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Court
SINDH HIGH COURT

Date
2004-11-29

Appeal No.
CONSTITUTIONAL PETITION NO. S-81 OF 2004

Judge

Parties
JAGSI (PETITIONER) VERSUS SHR. MARWAN AND ANOTHER (RESPONDENT)

Lawyers
JAGDESH R. MULLANI FOR PETITIONERTAJ MUHAMMAD KAIMKHANI FOR RESPONDENT NO.L. .MASOOD A. NOORANI, ADDL. A. G.

Statutes
WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) - SS. 2(B), 5 AND SCHEDULE
CONSTITUTION OF PAKISTAN (1973) - ARTICLE 199

Judgment

' This petition is directed against the impugned judgment of the learned Joint Civil and Family Judge, Mirpurkhas in Family Suit No.46 of 2003 dated 20-1-2004 dissolving the marriage.

2. The suit for dissolution of marriage was instituted by respondent No.l on the ground that she belonging to Hindu Menghwar community was subject to custom providing for dissolution of marriage. She sought dissolution on the ground of cruelty and for not providing maintenance. After expulsion respondent left the house of petitioner while the fact of belonging to Menghwar community, custom of dissolution of marriage' and the marriage itself were admitted by the petitioner in his written statement. The matter was contested before the learned Family Judge on factual aspects of the controversy. The case was ultimately disposed of by the impugned judgment in favour of respondent.

3. The contentions raised by Mr. Jagdesh R. Mullani are that the parties belonging to the Hindu community were not subject to the jurisdiction of the Family Court constituted under the Family Courts Act, 1964. As the point required consideration Mr. Jhamat and Mr. Hassan Mehmood Baig learned Senior Counsel of the Court were appointed as Amicus Curiae vide order dated 27-9-2004.

4. The second contention of Mr. Jagdesh R. Mullani learned counsel for the petitioner is that the Family Law Ordinance makes references to the Muslim Laws, provides for matter exclusively within the domain of Muslim Personal Law and as such would apply to Muslim marriages and not those attracting the Hindu Law. He has referred to the provisions of subsections (4)(10) of the said Act and contended that in view of the provisions of section 5 and Family Courts Act, 1964 is a mere procedural Act and cannot be invoked to adjudicate the case of the respective parties. To elaborate his above contention, he has placed reliance on the promulgation of an Act of dissolution of marriages as 1955 in India.

He has also placed reliance on the case of Sultan Ahmad v. Mst. Mahr Bhari (PLD 1982 FSC 48), Masood Ahmed Malik v. Mst. Fouzia Farhana Quddus (1991 .SCMR 681), Mrs. Daphne Joseph v. Malik Eric Roshan Khan (PLD 1978 Karachi 336) and Mulchand v. Smt. Indra (PLD 1985 Karachi 362).

5. Mr. Taj Muhammad Qaimkhani, learned counsel for the respondent No. 1 opposed the petition and contented that no objection as to the jurisdiction of the Court was taken up before the learned trial Court, as such the question of jurisdiction was neither discussed nor any issue was framed in this regard. According to him, the parties have submitted to the jurisdiction of the Family Court and, therefore, by submission of parties without any objection, the Court had jurisdiction to adjudicate and decide the matter. He has placed reliance on the case of Ghulam Sarwar v. District Judge (1985 CLC 2478), Mubashar Ahmad v.

Talat Khurshid (1996 CLC 1963) and Ramdas v. Bernadat (PLD 1998 Karachi 42).

6. The learned Amicus Curiae have rendered their views and before proceeding further, I may place on record my appreciation for the valuable assistance rendered by them in

arriving af the conclusion.

7. . Their views are similar. Mr. Hassan Mehmood Baig learned Amicus Curie has, .while agreeing with the view of Mr. Jhamat Jathanand, contended that there; are three sources of Hindu Law as enunciated in paragraphs 8 and 15 of the principles of Hindu Law by Mulla, Ninth Edition. .These are (1) .Sruti (2) Smriti and (3) Custom

while the details of the respective sources as contained in section 15 specifically provides that in case of conflict a custom prevails over the text of the Sruti. Reference to section 8 may be made,. it reads as follows:- .

- 8. Sources of Hindu Law.--The three main sources of Hindu Dharma or law are (1) the Sruti, (2) the Smriti, and . (3) Custom:- '

(1) “Sruti” means literally, that which was heard. The Srutis are believed to contain the very words of the deity, and they include the four Yedas, but they contain very little of law. .

(2) “Smirit” means, literally, that which was remembered. It is the recollection handed down by. the Rishis, or sages of antiquity, of the precepts of God. The Smritis constitute the, principal source of law. The term Dhamra. Shastra, literally,

. teacher of law, comprehends both Srutis and Smirtis, but it is often used to designate the Smritis alone. .

The three principal Smritis are- .

(i) The Code of Institutes of Manu, compiled some time between . , 200 B.C. and 200 A.D. . .

(ii) The Code or Institutes of Yajnavalkya, written about the 4th century, A.D. The Mitakshara is the leading commentary upon this Code. ..

(iii) The Code or Institutes of Narada, written in the 5th or 6th . century A.D.

(3) Customs are supposed by some writers to be based on lost or

forgotten Sruti, and by others, on lost or forgotten Smriti.”

8. The requisite for such customs, the essentials for valid.customs,

redeemed customs proof and validity are discussed in subsequent sections 16 to 20 respectively. .

9. Mr.Masood A. Noorani, learned Additional A. G. has also supported these views and the case-law submitted.

10. The question was also examined by the Supreme Court of India in case of Gurdit Singh v. Angrez Kaur and others (AIR 1968 S.C. 142) and while admitting the institution and significance of custom as a source of the Hindu Law in the elaborate discussion, the

practice of different customs in different areas and castes have also been recognized.

11. Having examined the question of custom of divorce in the light of the above legal position as well as the admission of the parties before the Court, custom of divorce was specifically pleaded in paragraph 1 of the application that applicant belonging to Hindu Menghwar community, where custom of dissolution of marriage existed. This was admitted in the written statement. . This point does not require any further elaboration. The existence of the institution of divorce by custom having the force of personal law is acknowledged to be in practice by the Hindu Menghwar community.

12. The-next question as to the scope of the jurisdiction of Family Court constituted under the Family Courts Act, 1964 came for examination before this Court in the case of Mrs. Daphne Josehp v. Malik Eric Roshan Khan (PLD 1978 Karachi 336), after the powers of dissolution of Christian marriages earlier available to the District Courts were conferred upon the Family Courts. The Division Bench of this Court concluded that the case involving divorce under Divorce Act, 1869 was triable by the Civil Court.

13. In the case of Sultan Ahmed v. Mst. Mehr Bhari (PLD 1982 FSC 48), while examining the validity of the powers of appeal in pursuance to the provision of section 14 (2) of the Family Courts Act, the Full Bench of the Hon'ble Federal Shariat Court dismissed the petition on the ground that in the earlier decided case of Federation of Pakistan v. Mst.. Farishta and the subject-matter was beyond the scope of jurisdiction of the Federal Shariat Court.

14. In the case of Mulchand v. Smt. Indra and others (PLD 1985 Karachi 362), Justice Tanzil-ur-Rehman, J. (as his Lordship then was) examined the objection under section 5 of Family Courts Act, 1964 and its application to the Hindu Citizens of Pakistan. It was observed that "I find that the provisions of section 5 of the Family Courts Act, 1964 do not exclude from its ambit cases relating to marriage and family affairs of non-Muslims including Hindus. The Family Courts Act is a procedural statute and does not come into conflict with the Hindu

Married Women's Right to Separate Residence and Maintenance Act, 1946. The Act of 1964, in every sense of the term, has: brought about only procedural change and has not affected any substantive right, muchless the right to separate maintenance of Hindu married women as provided inAct XIX of 1946 to show or even infer from'the' scheme of the said Act by .which it-could be, said to be inapplicable .to Hindus.

Merely the use of .the expression, "subject,to the..provisions of Muslim Family Laws Ordinance, 1961" does not take away the jurisdiction of the. Family Courts to try and decide the matter relating to the maintenance of a,Hindu wife or.the minor. The, Central Act XIX of 1946 does not, in the circumstance of the case, have an overriding effect on Family Courts Act \vhich is a provincial statute. Reference may be made to a number of cases reported as Mrs. Daphne Josheph v. Malik Eric Roshan Khan, Adnan Afzal v. Capt. Sher Afzal and Safdar Bhatti v. Mst. Rozi Jan." v

, 15, The same view found favour before .the two. Single Benches of the Lahore High Court in case of Mubbashir Ahmed v. Talat .Khurshid (1996 CLC 1963) and in Naeem Ahmed v. Mst. Nuzhat Almas (1981 CLC. 195), the provisions of Family Courts Act, 1964, after

examining the section 5, were held to be applicable to the cases of non-Muslims, who were Qadianis.

16. The scope of application of the provision of Family Courts Act, 1964 in a cise of Talaq amongst two Muslims holding American citizenship came for examination before the Honourable Supreme Court in .the case of Masood-Ahmad Malik v. Mst. Fouzia Farhana Quddus (199.1 SCMR 681) and the Honourable Court has observed that a close examination of the provisions of the Family Courts Act, 19.64 and those of the. Muslim Family Laws Ordinance, 1961 shows that they do not operate exactly in the same field and that the scope of the Family Court . Act, 1964 is wider than that of the Muslim Family Laws Ordinance, 1961. In our view, the effect of the words'in section 5 that the Family Courts shall have the jurisdiction to entertain suits relating to dissolution of marriage, jactitation of marriage etc. but subject to the provisions of the Muslim Family Laws Ordinance, 1961 imply only that where there is an inconsistency between Muslim Family Laws Ordinance, 19,61 and the Family Courts Act, 1964, the provisions of the Muslim Family Laws Ordinance will prevail and shall be given effect to in their .pristine form and no more. They do not have any other effect and the provisions. of other laws are not affected thereby. Accordingly, suits of this nature filed by the parties, other than Muslim citizens of Pakistan if otherwise competent under any other law can be entertained but will be heard and tried not in accordance with the provisions of the Muslim Family Laws Ordinance, but by the proper law applicable to them.

Thus, under the Civil Procedure Code, 1908 a Civil Cpurt has jurisdiction to entertain and try a suit if the parties, at the commencement of the suit, are residing within its local limits (section 20, C.P.C). Accordingly, any party irrespective of the question whether he is a Muslim citizen of Pakistan or not can institute a suit-, including a suit for jactitation of marriage, before a Court within whose local limits the defendant is, for the time bfcing residing. If the parties are Muslim citizens of Pakistan, the suit will be tried and determined in accordance with the provisions of the Muslim Family Laws Ordinance, 1961. But if they are not Muslim Citizens of Pakistan the suit can still be entertained but it will be tried and determined by the proper law of the parties; in the former case by the Family Court while in the later case by the ordinary Civil Court of competent jurisdiction".

17. Masood Ahmed Malik's case (supra) also pertains to the dissolution of marriage between two Muslims who had migrated to Pakistan and acquired two different nationalities abroad and the Honourable Supreme Court was pleased to. observe that while the provisions of Family Courts Act were attracted to the citizen of Pakistan. Foreign citizen though Muslim may approach the Civil Court, however it was observed that, in that case, the same Court was exercising the power of Family Court as well as Civil Court and, therefore, the Court was competent to deal with the matter.

18. For the above reasons, the Family Court constituted under the Family Courts Act, 1964 are competent to adjudicate upon the matters .

pertaining to divorce claimed on the strength of customs. In Constitution matters, the findings of the trial Court are to be interfered only in case of gross irregularity or jurisdictional error as held by the Honourable] Supreme Court in the case of Mst. Nadira Shahzad v. Mubashir Ahmed (1995 SCMR 1419).

19. The practice of divorce exists, it is recognized and practised under the prevalent Customs of Hindu Dharma. Though it may vary from place to place and from community to community. The existence of the institution of divorce by way of custom having the force of personal law is admitted to be in practice by the Hindu Menghawar community. The Family Courts constituted under the Family Courts Act, 1964 are competent to adjudicate upon the matters involving the Hindu citizens of Pakistan to the extent as specified in the schedule to the said Act, which includes the cases pertaining to divorce. The contentions raised on behalf of the petitioner, therefore, have no force.

20. This petition being devoid of any merit is dismissed with costs.