(2015) 01 KL CK 0189

High Court Of Kerala

Case No: Mat. A. No. 679 of 2012

Bini B.	APPELLANT
Vs	
Jayan P.R.	RESPONDENT

Date of Decision: Jan. 30, 2015

Acts Referred:

- Constitution of India, 1950 - Article 336, 342, 366
- Hindu Marriage Act, 1955 - Section 2, 2(1), 2(2), 9

Citation: (2016) AIR (Ker) 59 : (2015) 2 ILR Ker 873 : (2015) 3 KHC 173

Hon'ble Judges: V.K. Mohanan, J; P.D. Rajan, J

Bench: Division Bench

Advocate: M.P. Ashok Kumar, P.C. Gopinath and S. Nandagopal, for the Appellant; P.K. Jose and Tessy Jose, Advocates for the Respondent

Final Decision: Allowed

Judgement

P.D. Rajan, J.

The question of law raised in this case is that whether the Kuruma Community of Wayanad District, notified as Scheduled Tribe within the meaning of Constitution of India, is entitled to get the benefit of Section 2(2) of the Hindu Marriage Act, when marriage is solemnized according to Hindu customary rites? The appellant is the wife and the respondent is her husband, who belong to Kuruma community which is notified as Scheduled Tribe according to Constitution of India, who otherwise profess Hinduism. This appeal is preferred against the order in OP No. 148/2011 of Family Court, Kalpetta, which was filed by the husband under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. The Family Court allowed the petition and directed the wife to reside in the society of the husband within two months from the date of the order, failing which, the husband is entitled to get the decree enforced in accordance with law.

2. The petitioner''s case in the Family Court was that he married Dr. Bini as per Hindu customary rites on 19/04/2009 at Chandragiri Auditorium, Kalpetta in the presence of friends and relatives, thereafter, they registered the marriage in the Kalpetta Municipality. After the marriage, both parties resided together in the matrimonial house at Meppadi for three months, after that, they went to their workplace. Appellant is a Doctor by profession, working at Government Hospital, Vythiri and the respondent is an Engineer, KSEB, Peringalkuthu in Thrichur District. While residing so, the husband requested the wife to reside with him, which was declined by her, hence, their relationship became strained. In the circumstances, husband preferred OP No. 148/2011 for restitution of conjugal rights.

3. Appellant filed written objection in the Court below and contended that while residing in the matrimonial house, husband and his parents treated her with cruelty by compelling her to do menial work in their house and to look after the cattle there. When she refused to do menial work, they treated her with cruelty. Since both of them were working at two different places in connection with their job, they could not meet each other. Appellant contended that her husband never treated her with love.

4. Both parties adduced evidence in the Trial Court which consists of oral testimony of PW 1 and RW 1 and there was no documentary evidence from both sides. The Trial Court, after analysing the oral evidence, allowed the petition under Section 9 of the Hindu Marriage Act, 1955.

5. The learned counsel appearing for the appellant contended that she belongs to Scheduled Tribe Community within the meaning of Clause 25 of Article 366 of the Constitution of India and Hindu Marriage Act is not applicable to the members of the Scheduled Tribe as per Section 2(2) of the Hindu Marriage Act. If that be so, the directions issued by the Family Court under Section 9 of the Hindu Marriage Act is not applicable to the appellant.

6. The learned counsel appearing for the respondent contended that the marriage was solemnised as per Hindu customary rites. After solemnisation of marriage as per Hindu customary rites, the appellant-wife cannot claim the benefit of Section 2(2) of the Hindu Marriage Act.

7. In order to appreciate the controversy involved in this appeal, it is necessary to refer the relevant Section 2(2) of the Hindu Marriage Act, 1955 (hereinafter referred to as the ''Act''). For restitution of conjugal right the respondent took several grounds in the Trial Court which were negatived by the appellant in the Family Court, however, the Family Court allowed the petition. But, now the wife put forward only one point in this appeal that Hindu Marriage Act is not applicable to members of Scheduled Tribe under Section 2(2) of the Act. Section 2(2) of the Act, reads as follows:

"2. Application of Act.--(1) xxxx xxxx xxxx

(a) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

(c) xxxx xxxx xxxx

Explanation.--xxxx xxxx xxxx

(a) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

(c) xxxx xxxx xxxx

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of Clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

8. A plain reading of Section 2(2) of the Act, shows the non-applicability of the Act to the members of any Scheduled Tribe unless the Central Government, by notification in the Official Gazette, otherwise directs. Article 366 of the Constitution defines the expression and meaning of the word Scheduled Tribe which says, "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed Article 342 to be Scheduled Tribes for the purpose of the Constitution which is to be further read with Constitution (Scheduled Tribes) Order, 1950.

9. The word ''Tribe'' has been considered by Patna High Court in Kartik Oraon Vs. David Munzni and Another, AIR 1964 Patna 201 , in which it is held as follows:

"(14). "Tribe" has been defined in Encyclopedia Britannica, Volume 22, 1961 edition, at page 465, by W.H.R. Rivers as "a social group of a simple kind, the members of which speak a common dialect, have a single government, and act together for such common purpose as "warfare". Other typical characteristics include a common name, a contiguous territory, a relatively uniform culture or way of life and a tradition of common descent. Tribes are usually composed of a number of local communities, e.g., bands, Villages or neighbourhoods, and are often aggregated in clusters of a higher order called nations. The term is seldom applied to societies that have achieved a strictly territorial organisation in large states but is usually confined to groups whose unity is based primarily upon a sense of extended kinship ties. It is no longer used for kin groups in the strict sense, such as clans."

Therefore, we are of the view that a member of ''Kuruma'' community, which has been specified as Scheduled Tribe in the State of Kerala under the Constitution (Scheduled Tribes) Order, 1950, is entitled to the rights and privileges of the tribes under the Constitution of India. The tribal people observe their festivals, which have no direct conflict with any religion, and they conduct marriage among them

according to their tribal custom. They have their own way of life to maintain all privileges in matters connected with marriage and succession, according to their customary tribal faith.

10. In this backdrops our anxious consideration was with regard to the applicability of the Act to the person mentioned as Hindus. In the Constitution of India, or in any other enactment of the Parliament the term ''hindu'' has not been defined in a comprehensive meaning. During a search one can see that it has not been defined in the Hindu Marriage Act or in any other enactment. But the word ''Hindu'' under the Hindu Marriage Act, 1955 has been considered by the Apex Court in Dr. Surajmani Stella Kujur Vs. Durga Charan Hansdah and Another, AIR 2001 SC 938 : (2001) 1 DMC 291 : (2001) 2 JT 631 : (2001) 2 SCALE 21 : (2001) 1 SCR 1028 : (2001) AIRSCW 711 : (2001) 1 Supreme 681 and held as follows:

"3. Section 2 of the Act specifies the persons to whom the Act is applicable. Clauses (a), (b) and (c) of sub-section (1) of Section 2 makes the Act applicable to a person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj and to persons who is a Buddhist, Jaina or Sikh by religion. It is also applicable to any other person domiciled in the territories of India who is not a Muslim, Christian, Parsi or Jew by religion. The applicability of the Act is therefore, comprehensive and applicable to all persons domiciled in the territory of India who are not Muslims, Christians, Parsis or Jews by religion.

4. The term "Hindu" has not been defined either under the Act or Indian Succession Act or any other enactment of the Legislature. As far back as in 1903 the Privy Council in Bhagwan Koer v. J.C. Bose (ILR 1904 (31) Calcutta 11) observed:

"We shall not attempt here to lay down a general definition of what is meant by the term "Hindu" to make it accurate and at the same time sufficiently comprehensive as well as distinctive is extremely difficult. The Hindu religion is marvelously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the Chamaras who profess Hinduism, but who eat beef and the flesh of dead animals, are however low in the scale included within its pale. It is easier to say who are not Hindus, not practically and separation of Hindus from non-Hindus is not a matter of so much difficulty. The people know the difference well and can easily tell who are Hindus and who are not."

5. The Act, is, therefore, applicable to:

"(1) All Hindus including a Virashaiva, a Lingayat, a Brahmo, Prarthana Samajist and an Arya Samajist.

(2) Budhists

(3) Jains

(4) Sikhs"

6. In this appeal the parties are admittedly tribals, the appellant being a Oraon and the respondent a Santhal. In the absence of a notification or order under Article 342 of the Constitution they are deemed to be Hindus. Even if a notification is issued under the Constitution, the Act can be applied to Scheduled Tribes as well by a further notification in terms of sub-section (2) of Section 2 of the Act. It is not disputed before us that in the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Casts and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990, both the tribes to which the parties belong are specified in Part XII. It is conceded even by the appellant that "the parties to the petition are two Tribals, who otherwise profess Hinduism, but their marriage being out of the purview of Hindu Marriage Act, 1955 in light of Section 2(2) of the Act, are thus governed only by their Santal Customs and usage."

Section 2(1) of the Act indicates that the Act is applicable to a person who is a Hindu by religion in any of its forms or developments. It is also applicable to any other person domiciled in the territories of India who is not a Muslim, Christian, Parsi or Jew by religion. Therefore, the applicability of the Act among any person is comprehensive and applicable to all persons domiciled in the territory of India who are not Muslims, Christians, Parsis or Jews by religion. But, at the same time, Section 2(2) of the Act directs non-application of the Act to the members of the Scheduled Tribe who are notified as per Clause 25 of Article 336 of the Constitution of India. However, the parties in this case are Kuruma, which is a Scheduled Tribe, therefore, the customs and usages governed by the tribe alone is applicable.

11. The applicability of custom in "succession" among tribals was considered by the Full Bench of the Apex Court in Madhu Kishwar and others Vs. State of Bihar and others, (1996) 4 AD 137 : AIR 1996 SC 1864 : (1996) 4 JT 379 : (1996) 3 SCALE 640 : (1996) 5 SCC 125 : (1996) 1 SCR 442 Supp , while considering the Hindu Succession Act (Act 30 of 1956) and Section 2 of the Succession Act (39 of 1925) and held as follows:

"31. It would thus be seen that the customs among the Scheduled Tribe, vary from tribe to tribe and region to region, based upon established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are

accepted as set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law."

In another decision Apex Court in Dr. Surajmani Stella Kujur''s case (supra) held that custom have the colour of a rule of law. In paragraph 9 it was held as follows:

9. For custom to have the colour of a rule of law, it is necessary for the party claiming it to plead and thereafter prove that such custom is ancient, certain and reasonable. Custom being in derogation of the general rule is required to be construed strictly. The party relying upon a custom is obliged to establish it by clear and unambiguous evidence. In Ramalakshmi Ammal v. Sivnatha Perumal Sethuraya (1870-72) 14 Moo. Ind. App 570 at P.585) held:

''It is of the essence of special usage modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.''

10. This Court in Mirza Raja Pushpavati Vijayaram Gajapathi Raj v. Pushavathi Visweswar Gajapathiraj Rajkumar of Viziangram, AIR 1964 SC 118 again reiterated the same position of law regarding the establishment of custom upon which a party intends to rely."

It is clear from the above decisions that when custom become part of the tribal community as a law, it will guide their attitude and practice in their social and economic life. Custom is considered as the guiding principle among them, which will acquire the status of law. The party claiming custom is necessary to plead and prove that such custom followed in the community is ancient and certain. Since custom is ancient the person relying on it has to establish it by clear and unambiguous evidence. It is true that the majority of the Tribal people are living below the poverty line and they have not reached development which is equal to the civilised section of the other people in the civil society. Therefore, the validity of the custom must be examined and decided by a Court, when full facts are placed before it for consideration.

The application of custom among the Tribes and restrictions under Section 2(2) of the Act, were not considered by the Family Court. It has been clearly stipulated in the Act that the provisions of the Act are not applicable to members of the Scheduled Tribe unless there is a notification issued by the Central Government in the Official Gazette making the Act applicable to the Scheduled Tribes. No such notification has been produced before the Family Court, therefore the order passed by the Family Court, Kalpetta is liable to be set aside.

Hence, this appeal is allowed. We set aside the order dated 27/09/2012 in OP No. 148/2011 of Family Court, Kalpetta and the matter is remitted to the lower Court for fresh consideration as per law. Both parties are at liberty to adduce fresh evidence in support of their contentions.

They are directed to appear before the Family Court, Kalpetta on 25/05/2015.