigation, no rights are claimed based upon any Statute.

29. In the result, the second appeal fails and is dismissed. Parties will bear their costs in this second Appeal.

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