
S.K. Subbaraj and Others Vs Indirani

S.A. No. 711 of 1987

Court: Madras High Court

Date of Decision: April 9, 1999

Acts Referred:

Hindu Marriage Act, 1955 " Section 29(2), 3

Citation: (2000) 1 DMC 86 : (1999) 3 LW 327 : (1999) 2 MLJ 579

Hon'ble Judges: A. Subbulakshmy, J

Bench: Single Bench

Advocate: Vijayakumari Natarajan, for the Appellant; S.V. Jayaraman, S.C. for V. Venkatasamy, for the Respondent

Judgement

A. Subbulakshmy, J.
Plaintiffs are the appellants.

2. Plaintiffs filed the suit for declaration that they are the heirs of Govindaraj to receive all the benefits that may accrue to the legal heirs of

Govindaraj. They contend as follows: Second plaintiff is the mother of the deceased Govindaraj and the first plaintiff is his only brother. The said

Govindaraj died on 21.7.1982 while he was in Army service. The deceased Govindaraj married the defendant in the year 1964, but he had no

issues. There were ill-feelings between Govindaraj and the defendant which resulted in customary divorce before the mediators. As per the

directions of the mediators, the deceased Govindaraj paid a sum of Rs. 7,000/- to the defendant and a divorce deed was reduced to writing and

signed by Govindaraj and the defendant on 24.7.1978 at the Sub-Registrar's Office, Pandalgudi. The parties to the divorce belong to Kammavar

Naicker Community and customary divorce is recognised in their community. After the divorce, the defendant was living with another person and

lost the status of wife of the deceased Govindaraj. The deceased Govindaraj nominated the first plaintiff as his nominee to acquire all benefits of

pension and other amounts due to him in the event of his demise. So, as per the nomination of the deceased Govindaraj, he first plaintiff is entitled

to all the benefits which will accrue to the legal heir of the deceased Govindaraj. Since the defendant was divorced long before the death of

Govindaraj, she cannot claim any right or interest over the pension and other benefits which accrue to the legal heirs of the deceased Govindaraj.

The defendant is not the legal heir of the deceased Govindaraj. So, only the plaintiffs are the legal heirs of the deceased Govindaraj.

3. The defendant filed written statement contending as follows:

There was no serious ill-feelings between the deceased Govindaraj. He wanted to marry a second time. The defendant resisted it. But, later

yielded to the idea in the hope that a child might be born at least to the second wife of her husband. It was represented to her that since customary

divorce was not in vogue in the community, she should agree for divorce being effected by Court and that a petition for divorce would be filed in

the proper Forum. The defendant refused to that demand. It was, thereafter, suggested to her that they could not go to Court for divorce and that

she could continue to enjoy the status of senior wife. The defendant was threatened that if she does not agree for the suggestion of the plaintiffs,

there was likelihood of her being done to death. So, the defendant, out of pressure brought upon her agreed to be a party to such document. There

has never been any legal divorce effected between the defendant and the deceased Govindaraj. In Kammavar Naicker community, there is no

customary divorce. This defendant is not living with any other person. The first plaintiff cannot derive any benefit as the legal heir of the deceased

Govindaraj as per the Hindu Succession Act and only the second plaintiff and this defendant alone will be the legal heirs of the deceased

Govindaraj.

4. The Trial Court decreed the suit. The first Appellate Court set aside the judgment and decree of the Trial Court.

5. As against that judgment and decree, the present second appeal is preferred by the first plaintiff and the legal representatives of the second

plaintiff.

6. The substantial questions of law that were framed at the time of admission of the second appeal are as follows:

(i) When the custom permits customary divorce, it is necessary for the defendant's husband to get divorce through Court ?

(ii) Cannot the factum of custom in the community be proved by ancient, continuous and recent documents with supporting oral evidence ?

(iii) Even if the divorce is not effected, has not the second plaintiff, the mother, entitled to her share as heir ?

(iv) Can the documentary evidence be rebutted by oral evidence ?

(v) When the execution of a registered document is admitted by the defendant, can the defendant plead coercion and threat ?

(vi) Can there be no presumption that Ex. A2, a registered document is a genuine one and can that document be challenged ?

(vii) By Ex. A2, has not the defendant waived all her rights to the properties of her husband ?

7. The first plaintiff is the brother and the second plaintiff is the mother of the deceased Govindaraj. The deceased Govindaraj was in Army

service. He married the defendant in the year 1964. He died on 21.7.1982. According to the plaintiffs, since the defendant was divorced by the

deceased Govindaraj under customary divorce before the mediators, she ceased to be the wife of the deceased Govindaraj and so, she is not

entitled to receive the benefits of pension and other amounts due to the deceased Govindaraj and the plaintiffs alone are the legal heirs of the

deceased Govindaraj and they alone are entitled to the amount claimed. Thus, the plaintiffs have sought for the relief of declaration that they are the

legal heirs of the deceased Govindaraj to receive all the benefits that may accrue to the legal heirs of the deceased Govindaraj. The defendant

vehemently contends that no customary divorce was in vogue in their Kammavar Naicker Community and the deceased Govindaraj wanted to

marry a second time since the defendant and Govindaraj had no issue and even though the defendant initially resisted it, later, yielded to the idea of

the deceased Govindaraj with the hope that he may have a child through the second wife and only at his insistence, she signed the document under

pressure and there was no divorce between the defendant and the deceased Govindaraj and she is the legal heir of the deceased Govindaraj.

8. So, the point to be considered is as to whether any customary divorce was prevailing in the said community and whether the customary divorce

pleaded by the plaintiffs is true and valid.

9. The plaintiff relies upon the document Ex. A2 to prove customary divorce and also the evidence of PWs and contends that customary divorce

was prevailing in their community and it was effected between the deceased Govindaraj and the defendant ceased to be the wife of the deceased

Govindaraj after that customary divorce. The first plaintiff as P.W. 1 speaks in his evidence that as the defendant was not morally good, there

arose some misunderstanding between the defendant and his brother the deceased Govindaraj and so, customary divorce was effected after giving

a sum of Rs. 7,000/- to the defendant by the deceased Govindaraj and Ex. A2 was executed and registered. P.W. 1 further speaks in his evidence

that after that divorce, between the deceased Govindaraj and the defendant his brother the deceased Govindaraj has nominated the first plaintiff in

his official records under Ex. A6. The plaintiffs have also examined P.Ws. 2 to 9 to speak about the customary divorce. P.W. 2 states that as per

the custom in their community, there is customary divorce and for the past 50 years he had seen so many customary divorces. P.W. 3 states that

there is customary divorce and herself and her husband got customary divorce in the year 1961 and after that, there is no relationship of husband-

wife between them and she has filed Ex. A3 to prove her divorce. P.W. 4 states that he got customary divorce from his wife and he filed Ex. All

and he states that as per the custom in their community, they got customary divorce. He speaks that this kind of divorce was being done in the

presence of Panchayatdards. Later, he states that he does not know whether there was any custom like this to have such divorces previously.

P.W. 5 is another divorcee. He has spoken in his evidence about the divorce between himself and his wife under Ex. A5. He states that he came to

know about the customary divorce from the elders and this divorce is in vogue for about 30 years. P.W. 6 states that he had divorced his wife in

the year 1963 under Ex. A12. P.W. 7 states that she divorced her husband under Ex. A13 in the presence of Panchayatdards as per the custom in

their community. P.W. 8 states that he divorced his wife under Ex. A14. P.W. 9 has spoken in his evidence about the customary divorce in the

Kammavar community. He has spoken about Ex. A21 which relates to the divorce of his paternal uncle. He states that in their Kammavar

community, customary divorce was in vogue.

10. Relying upon the evidence of P.Ws. and the documents filed by them, learned Counsel for the plaintiff submitted that the customary divorce is

prevailing in the plaintiffs' community and as per the custom, the defendant was divorced by the deceased Govindaraj.

11. In none of the documents filed in support of this kind of divorces, viz., Exs. A3 to A5 and A11 to A14, there is a mention about the customary

divorce which was alleged to have prevailed in the community and only as per their communal custom, the respective parties in the documents have

effected the divorce. Further, the documents relate to the period after the enactment.

12. The first plaintiff as P.W. 1 speaks in his evidence that his brother the deceased Govindaraj and the defendant got divorced in the presence of

the mediators and as per the decision of the mediators his brother the deceased Govindaraj paid Rs. 7,000/- to the defendant and it is the custom

in their community to have such divorces in the presence of the mediators and it was in vogue for a long time.

13. P.W. 1 is aged about 25 only. He is not a right person to speak about customary divorce which prevailed in the ancient times.

14. Learned Counsel for the defendant submitted that the defendant was not divorced by a decree of Court and customary divorce pleaded by the

plaintiff must be established by the plaintiff and it must be proved on the side of the plaintiffs. He further submitted that all the documents and the

witnesses on the side of the plaintiffs are only with regard to divorce relating to the period after the enactment of Hindu Marriage Act and those

documents are of no avail and it must be established by the plaintiffs that customary divorce was ancient and it was prevailing in their community

for a long time and prior to passing of the Act there was such customary divorces and as the plaintiffs have failed to substantiate that by filing

documents, the case of the plaintiffs has to fall to the ground.

15. The Hindu Marriage Act came into force on 18.5.1955. Section 29(2) of this Act reads thus :

Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the

dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act.

Relying upon the above provision, Counsel for the defendant submitted that custom must be ancient and there must be proof of customary divorce

prior to passing of the Act and as all the documents filed are after the Act, that will not prove custom. He further submitted that the evidence of

P.W. 1 is that in the presence of Panchayatdars, divorce had taken place and so, it is not the custom and it does not prove that customary divorce

was prevailing in their community and it was ancient and prior to passing of the Act. To prove customary divorce, the plaintiff must establish the

proof of custom. As regards the nature and quantum of proof of custom, the following propositions are enunciated by this Court in Gopalayyan v.

Ragupatiayyan, 7 MHCR 250 :

(i) The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting

in accordance with the law and this conviction must be inferred from the evidence.

(ii) Evidence of the acts of the kind, acquiescence in those acts, decisions of Courts, or even of Panchayats, upholding such acts; statements of

experienced and competent persons of their belief that such acts were legal and valid, will all be admissible; but it is obvious that although

admissible evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.

Even though there is oral evidence of P.Ws. 1 to 8, those witnesses: have spoken about the divorces which took place after passing of the Act and

they have not spoken with regard to divorce relating to the period prior to passing of the Hindu Marriage Act. The evidence on the side of the

plaintiffs must satisfy the Court with regard to customary divorce. Any amount of document filed which came into existence after coming into force

of the Act will not amount to proof of custom. The evidence of PWs is that there is customary divorce in their Kammavar community. P.W. 1's

evidence does not speak about the customary divorce. He says that the divorce between the defendant and the deceased Govindaraj was effected

in the presence of Panchayatdars. The plaintiffs also rely upon the document Ex. A2 to prove the divorce. In Ex. A2; there is no mention with

regard to customary divorce.

16. Counsel for the plaintiff submitted that Ex. A2 is a registered document and under Ex. A2, the defendant was paid Rs. 7,000/- by the

deceased Govindaraj and there is no relationship of husband and wife between the deceased Govindaraj and the defendant thereafter.

17. No acceptable evidence is produced on the side of the plaintiffs with regard to customary divorce. The custom cannot also be created by an

agreement between parties as under Ex. A2 so as to bind upon others. Section 3(a) of the Hindu Marriage Act defines custom and usages thus :

the expression ""custom"" and ""usage"" signify any rule which having been continuously and uniformly observed for a long time, has obtained the force

of law among Hindus in any local area, tribe, community, group of family :

Provided that the rule is certain and not unreasonable or opposed to public policy; and provided further that in the case of a rule applicable only to

a family it has not been discontinued by the family.

So, the custom must have been observed for a long time and it must be ancient. In pages 49 and 50 of the Mayne's Hindu Law and Usage, it is

observed that-

The beginnings of law were in Customs. Law and usage act, and react, upon each other. A belief in the propriety, of the imperative nature of a

particular course of conduct, produces a uniformity of behaviour in following it; and an uniformity of behaviour in following a particular course of

conduct produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage

has moulded the life, and regulated the dealings, of a particular class of the community, it becomes a custom which is a part of their personal law.

The plaintiff has not let in any evidence to show any existence of customary divorce preceding the Act. No document is filed relating to the period

prior to passing of the Act. The oral and documentary evidence do not establish that there was customary divorce prevailing in the Kammavar

community.

18. Much reliance is placed upon Ex. A2 which is styled as divorce deed and registered. The recital of Ex. A2 is that as there was difference of

opinion between the defendant and her husband, it was decided in the presence of Panchayatdars that divorce must be effected between them and

accordingly, the divorce deed has been executed and registered and in the presence of the Sub-Registrar, the defendant received a sum of Rs.

7,000/- and after the execution of Ex. A2, there is no relationship of husband and wife between the deceased Govindaraj and the defendant and

each cannot claim any right over the other. No customary divorce is mentioned in Ex. A2. It is simply stated as in the presence of Panchayatdars,

the decision with regard to divorce of the defendant with Govindaraj was effected. A divorce must be by a decree of Court or by customary

divorce. First one is not available in this case. Even with regard to the latter, customary divorce/there is no proof. No amount of recital is found

under Ex. A2 with regard to customary divorce. In the absence of customary divorce, Ex. A2 will not establish customary divorce between the

defendant and the deceased Govindaraj. Mere registration of that document will not cure that defect. So, basing upon Ex. A2, the plaintiffs are not

at all entitled to contend that divorce was effected between the deceased Govindaraj and the defendant and the defendant is not the wife of the

deceased Govindaraj. Until the marriage is dissolved by means of a Court decree or by customary divorce, the defendant continues to be the wife

of the deceased Govindaraj. Any amount of execution of any documents will not establish the divorce and basing upon Ex. A2, the plaintiffs cannot

claim that the defendant was divorced and the plaintiffs alone are the legal heirs of the deceased Govindaraj. The Court has held in Thangammal

Vs. Gengayammal and Others, , that:

There was proof of a custom in a community permitting divorce if both the husband and wife desired a divorce on account of disagreement

between them and there was no alternative plea in the case by the wife that even if there was a divorce it was forced upon her and that the custom

was not illegal and it is only where the divorce is enforced against the wish of the wife that the custom permitting divorce may be illegal.

It is held in Nallathangal v. Nainan Ambalam, (1960) 1 MLJ 134, that-

Hindu Law no doubt does not recognise a divorce, but custom in particular communities permit a valid divorce by means of a caste Panchayat or

other similar tribunal. Such customary divorces continue to have the force of law among the communities where the custom prevails.

It is held in Are Lachiah v. Are Raja Mallu, 1963 MLJ 212, that-

Section 29(2) of the Hindu Marriage Act states that, nothing contained in this Act shall be deemed to affect any right recognised by custom or

conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this

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 a customary divorce or dissolution of a Hindu marriage.

In the matter of divorce according to custom it is not necessary for the parties to such a divorce or dissolution of Hindu marriage to have again to

go before the Court u/s 10 or 13 of Hindu Marriage Act and obtain sanction of the Court in order that the divorce or dissolution may be rendered

valid.

19. Even though the plaintiffs have examined 8 witnesses to speak about customary divorce, their evidence do not establish with regard to

prevailing of custom in their Kammavar community. Their evidence do not prove customary divorce pleaded by the plaintiffs. Even the document

Ex. A2 is not helpful to the plaintiffs to come to the conclusion that customary divorce was effected. So, absolutely, there is no proof with regard to

customary divorce pleaded by the plaintiffs. So, the defendant, who is admittedly the wife of the deceased Govindaraj continues to be his wife and

she is the legal heir of the deceased Govindaraj. The second plaintiff is the mother of the deceased Govindaraj. Both the mother and the wife come

under Class I heir under the Hindu Succession Act, so, the second plaintiff and the defendant are the legal heirs of the deceased Govindaraj each

being entitled to half share of the amount due to the deceased Govindaraj.

20. Counsel for the plaintiffs submitted that by virtue of Ex. A2, since the defendant has received a sum of Rs. 7,000/- relinquishing her rights, she

is not entitled to claim any amount due to the deceased Govindaraj and she is estopped from claiming that amount.

21. Until a valid divorce between the defendant and the deceased Govindaraj is effected, it cannot be contended by the plaintiffs that the defendant

executed some document disclaiming her right after receiving some consideration which disentitled the defendant from claiming her right in the

amount due to her husband, the deceased Govindaraj. As I have already indicated, until a valid divorce is effected, the defendant continues to be

the wife of the deceased Govindaraj which entitles her to claim the amount due to her husband. So, the argument advanced by the Counsel for the

plaintiffs that by virtue of Ex. A2, the defendant is estopped from claiming the amount due to her husband is of no substance.

22. Counsel for the defendant submitted that by virtue of Ex. A2, the plaintiff cannot plead estoppel since it relates to divorce which is not a valid

document and there cannot be estoppel against a statute. Basu's Law of Evidence states that it being the duty of a Court to effect to a statute

inspite of conduct of the parties, there can be no estoppel against a statute. When this particular fact viz., divorce created under Ex. A2 is not valid

where there is no mention with regard to customary divorce which is unlawful by statute, the plaintiffs cannot raise the plea of estoppel against the

defendant so as to create a state of things. There can be no estoppel against a statute.

23. Learned Counsel for the appellants submitted that there is no dispute with regard to the proposition that there can be no estoppel against a

statute. But, she only stresses the point that by virtue of Ex. A2, the defendant lost her right over her claim in the amount due to the deceased

Govindaraj.

24. On a perusal of Ex. A2, it is clearly seen that only for the purpose of divorce, the defendant received a sum of Rs. 7,000/-. But/Ex. A2 does

not establish that there was valid divorce and customary divorce has not been proved in this case. So, it cannot be stated that by virtue of receipt

of a sum of Rs. 7,000/- under Ex. A2, the defendant lost her status as wife of the deceased Govindaraj. Even though it is recited in Ex. A2 that

there is no relationship of husband and wife and the defendant cannot also claim any right in the property, that will not establish that the defendant

lost her right over the assets of her husband as Ex. A2 is not a valid document with regard to divorce and as no customary divorce as pleaded by

the plaintiffs has been effected. So, I find that the defendant continues to possess the status of wife of the deceased Govindaraj and she is the heir

alongwith the mother, the second plaintiff. Both come under Class I heirs.

25. For the foregoing reasons, I hold that the second plaintiff, the mother and the defendant, the wife of the deceased Govindaraj, being Class I

heirs are entitled to the pensionary benefits due to the deceased Govindaraj and both are entitled to equal shares in the benefits accrued to the

deceased Govindaraj on his death. The defendant and the second plaintiff are entitled to half share each being class I heirs of the deceased

Govindaraj. The first plaintiff, the brother of the deceased Govindaraj is not a heir of the deceased Govindaraj and is not entitled to claim any share

in the assets of the deceased Govindaraj.

In the result, the second appeal is allowed in part and the suit is decreed declaring that the defendant and the second plaintiff are the legal heirs

(class I heirs) each being entitled to half share to receive all the benefits that have accrued on the death of the deceased Govindaraj. No costs.

Connected pending CMPs are closed.