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Court : Kerala

Decided On : Oct-28-1988

Reported in : 1989CriLJ1527

Judge : P.C. Balakrishna Menon and; K.G. Balakrishnan, JJ.

Appellant : Jose

Respondent : Alice and anr.

Judgement :

P.C. Balakrishna Menon, J.

1. The petitioner Jose and the 1st respondent Alice both Roman Catholic Christians - were married according to their religious rites on 15-1-1981 in the Santhipuram Church, The marriage was solemnized by a minister of the Roman Catholic Church according to the rules, rites, ceremonies and customs of the church. It is not disputed that the minister had received episcopal ordination and was competent to solemnize the marriage under Sub-section (1) of Section 5 of the Indian Christian Marriage Act, 1872. After marriage the couple resided in the house of the petitioner for 2 1/2 months. During the course of their stay together the petitioner suspected the chastity of the wife. According to him she was pregnant even at the time of the marriage. The pregnancy was terminated at the instance of the petitioner and the respondent wife was left at her parents' house. The petitioner thereafter filed an application before the Archdiocesan Tribunal,

Ernakulam to declare the marriage as null and void and the Tribunal by Ext.D1 decree granted a declaration as prayed for. The matter was taken in appeal before the Eparchial Tribunal, Trichur and as per its order Ext.D2 the decision of the Archdiocesan Tribunal declaring the marriage as null and void was confirmed. The respondent thereafter filed a petition under Section 125(1) of the Cri. P.C. in the court of the Chief Judicial Magistrate, Trichur against the petitioner for maintenance. Overruling the contention of the petitioner that the marriage is null and void, and it has been so declared by the ecclesiastical tribunals, the learned Magistrate ordered the petitioner to pay maintenance at the rate of Rs. 200/- per month from the date of the petition. The decision of the Magistrate was confirmed in revision by the learned Sessions Judge. The present petition is under Section 482 Cr. P.C. to quash the decision of the Magistrate and the Sessions Court directing the petitioner to pay maintenance to the respondent.

2. According to the petitioner he was not aware of the pregnancy of the respondent on the date of the marriage and his consent for the marriage was obtained by fraud in withholding such a vital information. It is for that reason that the petitioner contended that the marriage is null and void and the contention was accepted by the acclesiastical tribunals as per Exts. D1 and D2.

3. Learned Counsel for the petitioner Sri M. I. Joseph has raised two contentions before us viz. (1) that the marriage solemnized according to the rules, rites, ceremonies and customs of the church to which the parties belong had been declared by the acelesiastical tribunals to be null and void as per Exts. Dl and D2 and the respondent is not his wife entitled to maintenance under Section 125(1) of the Cr. P.C., and (2) even if the decision of the acclesiastical tribunals is not to be treated as final and conclusive between the parties, the courts below should have considered the question of fraud alleged by the petitioner in extending the consent for the marriage.

4. A Christian marriage is more a sacrament than a contract and is not dissoluble except by resort to the statutory provisions in that behalf. In Hyde v. Hyde and Woodmansee (1866) LR 1 P & D 130 Lord Panzance referring to the implications of the Christian marriage stated:

Marriage has been well said to be some thing more than a contract, either religious or civil - to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that, it confers a status. The position or status of 'husband' and 'wife' is a recognized one throughout Christendom; the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What then is the nature of this institution as understood in Christendom V Its incidents vary in different countries, but what are its essential elements and invariable features If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

Lord Romer referring to the above passage of Lord Penzance stated in Nachimson v. Nachimson (1930) P 217 at page 239:

The only words in this definition that create any difficulty are the words 'for life'. Lord Penzance's judgment was given in the year 1866 at a time therefore when the Matrimonial Causes Act of 1857 had been in operation for several years, and at a time when in most Christian countries a marriage could be dissolved for various causes. It seems clear therefore that in deciding whether any particular union of one man and one woman is for life, the fact that the union is made dissolube in certain events by the laws of the country where it is entered must be disregarded. This is in precise accordance with the statement made by Lord Brougham in (1835) 2 Clause & F. 488 that dissolubility or indissolubility is not of the assence of the contract of marriage.

5. The Indian Divorce Act, 1869 as its preamble shows was passed 'to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial'. Section 18 of the Act enables the husband or the wife to present a petition to the District Court or the High Court praying that his or her marriage may be declared as null and void. Section 19 enumerates the grounds on which the court may pass a decree of

nullity of marriage. There are four grounds mentioned in the main part of the section. Those grounds are : (1) impotency of the respondent at the time of marriage and at the time of the institution of the suit; (2) prohibited degrees of consanguinity or affinity between the parties; (3) that either party was a lunatic or idiot at the time of the marriage; and (4) that the respondent had a former spouse living and the marriage with the former spouse was in force at the time of the marriage. Apart from the four grounds mentioned above the section preserves the exclusive jurisdiction of the High Court to pass decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud. A petition for declaration of nullity of marriage on any of the four grounds mentioned in the main part of Section 19 can be filed either in the High Court or in the District Court. But, any decree of nullity of marriage passed by the District Judge shall be subject to confirmation by the High Court as provided for in Section 20 of the Act.

6. Jaganmohan Reddy, J. in T. Saroja David v. Christie Francis : AIR 1966 AP178 considering Sections 18 and 19 of the Indian Divorce Act stated at page 179:

It may be observed that in so far as dissolution of marriage and nullity of marriage on the specific grounds stated in Section 19 are concerned both the District Court and the High Court have concurrent jurisdiction and when the case is one for declaration of nullity of marriage on the ground of force or fraud, the exclusive jurisdiction of the High Court is saved. In order to understand what this jurisdiction is, it is necessary to refer to the history of that jurisdiction. Originally, the eccelesiatical Courts in England were empowered to deal with matrimonial matters. The Surpeme Court in India which was administering the English law as it was on a particular day, had inherited this jurisdiction from the Ecclesiastical Courts. Ultimately, by statute the High Courts have inherited their jurisdiction direct from the Supreme Courts. Thus the power to make decrees of nullity of marriage on the ground of duress or fraud was inherited by the Supreme Courts from the Ecclesiastical Courts and the High Courts inherited that power from the Supreme Courts. This Court has, therefore, clear jurisdiction to entertain this petition.

The above passage was quoted and followed by a Full (special) Bench of the Karnataka High Court in B. Ignatius Anthoney Jayaraj v. Immy Margaret Florence

AIR 1978 Kant 69. Malimath, J. as he then was on behalf of the Full Bench stated at page 70:

So far as the decree of nullity of marriage on the ground of force or fraud is concerned, the same can be obtained only by presenting a petition to the High Court which has a residuary jurisdiction to deal with a petition for dissolution of marriage on the ground that consent of either party was obtained by force or fraud. This view of ours receives full support from a decision of the Andhra Pradesh High Court reported in T. Saroja David v. Christie Francis : AIR 1966 AP178 .

7. Marriage between the parties creates civil rights and the ecclesiastical tribunals have no jurisdiction to annul marriages involving the civil rights of parties. In J. F. S. Eric D'Souza v. Florence Martha : AIR1980 Delhi275 a Full Bench of the Delhi High Court held at p. 277:

The ecclesiatical law under which the marriage was dissolved by the Church cannot, however, affect or govern the Civil Law.

It was a case where the respondent wife had addressed a letter to His Holiness Pope Paul VI for grant of a dispensation dissolving the marriage between the petitioner and herself on the ground of non-consummation. The Church after investigation had granted the prayer dissolving the marriage and a communication to that effect had been issued to the petitioner from the Chancellor of the Archdiocese of Delhi. Sreedharan, J. in Kurian v. Alphonso 1986 Ker LJ 585 has taken the view that when Parliament has enacted a law providing for dissolution and for a decree of nullity of Christian marriage, Eparchial Tribunals have no jurisdiction to adjudicate upon such matters so as to affect the civil rights of the parties to the marriage. The learned Judge has followed the following observation of Lord Blackburn in Re V. Alexander H. Mackonochie v. The Hon. Lord Panzance and John Martin (1880-1) 6 AC 424:

I think that there is authority for saying that the temporal Court, proceeding in prohibition to restrain excess of jurisdiction in the court of Ecclesiastical, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters.

8. Asobserved by Jaganmohan Reddy, J. in Saroja David's case : AIR 1966 AP178 (supra) the Jurisdiction of ecclesiatical courts had been inherited by High Court and by virtue of the provisions contained in Sections 18 and 19 of the Indian Divorce Act, jurisdiction to declare nullity of marriage has been conferred on the District Court and the High Court. We, therefore, hold that the decisions of the Archdiocesan Tribunal and the Eparchial Tribunal do not in any way affect the civil rights of the parties arising out of the marriage between them duly solemnized in accordance with Section 5(1) of the Indian Christian Marriage Act, 1872 by a minister of the church who had received episcopal ordination.

9. The next question is whether the courts below were right in directing payment of maintenance to the respondent without considering the question of validity of the marriage. According to the petitioner his consent for the marriage was obtained by fraud suppressing the pregnancy of the respondent through some other person. Counsel for the petitioner relies on the decision of the Supreme Court in Yamunabai Anantrao v. Anantrao Shivaram (1988) 1 Ker LT 416 : (1988 Cri LJ 793) in support of the proposition that unless the marriage is valid, the respondent is not the wife entitled to claim maintenance under Section 125 of the Cr. P.C. The case before the Supreme Court arose out of proceedings under Section 125 of the Cr. P.C. instituted by a Hindu woman for maintenance against the respondent said to be her husband. There was a marriage between the parties at a time when the respondent had his wife living and the marriage between them was subsisting. The Supreme Court construing Section 11 of the Hindu Marriage Act held that there was no valid marriage between the parties to the proceedings and the expression 'wife' in Section 125 of the Cr. P.C. would mean a lawfully wedded wife including also a divorced wife within the meaning of the section. It is held at page 418 (of Ker LT) : (at P. 795 of Cri LJ):

The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Althogh the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose.

This decision was followed by the Supreme Court in Bakulabai v. Gangaram (1988) 1 Ker LT 413.

10. Section 11 of the Hindu Marriage Act declares any marriage solemnized after the commencement of the Act to be null and void if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5 of the Act. The section itself contains a declaration of invalidity of the marriage and when the question arises the court is bound to consider whether a person claiming to be the wife is the legally wedded wife of the respondent. The Indian Divorce Act does not contain any such declaration. It has only conferred jurisdiction on the courts specified in Section 18 to pass a decree declaring the marriage between the parties as null and void for any of the grounds mentioned in Section 19. A statutory declaration as found in Section 11 of the Hindu Marriage Act is absent in the Indian Divorce Act, 1869 and the exclusive jurisdiction of the High Court to declare invalidity of marriage on the ground of consent obtained by force or fraud cannot be exercised by any other court or tribunal. The concurrent jurisdiction of the District Court in regard to the four grounds mentioned in Section 19 is also subject to confirmation by the High Court under Section 20 of the Act. The decision of the Supreme Court in Yamunabai's case 1988 Cri LJ 793 (supra) confirming the Full Bench decision of the Bombay High Court in Yamunabai v. Anantrao 1983 Cri LJ 259 does not apply to the present case where the question of validity of the marriage between the parties is to be adjudged in accordance with the Indian Divorce Act. The decision of a learned single Judge of this Court in Moni v. State (1987) 1 Ker LT 34 was also relating to the validity of the marriage under Section 11 of the Hindu Marriage Act and has no application to a case where the validity of the marriage has to be considered with reference to Section 19 of the Indian Divorce Act.

11. In Santhakumari v. Padmanabhan 1985 Ker LT 42 a learned Judge of this Court held that in proceedings under Section 125 of the Cr. P.C. the Magistrate is bound to consider the factum and validity of the marriage between the parties. It was a case where the factum fo marriage was itself in dispute and the Sessions Judge in revision had dismissed a petition for maintenance directing the parties to have the dispute settled by a civil court. It was in that context that the learned

Judge held that the factum and validity of the marriage are to be decided in the same proceedings arising out of the petition instituted under Section 125 Cr. P.C. It was not a case to which the Indian Divorce Act applied and no question of exclusive jurisdiction of the courts mentioned in Section 18 of the said Act arose for decision in that case. The decision of a Division Bench of this Court in Amina v. Hassan Koya 1985 Ker LT 596 (1985 Cri LJ 1996) relating to the validity of a Mohammedan marriage at a time when the woman was pregnant through some other person had necessarily to be based on the Muslim Law on the subject in the absence of any statutory provision. The learned Judges held that the marriage is void under the Mohammedan Law and the woman is not entitled to maintenance as she is not a wife within the meaning of S. l25 Cr. P.C. This decision also is not an authority for a case like this where the validity of the marriage is to be adjudged in the light of Section 19 of the Indian Divorce Act.

12. A recent decision of a single Judge of this Court in Gabriel Antony v. Thressya Gracy (1987) 1 Ker LT 690 : 1987 Cri LJ 688 relates to a claim for maintenance by wife against her husband under Section 125(1) of the Cr,P.C. The parties in that case are Indian Christians and the Indian Divorce Act, 1869 is applicable to them, The husband raised a contention that his consent for marriage was obtained by fraud in that the wife had concealed her pregnancy at the time of marriage. Accordingly it was contended that the marriage was null and void and the petitioner is not entitled to claim maintenance under Section 125(1) Cr. P.C. as a 'wife' against the respondent. The learned Judge considered the different grounds for a decree of nullity of marriage enumerated in Section 19 of the Indian Divorce Act and held that grounds 2 and 4 viz. the parties being within the prohibited degree of consanguinity and the subsistence of an earlier valid marriage would ipse jure invalidate the marriage even without resort to the provisions of Section 18 of the Act. The other grounds viz. impotency, lunacy or idiocy and want of a valid consent, according to the learned Judge, are all matters which require an adjudication by the court under Section 19 of the Act. The reason mentioned is that in regard to ground (1) impotency at the time of filing of the application is as crucial as impotency at the time of marriage arid hence no court can treat or declare a marriage as null and void on that ground other than the court before which an application can be filed under Section 18 of the Act. But in regard to the

2nd and 4th grounds mentioned in Section 19 viz, the prohibited degree of consanguinity and the subsistence of an earlier marriage, the parties cannot improve the position and, even if they agree, cannot validate the marriage. Hence according to the learned Judge the marriage is void ipse jure. The learned Judge at page 695 (of Ker LT) : (at P. 692 of Cri LJ) states:

12. If the initial defect is not curable by subsequent concurrence, as in the case of subsistence of an earlier marriage, or in the case of a marriage between parties within prohibited degree of consanguinity, the marriage is void irrespective of whether the same is avoided or not by other party concerned. But if that defect is curable by concurrence the marriage becomes void only if it is avoided as in the case of insanity at the time of marriage, or want of voluntary consent for the marriage. So the word 'void' in Section 19 is susceptible to the above two connotations depending upon the context. Therefore, the purposeful interpretation is that such a marriage is null and void when the aggrieved spouse elects to avoid it.

The learned Judge has given a purposive interpretation of the word 'void' occurring in Section 18 (wrongly stated as Section 19) to come to the above conclusion that in regard to grounds in respect of which the parties cannot condone, the marriage is void even without a declaration to that effect and in regard to the other grounds the marriage is only voidable at the option of either of the parties and can be declared void by a decree of court under Section 19 of the Act.

13. Section 18 enables either the husband or the wife to present a petition to the District Court or the High Court praying that his or her marriage may be declared null and void. Section 18 only gives an option to the parties to approach the court for a declaration of nullity of marriage on any of the grounds mentioned in Section 19 of the Act. Sections 18 and 19 make it abundantly clear that a decree of nullity of marriage is contemplated only on presentation of a petition by either of the parties to the marriage. The statute does not declare a marriage void even if any of the grounds in Section 19 is attracted. The statute confers jurisdiction on the District Court or the High Court to declare a marriage null and void. The jurisdiction inherited from the ecclesiastical courts referred to by Jaganmohan Reddy, J. is

thus dealt with under the statute and the latter part of Section 19 merely preserves the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party for the marriage was obtained by force or fraud. It is only optional for the parties to make an application under Section 18 of the Act and a decree declaring the marriage null and void can be passed only on presentation of such a petition by either of the parties to the marriage. There is, therefore, no scope for extending the principle of purposive interpretation when the section only authorises the court to pass a decree declaring the marriage as null and void. The learned Judge at page 695 (of Ker LT) : (at P. 692 of Cri LJ) states that the word 'void' in Section 19 shall, subject to the context, mean 'voidable' as well. The word 'void' does not appear in Section 19. It appears only in Section 18 and that section provides only for a petition by the husband or the wife praying that his or her marriage may be declared null and void. Section 19 authorises the court to pass a decree of nullity on any of the grounds mentioned therein. The marriage becomes null and void only on me passing of a decree of nullity by the court. The effect of such a decree, if passed, is that the marriage is rendered null and void ab initio. If either of the parties does not choose to file a petition as contemplated by Section 18, the marriage is not rendered void even if any of the grounds capable of invalidating the marriage is present and available to the parties to have recourse to the procedure established by the Act. When Section 18 gives only an option to the parties to present a petition for a decree declaring the marriage null and void, it cannot be said that the marriage is void ipse jure for the reason of ground 2 or 4 mentioned in Section 19 of the Act. It is also not correct to say that these grounds do not postulate any adjudication. These are grounds to be established on facts proved and it cannot be said that Section 19 of the Act is capable of rendering the marriage void without recourse to an adjudicatory process. We therefore hold that a Christian marriage can be declared null and void only by a decree of court as provided for in Sections 18 and 19 of the Indian Divorce Act and the marriage is not rendered void for any of the grounds enumerated in Section 19.

14. When the marriage is solemnized by a minister of the church in accordance with Sub-section (1) of Section 5 of the Indian Christian Marriage Act, it should be presumed that the marriage is valid and the minister had satisfied himself that the parties had voluntarily given consent for the marriage. A Christian marriage is a

sacrament and it cannot be dissolved except by recourse to the procedure under Section 18 and on one or the other of the grounds mentioned in Section 19 of the Indian Divorce Act. In the absence of a decree of nullity of marriage, the Magistrate exercising the jurisdiction under Section 125 of the Cr. P.C. is bound to accept the marriage as valid. The Code itself provides for cancellation of an order for maintenance where such cancellation is found necessary in consequence of any decision of a competent civil court (vide Section 127(2) of the Cr. P.C.).

15. The Supreme Court in Lakshmi Sanyal v. Sachit Kumar Dhar : [1973]2SCR122 approving the dictum in Lopez v. Lopez (1886) ILR 12 Cal 706 (FB) stated at page 133 (of SCR) : (at P. 2673 of AIR:

It was further held that where a man and a woman intended to become husband and wife and a ceremony of marriage was performed between them by the Clergyman competent to perform a valid marriage the presumption in favour of everything necessary to give validity to such a marriage was one of very exceptional strength and unless rebutted by evidence strong, distinct, satisfactory and conclusive must prevail. In the subsequent decision H. A. Lucas v. Theodoras Lucas 1905-ILR 32 Cal 187 the earlier decision in Lopez v. Lopez 1886-ILR 12 Cal 706 (FB) was referred to and followed.

Referring to Sub-section (1)(a) of Section 125 Cr. P.C. the Supreme Court in Yamunabai's case (supra) stated at page 419 (of (1988) 1 Ker LT 416) : (at p. 796 of 1988 Cri LJ 793):

6. The attempt to exclude altogether the personal law applicable to the parties from consideration also has to be repelled. The section has been enacted in the interest of a wife, and one who intends to take benefit under, Section 125(1)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes her status or relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the section is estabilised by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law.

There is no dispute that the marriage in the present case was solemnized in accordance with the personal law applicable to the parties. The minister who had received episcopal ordination and had solemnized the marriage in accordance with Sub-section (1) of Section 5 of the Indian Christian Marriage Act of 1872 should be presumed to have ensured that the parties had given free consent for the marriage and such presumption will hold the field until the High Court passes a decree of nullity of marriage on the ground of force or fraud in obtaining the consent.

16. Pathak, J. as he then was in his concurring judgment in Lila Gupta v. Laxmi Narain : [1978]3SCR922 quotes the following observation of Dr. Lushington in Catterall v. Sweetman (1845) 9 Jur 951 at p. 954:

The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void...is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain for any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it.... From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity, unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity.

The above passage found in Craies on Statute Law, 6th Edn., pages 263 and 264 is quoted with approval by Desai, J. at page 1354.

17. For the aforesaid reasons we hold that 'the 1st respondent is the wife of the petitioner entitled to claim maintenance against him under Section 125(1) of the Cr. P.C. The social purpose of Section 125 of the Cr. P.C. is to prevent vagrancy and destitution. As observed by Varghese Kalliath, J. in Amina's case 1985 Cri LJ 1996 (Ker) (supra), the section is not intended to punish a husband or parent for his neglect, but to compel those who have a social and moral obligation to pay

maintenance to those who are unable to support themselves. The Supreme Court in Mohammed Ahammed Khan v. Shah Bano Begum : 1985 CriLJ875 .

The liability imposed by Section 125 is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion.

We see no ground to quash the impugned orders of the courts below. The Crl.M.C. is accordingly dismissed.

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