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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

WEDNESDAY, THE 23RD DAY OF JUNE 2021 / 2ND ASHADHA, 1943

MAT.APPEAL NO. 338 OF 2017

AGAINST THE JUDGMENT IN OP 317/2009 OF FAMILY COURT,

THIRUVALLA, PATHANAMTHITTA

APPELLANT/RESPONDENT NO.4 IN O.P.:

RAJEEVE
AGED 59 YEARS
W/O. REGHUNATHAN, R/O. RAILWAY QUARTERS, REST
HOUSE, DAVANGERE, KARNATAKA STATE, PIN-577006

BY ADVS.
SRI.JOSEPH GEORGE
SRI.BIJO THOMAS GEORGE
SMT.NICEY A. MENON

RESPONDENTS/PETITIONER AND RESPONDENTS 1 TO 3 IN O.P.:

- 1 SARASAMMA
AGED 53, REGHUMANDHIRAM (SREE HARI
MANDHIRAM), VALIYAKUNNAM MURI, THEODICAL PO.,
PERUMPETTY VILLAGE, MALLAPPALLY
TAUK, PATHANAMTHITTA DISTRICT PIN-689613
- 2 UNION OF INDIA
REP.BY GENERAL MANAGER DEPARTMENT OF
RAILWAYS, RAILWAY BHAVAN, NEW DELHI, PIN-110001
- 3 THE GENERAL MANAGER AND CHIEF PERSONAL OFFICER
SOUTH WESTERN RAILWAYS, HUBLI, KARNATAKA PIN-
580021

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Mat.Appeal No.338/2017

-:2:-

4 THE DIVISIONAL PERSONAL OFFICER
SOUTH WESTERN RAILWAYS, MYSORE, KARNATAKA PIN-
570001

BY ADVS.
SRI.JACOB P.ALEX
SRI.S.CHANDRASENAN, SC, RAILWAYS
SRI.JOSEPH P.ALEX

**THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
11.06.2021, THE COURT ON 23.06.2021 DELIVERED THE
FOLLOWING:**

J U D G M E N T

Dated this the 23rd day of June, 2021

Dr.Kauser Edappagath, J.

The marital status of the appellant and the first respondent is in dispute in this matrimonial appeal.

2. One Mr.S.Reghunathan, an employee of South Western Railways, died on 31/1/2009 while in service. After his death, the appellant as well as the first respondent claiming themselves to be his legally wedded wife came forward and raised rival claims before the Railways, the respondents 2 to 4, for his service benefits. Since the issue could not be settled at the official level, the first respondent instituted original petition before the Family Court, Thiruvalla (for short ‘the court below’) invoking S.7 (b), (c) and (d) of the Family Courts, Act, 1984 to declare her marital status as the wife of late Reghunathan and also for a permanent prohibitory injunction to restrain the respondents 2 to 4 from disbursing the family pension and other death benefits of late

Reghunathan to the appellant and further to restrain the appellant from receiving the same. The court below allowed the original petition and granted the reliefs sought for to the first respondent vide the impugned judgment. The said judgment is under challenge in this matrimonial appeal.

3. We have heard Sri.Joseph George, the learned counsel for the appellant and Sri.Jacob P.Alex, the learned counsel for the first respondent.

4. Both the appellant and the first respondent contended that they are the legally wedded wife of late Reghunathan and two children each were born in their respective wedlock and, as such, they alone are entitled to receive the family pension and other service benefits of the deceased. According to the appellant, the marriage between her and late Reghunathan was solemnized at Kateelu Temple, Mangalore on 30/5/1977, two children were born out of the said wedlock in the years 1980 and 1984 and they lived as husband and wife at the official quarters of late Reghunathan till his death. Per contra, the first respondent contended that the marriage between her and late Reghunathan was solemnized on 13/7/1981 at Aranmula Parthasarathy Temple

as per the customs prevailing among Hindu Nair community, two children were born out of the said wedlock in the years 1983 and 1987 and they were living as husband and wife till the death of late Reghunathan. Both the appellant and the first respondent disputed and denied the alleged marriage between late Reghunathan and the other spouse. In short, both alleged that the status of the other one is only that of a concubine. The court below after evaluation of the evidence on record found that the first respondent has succeeded in proving the marriage between her and late Reghunathan at Parthasarathy temple, Aranmula on 13/7/1981 in accordance with customary rites and ceremonies prevalent among Hindu Nair community and that there is evidence to show that they lived together thereafter as husband and wife. The court below further found that the appellant failed to prove valid ceremonial marriage and mere living together by her with late Reghunathan will not confer her the status of a wife. Accordingly, the court below declared the status of the first respondent as the legally wedded wife of late Reghunathan. The consequential reliefs of permanent prohibitory injunction sought for were also granted.

5. The learned counsel for the appellant assailed the impugned judgment on the ground that the court below was unreasonable and unrealistic in the appreciation of oral as well as documentary evidence. The learned counsel submitted that the evidence adduced by the appellant clearly proves the solemnization of marriage between her and late Reghunathan on 30/5/1977 and that they lived together as husband and wife since then and two children were born out of the said wedlock. The counsel further submitted that the law presumes in favour of marriage when a man and woman have cohabited continuously even if the direct evidence of marriage, if any, is unsatisfactory. The counsel also submitted that the evidence adduced by the first respondent is quite insufficient to rebut the legal presumption arising from the established facts in favour of the appellant and inasmuch as the alleged marriage between late Reghunathan and first respondent is a subsequent one, the said marriage is invalid as hit by S.5(i) of the Hindu Marriage Act, 1955. The counsel further submitted that where a person is already married, no presumption of second marriage arises by reason of long cohabitation. At any rate, the court below went

wrong in deciding the legitimacy of the children of the appellant, added the learned counsel. The maintainability of the original petition for want of notice under Section 80 of the Code of Civil Procedure was also challenged.

6. Who among the appellant and the first respondent is the legally wedded wife of the deceased Reghunathan? - is the crucial point arises for consideration in this appeal.

7. Both parties gave evidence to prove the factum of their respective marriage and long cohabitation thereafter. The evidence consists of the oral evidence of PWs 1 to 4 and Exts. A1 to A17 on the side of the first respondent and oral evidence of RWs 1 to 4 and Exts. B1 to B31 on the side of the appellant.

8. We will first consider the evidence tendered by the first respondent. PW1 is the first respondent herself. PW2 and PW3 are the close relatives of PW1 who attended the marriage ceremony and witnessed the cohabitation of the first respondent and late Reghunathan thereafter. PW4 is the mother of late Reghunathan. Out of 17 documents produced on the side of the first respondent, Exts. A1, A2, A3, A6, A7, A9, A10, A11, A12, A13 and A16 are important.

9. PW1 gave evidence in tune with the pleadings. She deposed that the marriage between her and late Reghunathan was solemnized on 13/7/1981 at Parthasarathy temple, Aranmula in accordance with customary rites and ceremonies prevalent among Hindu Nair community and in the said wedlock two children were born. It is not in dispute that the first respondent as well as late Reghunathan belonged to Hindu Nair community. PW1 also gave evidence that after the marriage, she and late Reghunathan lived as husband and wife till the latter breathed his last. It has come out in evidence that late Reghunathan was working in the Engineering department of the Mysore division of Southern Railway at the time of his marriage with the first respondent. Thereafter, he has worked at Mangalore and Thumpoor. At the time of death, he was working at Davanagere. PW1 deposed that the late Reghunathan was residing at his workplace and she along with her children were residing at her own house constructed by her husband at her native place. She further deposed that late Reghunathan used to come and reside with them three to four times in a year and during Onam and other holidays. She further deposed that occasionally she used to

go over to his place and reside with him at the railway quarters. PW2 is the paternal first cousin and PW3 is the uncle of late Reghunathan. Both of them deposed that they attended the marriage between the first respondent and late Reghunathan which was solemnized at Parthasarathy temple, Aranmula and, after the marriage, they lived together as husband and wife and two children were born out of their wedlock. They further deposed that late S.Reghunathan used to come on leave every year and reside with the first respondent and her children. PW4 is none other than the mother of late Reghunathan. She also categorically deposed that she witnessed the marriage between the first respondent and his son Reghunathan which was solemnized at Parthasarathy Temple, Arnamura and after the marriage, they lived together as husband and wife and two children were born out of their wedlock. She further deposed that late Reghunathan has no other wife or children and appellant put forward her claim without any bonafides.

10. Ext. A1 is the original marriage certificate issued by the President and Secretary of NSS, Karayogam, Thadiyoor which shows that the marriage between the first respondent and

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S.Reghunathan was solemnized between 11.30 a.m and 12.15 noon on 13/7/1981 at Parthasarathy Temple, Aranmula in accordance with the customary rites and ceremonies prevalent in their community. Ext. A2 is the certificate of marriage issued by the Secretary/Registrar of Hindu Marriages of Aranmula Grama Panchayat. It shows that the marriage was registered on 17/7/1981. Ext. A3 is the identity card issued to late Reghunathan by the South Western Railway Division. The name of the first respondent has been stated as his wife and the daughter born to her has been shown as their daughter therein. Exts. A6 and A7 are the original title deeds in respect of properties purchased in the name of late Reghunathan and the first respondent. In these documents also, the first respondent has been shown as the wife of late Reghunathan. Ext. A9 is the certificate issued from Thadiyoor school to the Southern Railway for giving educational allowance to the daughter of late Reghunathan born out of wedlock with the first respondent. Ext. A10 series are the extract of the SSLC certificates of the children of the first respondent. In those documents, the name of the father of the children of the first respondent has been shown as Reghunathan Nair. Ext. A11 is

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the passport of the son of the first respondent. In the said document also, his parents' name have been shown as late Reghunathan and the first respondent. Ext. A12 is the attested copy of the identity card issued to the first respondent by the Election Commission of India in which the name of her husband is stated as Reghunathan. Ext. A13 is the birth certificate of the daughter of the first respondent in which the name of the mother is stated as the first respondent and the name of the father is stated as Reghunathan. Ext. A16 is the copy of the Family Composition Certificate issued by the South Western Railways, Mysore. The first respondent and her two children have been shown as the wife and children of late Reghunathan in the said document.

11. We will now examine the evidence tendered by the appellant. RW1 is the appellant herself, RW2 and RW3 are her children and RW4 was a co-worker of late Reghunathan. Out of 31 documents produced, Ext. B3 series, B4 series, B5, B6 and B17 to B19 alone are important.

12. RW1 gave evidence in tune with the contentions raised in the written statement. She deposed that the marriage between

her and late Reghunathan was solemnized on 30/5/1977 at Kateelu temple at Mangalore, they lived as husband and wife thereafter and two children were born out of the said wedlock. RW2 and RW3 supported the evidence of RW1 and deposed that they were born out of the marital relationship between the appellant and late Reghunathan. RW4 deposed that he worked along with late Reghunathan for about 20 years and during the said period, the appellant was residing along with Reghunathan as his wife at railway quarters at Davanagere and RW2 and RW3 are the children born to the appellant out of her wedlock with late Reghunathan.

13. Ext. B3 is a confirmation letter issued by one Sadananda Mally of Bunt's Alias Nadavara Mathr Sangha in which it is stated that the appellant and late Reghunathan got married on 30/5/1977 at 11.35 a.m. at Kateelu Sri Durga Parameshwari Devi temple, Karnataka. Ext. B4 is an affirmation letter issued by one Vasudeva Asranna, hereditary Pradhana Archaka, Shree Durga Parameshwari Temple, Kateel. It is seen stated therein that late Reghunathan and appellant were married on 30/5/1977 at Kateelu Sri Durga Parameshwari Devi temple and the marriage

was performed by his uncle late Krishna Asranna. Exts. B5 and B6 are the transfer certificates of the children of the appellant issued by the school authority in which the father's name has been shown as S.Reghunatha Shetty. Ext. B17 is the pan card of late Reghunathan.

14. An analysis of the oral and documentary evidence adduced by both sides in support of their respective claim would clearly show that there is concrete evidence to prove the valid marriage between the first respondent and late Reghunathan and long cohabitation between them pursuant to the said marriage. On the other hand, the evidence tendered by the appellant is weak, shabby and insufficient to prove her case.

15. The parties are Hindus. Marriage, according to the pristine Hindu Law is *sanskar* – a sacrament; one of the sixteen important sacraments essential to be taken during one's lifetime. The traditional concept of marriage is now grossly changed and Hindu marriage today has assumed more or less the nature of contract for the mutual benefit of the parties concerned, duly aided by different legal provisions and reformers. The Hindu Marriage Act, 1955 reformed radically the Hindu law of marriage.

The Act overrode all the rules of law of marriage whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law in respect of all the matters dealt with in it. The Act does not use expression 'sacramental marriage' but speaks of a Hindu marriage solemnized in accordance with customary rites and ceremonies of either party. Section 7 makes it clear that a Hindu marriage has both religious as well as secular aspects. Therefore, it is to be treated both as a sacrament and as a contract. It is a sacrament because there is emphasis on the performance of the customary rites and ceremonies including *Saptapadi* wherever it is treated as an essential ceremony for the completion of the marriage. It is a contract because this section deals with the capacity of the spouses to enter into an alliance for a marriage.

16. To prove a valid marriage under the Hindu law, the evidence regarding the performance of marriage as required under Section 7 of the Hindu Marriage Act must be brought on record. Section 7 speaks of solemnization of marriage with customary rites and ceremonies. The word 'solemnized' means, to celebrate the marriage with proper ceremonies with intention

that the parties should be considered to be married. The Apex Court in **Gopal Lal v. State of Rajasthan** (AIR 1979 SC 713) while defining the word 'solemnize' in connection with a marriage under the Hindu Marriage Act, held *inter alia*, that word 'solemnize' means in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form'. In **Bhaurao v. State of Maharashtra** (AIR 1965 SC 1564), it was held that unless the marriage is 'celebrated or performed with due ceremonies and due form' it cannot be said to be "solemnized". It follows, therefore, that unless the marriage is celebrated or performed with proper ceremonies and due form, it cannot be said to be 'solemnized'. Where the factum of marriage is disputed, essential ceremonies constituting the marriage must be pleaded and proved to show that the marriage was valid.

17. The first respondent has clearly pleaded in the original petition that her marriage with late Reghunathan was solemnized in accordance with customary rites and ceremonies prevalent among Hindu Nair community. The first respondent has also deposed so. She was not specifically cross examined on this aspect. PW2 to PW4 who witnessed the ceremony of marriage

were also examined. All of them were present at the time of the marriage ceremony. They consistently gave evidence that they witnessed the marriage ceremony and they have seen the first respondent and late Reghunathan living as husband and wife till the death of late Reghunathan. PW2 and PW3 are close relatives of PW1 and PW4 is none other than the mother of late Reghunathan. The evidence tendered by them are relevant under Section 50 of the Indian Evidence Act.

18. As per Section 50 of the Indian Evidence Act, when the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship. What the Section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved. The two illustrations appended to the Section clearly bring out the true scope and effect of the Section.

The evidence of PWs 2 to 4 would clearly show that they had special means of knowing the disputed relationship between the first respondent and late Reghunathan. They have attended the marriage ceremony and they have witnessed the first respondent and late Reghunathan cohabiting together as husband and wife. Undoubtedly, they showed their opinion as expressed by their conduct and thus admissible under Section 50. The Supreme Court in **Reema Aggarwal v. Anupam** (2004 KHC 668) has held that when the factum of celebration of marriage is established, it will be presumed that absence to the contrary that all the rites and ceremonies to constitute a valid marriage have been gone through.

19. Coming to the documentary evidence adduced on the side of the first respondent, Ext. A2 is the certificate of marriage issued by the competent authority. If the valid marriage is proved, the registration of the marriage under Section 8 of the Act becomes proof of that valid marriage under the Hindu Marriage Act, 1955. Ext. A2 gets corroboration from Ext. A1 which is the certificate issued by Secretary of NSS Karayogam, Thadiyoor stating that marriage between the first respondent and late

Reghunathan was solemnized between 11.30 a.m and 12.15 noon on 13/7/1981 at Parthasarathy Temple, Aranmula. The remaining documents produced on the side of the first respondent and discussed in the previous paragraphs would clearly prove the long cohabitation between the first respondent and late Reghunathan.

20. On the other hand, there is no pleading in the written statement filed by the appellant that her marriage with late Reghunathan was solemnized in accordance with the customary rites and ceremonies. In evidence also, RW1 did not state that the marriage was in accordance with customary rites and ceremonies prevalent in the community. Admittedly, the first respondent and late Reghunathan belonged to the Hindu Nair community. The appellant claims that she belongs to the Shetty community of Karnataka state. What are the customary rites and ceremonies prevalent among the Shetty community have also not been pleaded or deposed. That apart, no witness who was present in the alleged marriage ceremony was examined. The appellant failed to lead any evidence of solemnization of marriage in accordance with customary rites and ceremonies. The Supreme

Court in **Surjit Kaur v. Garja Singh and Others** (AIR 1994 SC 135) has held that without pleading any custom prevalent in the area and performance of ceremonies, mere statement that gur was distributed after marriage and the couple lived as husband and wife are not sufficient to establish marriage. This Court in **Leelamma v. Radhakrishnan** (2005 KHC 561) has held that mere long cohabitation and entry in the ration card and other documents without proving the performance of marriage conducted as per the customary rites of parties, existence of marriage cannot be presumed.

21. In so far as the documentary evidence adduced by the appellant is concerned, neither Ext.B3 nor Ext.B4 is the certificate of registration issued by any competent authority under Section 8 of the Hindu Marriage Act. Ext. B3 is only a confirmation letter and Ext. B4 is a letter issued by the nephew of the priest who allegedly conducted the marriage certifying the marriage. Nowhere in Exts. B3 and B4 it is stated on what basis those documents were issued. The authors of those documents were also not examined. Therefore, those documents cannot be relied on to prove the marriage.

22. Even though there is no satisfactory evidence to prove valid marriage between the appellant and late Reghunathan, the oral and documentary evidence adduced by the appellant would show that she and Reghunathan cohabited together for a pretty long period and two children were born out of the said relationship. Normally, long cohabitation of a man and woman for a number of years accepted by the society as such may raise the presumption of valid marriage, unless contrary is proved, even in the absence of direct evidence of ceremonial marriage. However, when there is evidence of long cohabitation of a man with two women simultaneously with habit and repute begetting children in both relationships, one pursuant to a ceremonial marriage and the other one not pursuant to a ceremonial marriage, the presumption of valid marriage must lean in favour of the former even if the latter relationship commenced prior in point of time. It is true that the parties to a live-in relationship or non formal relationship who have lived together for an extended period of time could be brought within the purview of laws relating to maintenance and domestic violence and could be considered as husband and wife for the said limited purpose. But, parties to

such a relationship cannot be elevated to marital status. A female partner in a live-in relationship cannot have a better claim than a legally married wife. For all these reasons, we hold that the court below was absolutely justified in declaring the status of the first respondent as the legally wedded wife of late Reghunathan.

23. After deciding so, the court below further went on to decide the question of legitimacy of respective children of the appellant and the first respondent. The court below found that since there is no evidence with respect to the marriage between the appellant and late Reghunathan, the children of the appellant also cannot claim any right over the property including the death benefits and that the first respondent along with her children are jointly entitled to the death benefits of late Reghunathan. The said findings cannot be sustained for more than one reasons.

24. Under Section 7(1) read with Explanation (e) of the Family Courts Act, 1984, a suit or proceeding for a declaration 'as to the legitimacy of any person' is within the jurisdiction of the Family Court. Legitimacy presupposes a valid marriage. In the absence of a valid marriage, there can be no question of legitimacy or otherwise at all. Existence of a valid matrimonial

relationship is *sine qua non* to attract Explanation (e) to Section 7(1). A declaration of legitimacy can be granted only when there is admitted or proved matrimonial relationship. Explanation (e) to Section 7(1) of the Family Courts Act cannot be stretched to adjudicate upon legitimacy or illegitimacy of any person born in a casual or live-in-relationship. Having found that there is no valid marriage between the appellant and late Reghunathan, the court below went wrong in further adjudicating the legitimacy of the children born out of their relationship. That apart, the legitimacy of those children and their entitlement to the death benefits of late Reghunathan was adjudicated and decided without hearing them. They are not parties to the original petition. Even no such relief was sought in the original petition. Hence, finding of the court below that the children of the appellant are not entitled to the right over the properties including the death benefits of late Reghunathan is liable to be set aside. We do so. It is up to the Railway authorities to decide in accordance with law whether the two children of late Reghunathan born out of the relationship with the appellant are also entitled to his death benefits. The Family Court cannot decide the said issue. The jurisdiction of the Family

court is confined to decide the dispute as to the marital status of the appellant and the first respondent and their entitlement to receive the death benefit based on the decision of marital status.

25. The learned counsel for the appellant lastly submitted that the original petition must fail for want of statutory notice under Section 80 of the Code of Civil Procedure to the respondents 2 to 4. We cannot subscribe to the said argument. The reliefs sought for in the original petition falls within Explanation (b) (c) and (d) to Section 7(1) of the Family Courts Act. Explanation (b) is in the nature of a proceeding relating to declaration as to the nullity of marriage or the matrimonial status of a person. If a person claims himself to be the wife or the husband of another, a declaration could be sought for that she is the legally wedded wife or he is the legally wedded husband of the other. It need not necessarily be between the parties and even after the death of either of them, such question may arise. Explanation (c) refers to a suit or other proceeding between the parties to marriage with respect to their properties or of either of them whereas Explanation (d) refers to a suit or proceeding for an order of injunction in the circumstances arising out of the

marital relationship. Therefore, to attract Explanation (c), the dispute must be between the parties to the marriage whereas Explanation (d) will be attracted if the dispute arises out of marital relationship and need not necessarily be between the spouses. If the real dispute is between the parties to the marriage, the fact that there are other parties also arrayed in the suit is irrelevant.

26. In this case, main relief sought for is for a declaration as to the status of the first respondent as the legally wedded wife of late Reghunathan. It will squarely fall under S.7(b) of the Family Courts Act. The reliefs of permanent prohibitory injunction sought are ancillary reliefs to the main relief of declaration. It falls under Explanation (c) and (d). Essentially, the dispute is between the appellant and the first respondent as to their marital status. To decide the dispute involved in the case, the presence of the respondents 2 to 4 are not even necessary. Their position in the array of parties is also not all relevant so long as the suit or proceedings in substance and in its core is between the appellant and the first respondent. They can only be treated as a *pro forma* respondents and, hence, no notice under Section 80 is required.

As stated already, the Railway authorities is at liberty to take a decision on the entitlement of the death benefits of late Reghunathan based on the declaration of marital status made in favour of the first respondent in this proceedings. The relief of permanent injunction granted by the court below against a party, that too formal, outside the matrimony is uncalled for and is, thus, liable to be set aside.

In the result, the appeal is allowed in part.

The relief of permanent prohibitory injunction granted against the respondents 2 to 4 (Respondents 1 to 3 before the court below) is set aside. The relief of declaration and the relief of permanent prohibitory injunction granted against the appellant (Respondent No.4 before the court below) are confirmed. No costs.

Sd/-
A.MUHAMED MUSTAQUE, JUDGE

Sd/-
DR.KAUSER EDAPPAGATH, JUDGE

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PS to Judge