C. Gajapathi Naidu and Two ors. Vs. Jeevammal Alias Padmavathi Ammal and Twenty ors.

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Court : Chennai

Decided On : Jul-29-1929

Reported in : AIR1929Mad765; 122Ind.Cas.512; (1929)57MLJ253

Appellant : C. Gajapathi Naidu and Two ors.

Respondent : Jeevammal Alias Padmavathi Ammal and Twenty ors.

Judgement :

Krishnan Pandalal, J.

1. The third issue has been set down for trial as a preliminary issue. It is as follows:

3. Even if there be one (i.e., a custom in the family permitting re-marriage), does such a custom override the provisions of the Hindu Widows' Re-marriage Act and is the 1st defendant entitled to retain the properties?

2. The facts on which this issue has to be determined can be gathered from the pleadings. The plaintiffs and 1st defendant are Naidus by caste and the plaintiffs claim to be the nearest reversioners of 1st defendant's first husband, the deceased Madanagopal Naidu, whom she married in 1910 and who died issueless in April, 1915. The suit is for possession of the immoveable properties mentioned in A schedule which are admittedly properties which 1st defendant inherited from her first husband. Plaintiffs allege that there were other properties but that is disputed and this question is dealt with in the other issues. The 1st defendant who was a minor at the date of her first husband's death re-married one Padmanabham Naidu in 1923. This is admitted. It was stated at the bar by plaintiffs' advocate that the re-marriage was under the Special Marriage Act, 1872, but the 1st defendant's advocate was not prepared to admit this. The plaintiff alleges in paragraph 11 of the plaint that the 1st defendant belongs to a caste or community in which widow* re-marriage is not permitted by law or custom. But the 1st defendant in paragraph 14 of her written statement alleges that widow re-marriage is permitted in her caste and explains this by adding that the caste originally migrated into British India from the Nizam's Dominions. The 8th defendant makes a similar allegation as to custom in paragraph 9 of his written statement. The question of custom raised as above is covered by the second issue where it is referred to as a custom in the family. The third issue above set forth arises upon the plaintiffs' contention that assuming that there is such a custom, it cannot be proved as it is overriden by the language of Section 2 of the Widows' Re-marriage Act XV of 1856; in other words, that the forfeiture enacted by that section applies even to communities in which widow re-marriage was, or is, by custom permissible. This is the real question for determination on this issue.

3. There is no direct authority in our Court on the point, though questions more or less cognate to the present have been discussed. In Murugayi v. Veeramakali I.L.R. (1877) M. 226 a re-married widow of the Maravar caste, in which widows may re-marry, was held disentitled to claim the property of her first husband. Their Lordships said:

Although it has often been doubted whether people of the class of these contending parties are strictly speaking Hindus, there can be no question that in their customs and observances they are mainly governed by the Hindu Law. Among them widows may remarry, and in this respect their customs differ from those of the Hindu Law as understood to be binding upon the higher castes in the present day. Their law of inheritance of properly and of the right of the widow of a man who has left no male issue to a life-interest in it is the Hindu Law and it must he assumed that they are in such matters guided by the principles of that Law, however much it may be relaxed in reference to some of their social usages.

4. Then their Lordships refer to the custom as recorded in Steele's 'Hindu Castes' that it is the practice of a wife or widow among the Sudra castes of the Deccan on re-marriage to give up all property to her former husband's relations except what has been given her by her own parents and state that the law in this Presidency is the same. Though this decision does not refer to the Widows' Re-marriage Act of 1856, it has been followed ever since not only in this Court but by other High Courts also and establishes that though there are numerous Hindu castes in which widows do re-marry, such widows cannot as a consequence of Hindu Law which defines the essential nature of a widow's estate in her husband's property, hold that husband's property after re-marriage with another man--see Sreeramulu v. Kristamma : (1902)12MLJ197 . In Vitta Tayaramma v. Chatakondu Sivayya : (1918)35MLJ317 the question arose of a widow who had been a Hindu but became a convert to Islam and then re-married a Mahomedan and claimed to retain the deceased Hindu husband's property. The question 'Does a Hindu widow who becomes a Mahomedan and marries a Mahomedan by her re-marriage forfeit her interest in her first husband's estate' was referred to a Full Bench and it was held by a majority that she does. The ground on which the majority whose opinion forms the decision agreed is that quite apart from the effect of Section 2 of the Widows' Remarriage Act, the rule of Hindu Law is that a Hindu widow who re-marries cannot hold after re-marriage the estate of her first husband--and this even in castes which by custom permit re-marriage--see per Wallis, C.J., at page 1090 and per Oldfield, J., at page 1093. But as to the construction of that section while Wallis, C.J., was prepared to hold that it applied also to Hindu widows re-marrying after conversion to another religion, Oldfield, J., was of opinion that such cases are outside the scope of that section. It will be noted that the question which the members of the majority had before them and on which they differed was the applicability of Section 2 of this Act to an apostate Hindu widow re-marrying after apostacy. That is not the present case. The other learned Judge differed from both his colleagues on the question of Hindu Law and from the Chief Justice on the applicability of the section to the case. The case is thus not an authority on the question of construction which arises in this case, i.e., whether Section 2 of the Widows' Re-marriage Act is applicable to Hindu castes in which the custom of re-marriage is prevalent, but it establishes another illustration of the proposition that the estate of a Hindu widow who re-marries is lost by the re-marriage.

5. The construction of the section in question has come before the Calcutta, Bombay and Allahabad High Courts. The decision in Matungini Gupta v. Ram Rutton Roy I.L.R.

(1891) C. 289 (F.B.) though not on the precise point whether Section 2 applies to Hindu castes in which widow re-marriage is permitted, proceeds on the footing that that question can be answered only in the affirmative. There a Hindu widow Harani married again a second husband under the Special Marriage Act (III of 1872) after making the declaration which was at that time necessary under Section 10 that she did not profess the Hindu religion. (No such declaration is now necessary, see Act XXX of 1923.) In his referring judgment Wilson, J., says at page 294:

It appears to me that each of these Sections, vis., 1 and 2, applies to the whole class of widows to whom the Act is applicable. I think further that each section applies to a Hindu widow from the lime she becomes a widow so that Section 1 makes her free to marry again if she pleases and Section 2 declares one of the conditions on which she takes the estate.

6. In the argument before the Full Bench the learned vakil for the plaintiff drew attention to the fact that the custom existed among the lower castes all over the country by which re-marriage was allowed and that even in such castes the re-marrying widow forfeited by ordinary Hindu Law her widow's estate in her first husband's property and the Re-marriage Act of 1856 was passed by the legislature with full knowledge of this fact. The decision of the Full Bench was pronounced by Chief justice Petheram who said that Section 2 includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows, and that it followed from this that if any such widow re-marries she is deprived of the estate which she inherited from her Hindu husband. No doubt the question before the Court was only whether Hindu widows who before their re-marriage became Brahmos in order to avail themselves of the Special Marriage Act were within the section. But it is impossible to read the judgments and the argument without feeling that the question now raised by the defendant would hardly admit of argument. In Rasul Jehan Beyum v. Ram Surun Singh I.L.R.(1877) M. 226 the exact point now raised arose. The District judge held that he did not understand that Act XV of 1856 would apply to cases where re-marriage was allowed by the custom of the caste but that the rule of forfeiture laid down by the Act is based upon general principles of Hindu Law by which even where a second marriage is recognised by custom it entails forfeiture of all interest in the first husband's estate. The High Court upheld the view as to the general Hindu Law but dissented from the decision in Har Saran Das v. Ndndi I.L.R.(1889) A. 330 in which the view had been taken that Act XV of 1856 did not operate to deprive widows belonging to castes in which re-marriage was permitted of their estate in their first husband's property. In Vithu v. Govinda I.L.R. (1896) B. 321 (F.B.) a Full Bench of the Bombay High Court came to the same conclusion as the Calcutta High Court and held that under Section 2 of the Widows' Re-marriage Act a Hindu widow belonging to a caste in which re-marriage has always been allowed who has inherited property from her son forfeits by her re-marriage her interest in such property in favour of the next heir of the son. That decision being exactly in point on the question before me, it would not be necessary for me to more than adopt it, if it were not that the decisions of the Allahabad High Court are to the contrary effect. A number of decisions of that High Court have been cited to me, viz., Haw Saran Das v. Nandi I.L.R.(1889) A. 330 Ranjit v. Radha Rani I.L.R.(1898) A. 476 Khuddo v. Durga Prasad I.L.R.(1906) A. 122 Gajadhar v. Musammat Kaunsilla I.L.R. (1908) A. 161 Mula v. Partab I.L.R.(1910) A. 489 and Mangat v. I.L.R.(1926) A. 203 . The source and root of this long line of authority is the earliest decision in liar Saran Das v. Nandi I.L.R.(1889) A. 330. There a woman belonging to a sweeper caste had re-married and the question was whether she retained after her re-marriage any

interest in her first husband's property against which her personal creditor could proceed for his debt. It was held that looking to the preamble of Act XV of 1856 which refers to Hindu widows who could not re-marry it was not intended to apply to persons like the widow in that case or to place under disability and liability persons who could marry a second time before that Act was passed. In coming to this conclusion, as pointed out in Rasul Jehan Begum v. Ram Sumn Singh I.L.R.(1895) C. 589 and in Vithu v. Govinda I.L.R.(1896) B. 321 (F.B.) the decision of this Court in Murugayi v. Veeramakali I.L.R.(1877) M. 226 was not referred to, nor was, the aspect considered that according to Hindu Law even in castes where re-marriage is permitted the widow on remarriage forfeits her first husband's estate. In some of the subsequent Allahabad decisions which follow the decision in Har Saran Das v. Nandi I.L.R.(1889) A. 330 the learned Judges while expressing their personal doubts about the doctrine laid down in that case have felt bound to follow it on the ground of stare decisis; see Gajadhar v. Musammat Kaunsilla I.L.R.(1908) A. 16 where Banerjee J., says:

Had the question not been concluded by the rulings of this Court I should be inclined to accede to the contentions of Pandit Similar Lal. But as the course of rulings in this Court has been uniform, 1 feel myself bound by those rulings whatever my personal opinion may he.

7. The same Bench expressed the same doubt in Mula v. Partab I.L.R.(1910) A. 489 . Another Bench of the same Court expressed the same doubt in Mangat v. Bharto I.L.R.(1926) A. 203 .

8. The above stage of authority leaves it open to me to accept the construction which I think right. In view of the decision of this Court in Murugayi v. Veeramakali l.L.R. (1877) M. 226 which has been followed both in this Court and in other High Courts ever since, the only conclusion to which I can come on the question whether Section 2 of Act XV of 1856 applies to Hindu castes in which widow re-marriage is permissible is that it does. The reasons for this opinion are so well put in the referring judgment of Farran, C.J., and in the judgment of the Full Bench given by Ranade, J., in Vithu v. Govinda I.L.R.(1926) A. 203 that there is no need to repeat them. It is sufficient to say that if the rule of the general Hindu Law is as it has been held to be that even in cases of castes permitting re-marriage the re-marrying widow forfeits her interest in her first husband's property, the legislature must have had this clearly before it when enacting Act XV of 1856. This is also apparent from the first paragraph of the preamble where exceptions to the rule prohibiting re-marriage are expressly referred to. When, therefore, with this fact before it, the legislature enacted Section 2 by which Hindu widows on re-marriage are declared to forfeit their interests in their first husband's property, no new penalty or disability was being enacted, but statutory section was being given to what was then known to be the general Hindu Law. In short, what had been the general unwritten law of the Hindus was converted into an express and statutory enactment. On the question of construction therefore I am clearly of opinion that assuming that the first defendant belongs to a caste where widow re-marriage is permissible, her case would be within the forfeiture enacted by Section 2.

9. The question then is whether the custom pleaded can override that enactment. As pleaded by the first defendant in her own written statement the custom merely permits re-marriage of widows. There is no averment that it is also customary for re-marrying widows to retain their estate in their first husband's property after re-

marriage. The 8th defendant, however, has pleaded that the custom permits such retention for the period of the re-marrying' widow's natural life. For the purpose of deciding this preliminary issue this may be taken to be the plea of the 1st defendant also. The question is whether such a custom can be pleaded in the face of the express statutory forfeiture enacted by Section 2. In my opinion, it cannot; because no plea of custom can prevail to violate an express statutory enactment to the contrary and any custom repugnant to such enactment will be held to have been swept away thereby. On this point sec Halsbury's Laws of England, Vol. 10, Sections 460 and 461 where the cases will be found collected. I need not repeat the ground for holding that the words of Section 2 are general and embrace all Hindu widows, i.e., persons who become widows when they are Hindus and that the section is not confined, by anything to be inferred from the preamble, to such castes among the Hindus as did not permit re-marriage by custom. I refer to the reasons stated in Vithu v. Govinda I.L.R.(1896) B. 321 (F.B.) including the rule of construction that the preamble to the Act does not indicate the intention of the legislature to control its express enactments even if it could legitimately he used for that purpose which cannot generally be done. Section 2 thus lays down as an express enactment applicable to all Hindu widows what was then known generally to be the law applicable to all Hindus that a re-marrying widow shall upon re-marriage cease to have any interest in her first husband's property which she had as such widow either by inheritance, maintenance, or by will, and that the next heir of her deceased husband shall thereupon succeed to the same. After such an express enactment, express both in its deprivation and in its conferment, it is, I think, impossible to contend that any custom permitting a re-marrying Hindu widow to retain her first husband's property was or could be saved. I, therefore, hold on the preliminary issue that the custom pleaded by the 1st and 8th defendants is, even if true, overriden by statute and therefore cannot be proved.