IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD

* * * * *

HON'BLE SRI JUSTICE K. LAKSHMAN

AND

HON'BLE SMT. JUSTICE P. SREE SUDHA

FAMILY COURT APPEAL NO.338 OF 2013

Between:

Dr. N. Surya, S/o Mallu .. Appellant

Vs.

Smt. N. Sushma, W/o Dr. N. Surya .. Respondent

DATE OF JUDGMENT PRONOUNCED: 20.03.2024

HON'BLE SRI JUSTICE K. LAKSHMAN

1	Whether Reporters of Local newspapers may be allowed to see the Judgments?	Yes/No
2	Whether the copies of judgment may be marked to Law Reporters/Journals	Yes/No
3	Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?	Yes/No

JUSTICE K. LAKSHMAN

IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD
CORAM:
*** HON'BLE SRI JUSTICE K. LAKSHMAN**
AND
HON'BLE SMT. JUSTICE P. SREE SUDHA

+ FAMILY COURT APPEAL NO.338 OF 2013

% Delivered on: 20.03.2024
Between:
\# Dr. N. Surya, S/o Mallu …..Appellant
And
$ Smt. N. Sushma, W/o Dr. N. Surya …..Respondent

! For Petitioner : Sri Parsa Anantha Nageshwara Rao, Learned Counsel

^ For Respondent : Sri A. Prabhakar Rao, Learned Counsel

< Gist :

> Head Note :

? Cases Referred :

1. (2000) 8 SCC 587.
2. AIR 2001 SCC 938.
3. 2023 SCC Online Tri 830.
4. 2021 SCC Online Jhar 1339
5. (2002) SCC 637
6. (2005) 9 SCC 407

HON'BLE SRI JUSTICE K. LAKSHMAN
AND

HON'BLE SMT. JUSTICE P. SREE SUDHA

F.C.A.No.338 OF 2013

ORDER: (*Per Hon'ble Sri Justice K. Lakshman*)

Heard Sri Parsa Anantha Nageswara Rao, learned counsel for the appellant and Sri A. Prabhakar Rao, learned counsel for the respondent.

2. Challenging the impugned order and decree dated 28.09.2012 in O.P.No.214 of 2010 passed by the learned Chairman, Motor Accidents Claims Tribunal-cum-III Additional District Judge, Warangal, appellant-husband preferred the present appeal. He has filed the aforesaid O.P under Section 12 (1) (ia) (ib) and (1A) of the Hindu Marriage Act against the respondent-wife seeking dissolution of marriage on the ground of cruelty as well as desertion.

3. During the pendency of the said O.P, respondent-wife had filed a memo stating that the parties belong to Tribal Community (Lambadies), but the petition has been filed by the petitioner under the Hindu Marriage Act. Therefore, the learned Family Court has no jurisdiction to try this case, as the parties are not governed by the Hindu Marriage Act. Therefore, according to respondent, the

aforesaid O.P.No.214 of 2010 is not maintainable. She has also referred Section 2(2) of Hindu Marriage Act and also relying on decision of the Hon’ble Supreme Court reported in AIR 2001 SCC 938. Relying on the said principle and also considering the said memo, vide impugned order dated 28.09.2012, learned Family Court dismissed the said O.P. Challenging the said order, appellant-husband preferred the present appeal.

4. There is no dispute that the aforesaid O.P was posted for inquiry. At that stage, the respondent had filed a memo stating that the parties belong to Tribal Community (Lambadies). Therefore, the said O.P is not maintainable and they are not governed by provisions of Hindu Marriage Act. Relying on the said memo and referring to the principle laid down by Hon’ble Apex Court in AIR 2001 SCC 938, learned Family Court dismissed the said O.P.

5. Sri Parsa Anantha Nageswara Rao, learned counsel for the appellant would contend that learned Family Court cannot decide O.P basing on the memo filed by the respondent. Learned Family Court has to decide the said issue along with other issues in main O.P itself after conducting full-fledged trial. Thus, learned Family Court erred in dismissing the O.P without conducting any inquiry.

6. Whereas, Sri A. Prabhakar Rao, learned counsel appearing for the respondent fairly submits that the learned Family Court has to decide the said aspect during trial after conducting full-fledged trial.

7. In the light of the aforesaid submissions, it is relevant to extract Section 2(2) of the Hindu Marriage Act, 1955:-

> "*Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribes 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. In ***Labishwar Manjhi vs. Pran Manjhi And Ors***[1]**,** the Apex Court introduced the concept of "Hinduised" individuals. It was held if the members of Scheduled Tribe follows customary practices and traditions of Hinduism only, then they will be guided once they establish they are "Hinduised". Relevant portion is extracted below:-

> "*The finding is that they are following the customs of the Hindus and not of the Santhal's. In view of such a clear finding, it is not possible to hold that sub-section 2 of Section 2 of Hindu Succession Act excludes the present parties from the application of the said Act. Sub-section 2 only excludes members of any Scheduled Tribe admittedly as per finding recorded in the present case though the parties originally belong to the Santhal Scheduled Tribe they are Hinduised and they are following the Hindu traditions. Hence, we have no hesitation to hold that Sub-section 2 will not apply to exclude the parties from application of Hindu Succession Act. The High Court fell into error in recording a finding to the contrary.*"

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[1] (2000) 8 SCC 587

9. In ***Dr. Surajmani Stella Kujur vs. Durga Charan Hansdah***[2]**,** the Apex Court held as follows***:-***

> *"8. No custom can create an offence as it essentially deals with the civil rights of the parties and no person can be convicted of any offence except for violation of law in force at the time of commission of the act charged. Custom may be proved for the determination of the civil rights of the parties including their status, the establishment of which may be used for the purposes of proving the ingredients of an offence which, under Section 3(37) of the General Clauses Act, would mean an act or omission punishable by any law by way of fine or imprisonment. Article 20 of the Constitution, guaranteeing protection in respect of conviction of offence, provides that no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence. Law under Article 13 clause (3) of the Constitution means the law made by the legislature including intra vires statutory orders and orders made in exercise of powers conferred by the statutory rules.*
>
> *9. For custom to have the colour of a rule or 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"*

10. In ***Amrit Lal Chakma vs. Babita Chakma***[3], a Division Bench of Tripura High Court in paragraph Nos.16 and 19 held as follows:-

> *"16. In the present case, the parties have pleaded that though they are Scheduled Tribes but they are Buddhist and have solemnised and registered their marriage under the Hindu Marriage Act, 1955. It is*

[2] AIR 2001 SCC 938
[3] 2023 SCC Online Tri 830

for the parties to plead and prove that they were sufficiently Hinduised for being governed by the provisions of the Hindu Marriage Act, 1955. The provisions of Section 2(1)(b) of the Hindu Marriage Act also provides that the Act applies to any person who is a Buddhist, Jaina or Sikh by religion. As such, the opinion of the learned Family Court that simply because the parties belong to Scheduled Tribe; their application under the Hindu Marriage Act, 1955 could not be entertained, would not be proper as the parties have professed that they have solemnized their marriage under Hindu Marriage Act and have also got it registered under Section 8(1) of the Act of 1955. The learned Court should have allowed the parties to plead and prove that they are Hinduised and are governed by the Hindu Marriage Act, 1955 and that they had got their marriage registered under Section 8(1) of the Hindu Marriage Act, 1955."

"19. .....Simply being guided by the fact that the parties did belong to a Scheduled Tribe community, the suit ought not to have been dismissed. The learned Family Court ought to have framed an issue to that effect that whether the parties are sufficiently Hinduised to be governed by the Hindu Marriage Act…….."

11. In ***Baga Tirkey vs. Pinki Linda***[4], a Division Bench of Jharkhand High Court in paragraph No.26 held as follows:-

"26. Therefore, on a detailed consideration of the submissions of learned counsel for the parties and valuable assistance rendered by the learned Amicus Curiae, we are of the considered opinion that the learned Family Court committed an error of jurisdiction in holding that the suit instituted by the petitioner/appellant herein was not maintainable, as there was no codified substantive law applicable to the parties to marriage, like Hindu Marriage Act, 1955, Special marriage Act, 1954 and Divorce Act, 1869. It also committed an error in holding that the petitioner is

[4] 2021 SCC Online Jhar 1339

seeking relief of divorce on the basis of customs and usage, applicable to the parties, which can be exercised only by the Community Panchayat and not by Court of Law. The legislature having consciously conferred jurisdiction upon the Family Court to adjudicate on matters, enumerating under Clauses-(a) to (g) of the Explanation to Section 7(1) including a suit or proceeding between the parties to the marriage for decree of nullity of marriage or restitution of conjugal rights or judicial separation or dissolution of marriage, the learned Family Court could not have held the suit to be not maintainable as there is absence of a substantive codified law, governing the parties."

12. In the case of ***Yamanaji H. vs. Nirmala***[5]**,** the Apex Court enunciated a course to be followed by Family Courts in matters of divorce involving customary law. In paragraph No.7, it has been held as under:-

"*….As per the Hindu Law administered by courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court.*

[5] (2002) SCC 637

13. In ***Subramani vs. M. Chandralekha***[6], the Apex Court in paragraph No.10 held as follows:-

> *"It is established by long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by person propounding such custom.....".*

14. In the light of the aforesaid principles, parties have to plead and prove that provisions of the Hindu Marriage Act are not applicable and they are not guided by the said provisions during the trial. The learned Family Court has to frame an issue on the same and decide the same along with other issues after conducting full-fledged trial. Instead of doing so, learned Family Court dismissed the O.P filed by appellant-husband relying on memo filed by respondent-wife. Thus, learned Family Court erred in dismissing the aforesaid O.P simply relying on the memo. Therefore, impugned order is liable to be set aside and accordingly it is set aside. Matter is remanded back to the learned Chairman, Motor Accidents Claims Tribunal-cum-III Additional District Judge, Warangal with a direction to decide the aforesaid O.P.No.214 of 2010 afresh after affording an opportunity to appellant as well as respondent and they are at liberty to take all the pleas and grounds including applicability of provisions of the Hindu

[6] (2005) 9 SCC 407

Marriage Act before the learned Family Court and it is for the learned Family Court to decide the same along with other issues.

15. Since the O.P is of the year 2010, learned Family Court is directed to decide the said O.P by conducting day to day proceedings as expeditiously as possible preferably within a period of three (03) months from the date of receipt of copy of this order.

16. In the light of the aforesaid discussion, this appeal is allowed. There shall be no order as to costs.

As a sequel, the miscellaneous petitions, if any, pending shall stand closed.

K. LAKSHMAN, J

P.SREE SUDHA, J

20.03.2024

***Note*:**
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