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High Court Of Kerala

Case No: CRP No. 467 of 1968

Kunhu Muhammed		APPELLANT
	Vs	
Ummayithi alias Umma Haji Umma		RESPONDENT

Date of Decision: June 16, 1969

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 132, 132(1), 132(1)
- Constitution of India, 1950 - Article 15, 39

Citation: (1969) KLJ 468

Hon'ble Judges: V.R. Krishna Iyer, J

Bench: Single Bench

Advocate: K. Mohammed Naha and N.K. Job, for the Appellant; K. Velayudhan Nair and B. Moosakutty, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

V.R. Krishna Iyer, J.

The preservation and enforcement by Court of a custom which imprisons Mopla womanhood behind the veil and inhibits its fair appearance in public places involves a stagnant stance which need not be struck unless compelled by the law on the subject and the evidence in the case. I will examine both presently, since the problem raised in this revision is whether a Mopla woman of Ponnani, the plaintiff in the suit, can claim to be examined on commission at her home on the ground of gosha. But in examining and applying the law I think it proper to remind myself that the rule of law has a progressive edge and courts, which within strict limits, have to essay social engineering are not the sanctuary of age-old but unwholesome customs even if they are not the refuge of the social reformer working to emancipate women in the spirit of the Constitution. In the inevitable chemistry of

social change Courts certainly are not anti-catalysts. The suit which is between a young man and his divorced wife, is the aftermath of a break-up of the matrimonial home. The defendant, who is the revision petitioner, was the husband of the 1st plaintiff, the suit being one for maintenance and mahr. The other plaintiffs are the children of the 1st plaintiff by the defendant. In the light of the pleas put forward by the ex-husband the evidence of the 1st plaintiff probably is necessary. She has chosen to move the Court for the issue of a commission for her examination at her residence. In justification her brother has sworn an affidavit that she is a gosha lady, does not appear in public places and is entitled to be examined on commission in the light of the provisions of Order 26 Rule 1 and Section 132(1) C.P.C. The defendant calls this ''gosha'' plea a hoax and recalls romantically the lady''s visit to the Malampuzha gardens and other appearances in public offices and polling stations. The ex-wife flings in the face of her former husband the fact that in a connected litigation to which both were parties (O.P. No. 27 of 1967) she had been examined on commission under orders of the District Judge of Palghat. When husband and wife fall out and a divorce has intervened, they do not make bones about truth very much and one cannot pay too much respect to the words of either. However, one fact remains. The husband pleads that it would be very unpleasant (his counsel even suggests untoward consequences) for him to go to the residence of the divorcee, as go he must to instruct the counsel and even to identify the witness at the time of her examination.

2. The parties are apparently respectable and relatively young, the lady being around 30 years old. The irrevocable talak has bred bitter litigations and even the issue of a commission has, therefore, been hotly contested in revision before me by Shri Mohammed Naha, in an argument of learned length and forensic skill countered of course, by Shri Velayudhan Nair, learned counsel for the respondent tersely and adroitly.

3. The lower Court has allowed the issue of a commission for examining the plaintiff at her residence. After referring to certain rulings the learned Judge observed that:

As the fact that the plaintiff is a purdahnishan woman belonging to a respectable family is admitted, I am of the opinion that she should not be compelled to appear in Court and give evidence.....

The alleged admission is stoutly denied by counsel before me and he has set out this refutation in paragraph 8 of his grounds of revision. Shri Naha, appearing for the petitioner, also drew my attention to the allegations in his counter-affidavit refuting the plea that the 1st plaintiff is a gosha woman and argued that the lower Court fell into an error in assuming that there was no dispute about the purdah habit of the plaintiff. Earlier, in the judgment the learned Subordinate Judge has stated:

Here the fact that the petitioner belongs to a respectable family and that the female members of that family are following the custom of purdah are not disputed. The written statement filed by the defendant--respondent will itself prove these facts.

Learned counsel pointed out that there was nothing in the written statement of the defendant to indicate an admission of the fact set out by the Judge. On the contrary, the counter affidavit strongly denied that fact. I am inclined to agree with counsel for the petitioner that far from conceding the custom of gosha, the defendant has controverted it, may be for reasons of spite or hostility, may be because this young lady of an affluent family has been moving about publicly with a touch of modernity, abandoning the obscurantism implied in the practice of gosha which she is conveniently donning for this case. It is not as if the learned subordinate Judge had any evidence before him whether this Ponnani Mopla family has been observing the purdah and avoiding appearance in public places. It is also not as if there was an admission of such a custom by the opposite party. Nevertheless, the judgment turns almost entirely on the fatal assumption that the defendant had admitted the plaintiff to be a Purdahnashin. I am, therefore, constrained to hold that the learned Subordinate Judge has not exercised his jurisdiction judicially and the order must, therefore, be set aside.

4. This does not mean, however, that a commission cannot be issued to examine the 1st plaintiff. It is a matter for fresh consideration on evidence to be adduced by the parties who, perhaps, are bent upon a Kilkenny cat litigation. The Court has to investigate the custom set up and be satisfied that there is such a custom as accords with the requirements of Section 132 C.P.C. If it is affirmatively found that the community of the plaintiff observes, even in these progressive days and in this progressive State, the practice of hiding her face from being seen by her fellowmen in public places, the Court has to further find whether she should be allowed to give evidence at her residence or whether, alternatively, a more palatable place from the point of view of her estranged ex-husband, cannot be chosen in the interests of justice and fair-play.

5. Decisions galore were cited before me by petitioner''s counsel, even steeling the thunder of opposite counsel. I shall advert to them briefly a little later. But I would like to mention certain general considerations which strike me as relevant. The democratic system outlined by the Constitution is a significant element indicative of the spirit of the times, because the Indian community has chosen a form of government where every citizen, man or woman, is an elector, who forms intelligent opinions and expresses them in such a manner as to swell into a strong public opinion and also returns representatives to the legislatures to speak for him or her. These are processes which postulate participation, at least minimally, in public life. This is evident from the fact that there are many Muslim women''s organisations in this State, that there are leading Kerala Muslim women who have occupied and are still occupying responsible, official and non-official positions. It is a notorious fact

that some Muslim women''s colleges have sprung into existence and mixed colleges have begun to attract into their precincts Mopla grown-up girls and many a Kerala Muslim lady is lecturer, doctor or lawyer. Democratic ferment has awakened Mopla women into casting off obsolete habits of life to play their rightful role as citizens. The erosive impact of widespread education and the progressive politics of Indian democracy on Muslim womanhood vis a vis the outmoded purdah system is obvious. And the Court while ascertaining the existence, currently, of the custom of gosha will have due regard to these factors before mummifying obsolescent observances in the context of a dynamic society which sloughs off to-day meaningless usages of yesterday. If, viewed in this perspective, a custom as pleaded by the plaintiff is proved it must be given effect to.

6. Section 132(1) C.P.C. is a pre-constitution provision but since no one has challenged its vires before me I need not examine its constitutionality. Nevertheless, it must be construed as to prevent prejudice to the parties and Courts since the paramount task of deciding cases on oral evidence of an important party involves the personalised process of the Judge seeing the witness at first hand instead of poring over the prolix pages of a commissioner''s record.

7. While sober public opinion in India may frown upon gosha and geisha even judicial pronouncements have brought out the unconscionable aspects of the purdah system. I can do no better than to quote Dhavan J. to drive my point home. The question arose before his Lordship in a very different context where the right of privacy was claimed as an easement based on custom. In Basai Vs. Hasan Raza Khan and Others, his Lordship observed:

The essential characteristics of a custom are that (1) it must be of immemorial existence, (2) reasonable, (3) certain, and (4) continuous: Krishna Kumar Deb Vs. Atul Chandra Ghose and Others, . I am doubtful whether the custom of purdah fulfils these conditions today. In ILR 10 All. 358 it was observed,

In India, or at any rate in these provinces, the custom of the purda has for centuries been strictly observed by all the Hindus except those of the lowest classes.

With respect, purdah has been no part of Hindu religion and civilisation and has never been observed in many parts of India. There is not even a trace of its existence in the Ramayana, Mahabharatha, the dramas of Kalidas, even Dandi''s novel Dashakumaracharitam which is a much later work, or in any other piece of Sanskrit literature, epic or classical. It was imposed in the north under Muslim rule but not adopted by the large masses of Hindus (incidentally dismissed by the learned Judges who decided ILR. 10 All. 358 as ''of the lowest castes'').

Even before that decision, Hindu divines like Dayananda and others had denounced purdah as not sanctioned by any Shastra or custom. Today the custom cannot be considered as certain with regard to any locality or class of persons supposed to be observing it. In the 19th century it was rare for an Indian girl to go to school or

college but today there are girls schools in every tehsil and lakhs of girl students every year pass out of schools and colleges where thousands of women instructors teach them. In these conditions it is idle to pretend that purdah is observed in any locality with any degree of uniformity or certainty. Nor can purdah be regarded as a reasonable custom today. It is injurious to the health of women and based on a social philosophy which regards woman as the possession of man and is thus the negation of the philosophy on which our Constitution is founded.....

The right of privacy is based on the custom of purdah and nothing else, and the question is whether the right must continue to be enforced as before when the social custom on which it was based is in the process of disintegration and generally admitted to be a social evil.

ILR. 10 All. 358, was decided 75 years ago when social conditions were different. Purdah was common among Muslims and many sections of Hindus had adopted it under the influence of the Muslim civilisation. The policy of the Government of those days was to remain aloof from our social problems and not to disturb the social customs, good or bad. Today purdah is practically extinct among the Hindus and has been discarded by many sections of the Muslims. It is out of favour in Egypt, Turkey, Uzbakistan, Tadjikstan, Indonesia, even the Islamic State of Pakistan and most Islamic countries except the socially most backward. Any restriction today on the property rights of citizens for enforcing a right based on purdah would hardly be reasonable. Today the seclusion of women is completely inconsistent with the social philosophy on which our Constitution is founded. Art. 15 enjoins inter alia that the State shall not discriminate against citizens on the gound of sex. Art. 39 commands the State to direct its policy towards securing that the citizens, men and women equally, have the right to adequate means of livelihood and there is equal pay for equal work for men and women. Those are not idle provisions and women are serving today as District Magistrates, Ministers, legislators, one as a High Court Judge, and earning their living in almost every walk of life. These are fundamental principles which cannot be reconciled with any custom which keeps women in seclusion. I am conscious that Art. 15 permits the State to make any special provision for women and children, but I do not think that purdah which is harmful to health can be regarded as a special provision in the interests of women. It is a relic of the Muslim rule. Of course, the State refrains for reasons of political wisdom from interfering with many existing customs which society would be better without, and does not compel people by force to bring their women out of seclusion, as did Peter The Great. But it is one thing for the State to tolerate a custom like purdah but quite another to make it a vested right and enforce claims based on it by restricting the property rights of others.

8. I may add, with deference, that no country, Islamic or other, which has sought to improve the status of women has permitted the purdah system. So, while women

who, according to the customs and manners of the country, ought not to be compelled to appear in public are exempt from personal appearance in Court, Courts would be careful to see whether in the current context the norms of conduct adopted in a particular community insist that their women should keep away from public places, It is the conscience and consciousness of the community as a whole id not the individual disposition of an affluent family or set of families that matters. Section 132 C.P.C. cannot be treated as a concession to some aristocratic families, but is a recognition of a universally observed custom.

9. In Ayisha Beevi v. Bava Haji (1959 K.L.R. 1068) Mr. Justice Raman Nayar, as he then was, allowed a petition for examination of a Mopla woman on commission. In that case there were tow petitioners of whom one was undisputedly not accustomed to appear in public and the other was found to be so by the Court. ".... that being so it follows that a commission should have issued under Or.XXVI rule 1 read with Section 132 (1) of the Code" observed his Lordship. In the present case there is no finding on evidence nor concession regarding the observance of gosha. I do not, therefore, think that that ruling can conclude the present case. Nor does the ruling in Katheesakutty v. Ibrayan (1961 K.L.J. 502) clinch the point at issue before me. For, "It is admitted that the petitioner is a Muslim purdanashin lady" is the opening sentence in that decision and it is obvious that the sole question to be decided in the present case is what has been admitted in that case.

10. In Mohammed Ismail Maricair v. Wazir Bi Bi Sabeba (A.I.R. 1951 Mad. 311) a Division Bench of the Madras High Court, while holding that the customs and manners of the country prevailing at the time the Courts are called upon to apply Section 132 (1) of the Code should be the criterion and not the customs and manners which might have prevailed years ago, agreed that a change in the mode of life of a particular lady claiming exemption from personal appearance in Court can be taken into consideration in exercising discretion in the grant of a prayer for her being examined on commission.

11. The further question arises that even if customs and manners of the plaintiffs'' community enjoin upon her the observance of purdah, whether she has the right to insist upon being examined at her residence. In this case, there is force in the contention of the husband that it is embarrassing, if not hazardous for him, to go to the house of his former wife whose relations with him are bitter. There is also the important fact that the Judge must have the advantage of observing the demeanour or at least the manner of delivery of the witness if he is to assess her credibility justly. I take the view that the limited right u/s 132(1) of the Code is only be exempt from personal appearance in Court while holding its public hearing and does not extend to her examination in camera in the chambers of the Judge or in some other place where both parties will have equal facilities. In Khitipati Roy v. Dharani Mohan Mookerjee (I.L.R. 48 Cal. 448) Ghose J. considered this point: "I understood the learned counsel for the defendant to argue" said the Judge "that the lady, Sm. Golap

Sundari Debi, is entitled to say that she will refuse to be examined on commission except at the place of her own choice and that this is a right which she has under the law". The learned Judge continued:

I have looked into the cases decided from time to time under these and corresponding provisions of the CPC and I have been unable to discover a single case in which it has been laid down that women who do not desire to enjoy the sweets of unsecluded life have an absolute right to decline to be examined before the commissioner at any place other than at the place or places of their own choice. I am of opinion that they have no such right.

In Mariambai Vs. Abdul Hamid Suleman, Blagden J. adverted to the same question and made the following observation:

It is, as I say, eminently desirable, if at all possible, that the learned Judge who tries the case should hear this lady. Even if it is not possible to observe the lady''s countenance while she gives her evidence, he will at least have some opportunity of observing her demeanour for himself, as for example, noting the hesitancy or lack of hesitancy with which she answers the questions put to her.....The question does not seem to have been before considered whether the expression ''in Court'' in Sec. 132 means in the Court room the room in the Court building where the Court sits in public, or whether it includes any part of the Court building.....However that may be, I do not think (apart from the authorities) that a woman who is conveyed to the Court building in some suitably curtained vehicle and then escorted to a private room in that building, suitably and completely veiled in a burkah or some other garment, and is examined in a private room, could be said to be making, ''a personal appearance in Court''. Literally, she would not be doing so if she were conveyed suitably veiled into the Court room. Granted, however, that on a true construction of the section she would be doing so, I see no reason to extend that construction still further, and apply it to an examination of a veiled woman in the privacy of a Judge''s Chamber. There she will be, even to the Judge not an observable form, but only an observable voice.

In the decision reported in AIR 1951 Mad. 311 referred to by me earlier, Chief Justice Rajamannar tackled the point now under consideration as follows:

The question still remains if there cannot be found some way to enable the trial Judge at least to listen to the evidence of such a person without infringing her right under S. 132 (1) of the Code. Obviously, when such a person submits to an examination on commission, she also submits to appearance (though under a purdan) before the Commissioner appointed to take her evidence, counsel on either side and the parties, probably others instructing counsel. To this extent, it is clear that she is willing to give evidence before strangers. If so, I fail to see why she should refuse to give evidence outside her residence before the same persons as in a commission except that the trial Judge would take the place of the Commissioner.

She cannot decline to be examined at any place other than of her own choice.

There is no need to multiply rulings since, on the decisions I have already discussed, the proposition is clear that a Judge has the power to direct the examination of a party or witness in his chambers or in some place other than the residence of the person to be examined.

Now that I am setting aside the order of the learned subordinate Judge for reasons already stated, I further direct him to receive such evidence as may be offered by either party and to decide whether the 1st plaintiff is entitled to exemption from appearance in public and if she is, which should be the venue for her examination and by whom she should be examined. The Civil Revision Petition is allowed. There will be no order as to costs.