MYSORE HIGH COURT

Shivalingiah

Vs

Chowdamma

Appeal No. 202 of 1950-51, Bangalore, in O.S. No. 51 of 1947-48

(Venkata Ramaiya, C.J. and Hombe Gowda, J.)

14.10.1955

JUDGMENT

Venkata Ramaiya, C.J.

1. The principal point for decision in this appeal is whether the appellant is the legitimate son of Made Gowda. Made Gowda was murdered in 1929 and the suit from which this appeal arises was filed by his widow, Chowdamma, in 1946 for recovery of thirty four items of immovable properties specified in Schedule 'A' and six items of movable specified in 'B' Schedule of the plaint alleging that she is the lawful heir to Made Gowda and that the defendant has been wrongfully in possession of the same.
The plea of the defendant was that ha is the son of Made Gowda and as such entitled to the properties in preference to the plaintiff. The learned District Judge held that he is not the offspring of lawful wedlock between his mother and Made Gowda and therefore decreed the suit Defendant appeals.

2. It is not disputed that plaintiff was married to Made Gowda, that subsequent to this marriage Channamma defendant's mother lived with them and that Made Gowda got children by both these. Though the plaintiff alleged that the appellant was born before his mother joined Made Gowda, the allegation has to be discarded as Made Gowda himself referred to him as his son and expressed the anxiety of a father while he desired in Ex. XXXIV of 1924 that he should be taken care of by one of his relations.
Again in his application Ex. IV of 1925 to the Co-operative Society for allotment of some shares Made Gowda wanted the appellant as his son to be treated as nominee and his name is entered as such in the books of the Society. Respondent herself while giving evidence in the Magistrate's Court and Court of Session in the case relating to the murder of her husband stated that she and defendant's mother were wives of Made Gowda, that they were all on good terms and living together (See Exs. II and III of 1930). Exhibit XXXV (a) is the order of the Amildar dated 23-2-1932 passed, after enquiry, fan transfer of the khatha of Made Gowda's tends to defendant's name on the ground that he is his only son. On 5-12-1930 when defendant was a minor his paternal uncle Kade Gowda sold a site which belonged to Made Gowda under Ex. VIII for ₹ 200/-. This was attested toy the plaintiff and defendant's mother each being described as wife of Made

Gowda.
The entries in the Khetwar and Record of Rights with respect to suit properties are all in favor of the defendant. Exhibit XXXII is a genealogical tree showing that defendant is the son of Made Gowda by Channamma Ma wife and mentioning names of others to him. It was presented in the Taluk shortly after the death of Made Gowda bears signature of his brother, and of a and thumb mark of defendant's mother. The plaintiff in her evidence states :

> "Neither I nor my first son-in-law ever attempted to pay kandayam for the suit properties, or to have the khata changed to my name. I have not been in possession of any of the immovable properties belonging to my husband's estate. Since his demise I have not received any income therefrom. I do not know is the defendant has been in possession of those properties and enjoying income therefrom since my husband's death. It is Kade Gowda who was in possession and enjoyment of the suit immoveable properties after my husband's death. I did not ask Kade Gowda at any time to hand over possession of these properties to me."

This Kade Gowda is D.W. 11 and a brother of Made Gowda. He definitely says that defendant was the son of his brother, that after the brother was murdered, properties, were looked after by defendant's mother, that she and plaintiff lived in amity. When a woman fives for a number of years in close association with at man and bears children, who are acknowledged by the man as born to him, relations and persons of the village treat them as such there is a presumption of legitimacy, as vice and immorality are not usually attributed to such associations between a man and a woman.

3. In spite of the facts above end inferences arising therefrom the asserts that Channamma lived in with Made Gowda and that defendant is the product of an adulterous intercourse between the two. What is urged in support of this is not any misconduct or unchastity on the part of Channamma towards Made Gowda. The accusation against her is rather her loyalty and fidelity to him though she had been married to another man and he is alive. That Channamma the defendant's mother was married to Putte Gowda and that she went to live with the Made Gowda after this marriage is not denied. Defendant's explanation for this is that the marriage was got rid of by a divorce and after this Made Gowda married Channamma. It is said that there is a custom which, permits divorce and re-marriage and that no objection can be attached to Channamma's association with the Putte Gowda. Separation by mutual consent and dissolution of the marital tie, so as to enable the woman to marry another man in what is called kudike form and have the full status of a wife are proved to be possible in the community to which the parties belong. The plaintiff's witnesses P.Ws. 5, 6 and 7 themselves speak to this and to the formalities thereof which includes execution of document. As affording compliance with this requirement, Ex. VII a document purporting to have been executed by Putte Gowda the first husband of Channamma on 16-4-1918, was produced in the case. The paper used for the writing is found to be of the kind which became available for subsequent to the date which the document bears and Ex. VII is therefore held to be antedated, spurious and not reliable to prove the termination of marital relationship of Channamma with Putte Gowda. Sri M. Narayana Rao learned counsel for the appellant did not attempt to show that Ex. VII can be treated otherwise but urged that without the aid of this the Appellant is entitled to succeed.

4. In the evidence relating to the custom, no doubt reference is made to document being written to signify relinquishment of marital rights. This cannot be construed to imply that apart from its evidentiary value the document is a sine qua non for relinquishment and there can be no divorce without it. The community does not prohibit marriages without documents being executed and the efficacy of marriage or the divorce does not depend on the document but on consent of parties and the observance of traditional rites and ceremonies. Between the first marriage of a woman and the second - called kudike - the only difference is as stated by D.W. 17 brother of Made Gowda, that in the latter "there is no kalasa and kannadi". P.W. 7 who claims to be yaiaman of 10 or 12 villages says "it is their pleasure to marry in kudike form without release deeds. They do so with their consent". D.W. 2 is the husband who 'released' Channamma from the bonds of matrimonial relationship and he deposes that in fulfilment of the terms imposed by him the silver vessels given by him were all returned with the "thali" the vital symbol of the marriage.

After this, he himself married a woman similarly 'released' by her first husband. D.W. 3 is the husband of that woman's sister. There is no reference by him to the execution of any document for the purpose of the release as all that he says as being required for it is consent. He is the President of Manhya District Board and there is no reason to doubt the prevalence of the custom of the kudike marriage as he says it has been in vogue for several years. This form of marriage seems to be common in the community and instances of its being recognised as normal, attaching no taint or stigma to it are numerous. D.W. 17, elder brother of Made Gowda says that their mother was a kudike wife of their father and that he also has a kudike wife. He states that if Channamma was a mistress or concubine of Made Gowda as alleged by the plaintiff, she would not have been allowed to reside with the members of the family.
Made Goda and D.W. 11 were recognised by the members of the community to be legitimate sons of their father though their mother was a kudike wife. The defendant and his mother cannot be treated differently and as inferior in status to the plaintiff and her children. P.W. 6 a yajaman in the community says that his son-in-law is the offspring of a kudike marriage, that father-in-law of his son has a wife by ordinary marriage and another by kudike, that he has not seen any documents of release and did not enquire about this when he gave away his daughter in marriage. Channamma, according to the evidence, was given up by D.W. 2, when she was only 12 or 13 years of age and before the consumption of the marriage. D.W. 6 is also a yajaman who played an important part in bringing about the kudike marriage between Channamma and Made Gowda as it is he who tied the 'thali' on the neck of the woman. D.W. 16 is also a brother of Made Gowda and he testified to the kudike marriage of defendant's mother and D.W. 2 having consented to it. What may be gathered from the evidence as a whole is that the relationship of marriage may be dissolved by consent of the husband and that a document in token of this has to be or will be executed by him. No one says that in the absence of a document there can be no divorce. Persons who have kudike wives have not produced any document so that it is difficult to know the form and terms thereof. Many of these are in the village and may or may not be literate. The documents are to be written if at all by others and may not stand the test of being satisfactory if a particular standard is applied. It seems to me that the essence of the requirement for the validity of the second marriage or kudike as it is called is not so much the existence of the document as the fact of the former husband renouncing the conjugal rights over the woman and the observance of the social or religious acts to create the fresh alliance of the Woman with another man as wife and husband. Marriages are not nullified and considered invalid because of failure to conform to all the formalities in vogue or of the qualifications prescribed. The doctrine

of factum valet has been applied to overcome defects of an unessential nature.

5. Assuming that a document is absolutely necessary to leave the parties, at any rate the wife, free from the marital obligations, there is the admission of D.W. 2 about its execution and this should serve as sufficient to meet the requirement. The fact that the date given in Ex. VII is not correct, that the document cannot be deemed to have been executed on the date it bears cannot take away or nullity the admission of D.W. 2 and the evidence of others supporting it.

In - *'Maharaja of Kolhapur v. Sundaram Ayyar*[1] it was held when the question is as to the legitimacy of a certain type of marriage contracted by the members of a family much may be gathered from the treatment accorded to the alleged wives and from the way in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under Section 50, Evidence Act, as it shows the repute in which such marriage was held in the family.

6. The illustrations given by the section are clear about this. Lord Shaw in - '*A. Diaohamy v. W.L. Balahamy*[2]*',* states :

> "Where a man and woman are proved to have lived together as husband and wife the law will presume unless the contrary be clearly proved that they were living together in consequence of a valid marriage and not in a state of concubinage".

Sir James Colville dealing with a case in which factum of an adoption was disputed observed in - *'Rajendra Nath v. Jagendra Nath*[3]*',*

> "The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired by a party who has a strict legal right to question his legitimacy. In such a case the defendant in order to defend his status should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by the members of the family or other persons".

The plaintiff herself, her husband, his brothers acknowledged and recognized defendant as legitimate son, his mother as lawful wife of made Gowda. This was long before the present litigation and at a time when there was no motive or interest on the

[1] AIR 1925 Mad 497 [3]14 Moo Ind App 67
[2] AIR 1927 PC 185 at p. 187

part of any one to state anything calculated to help the defendant and his mother knowing it to be false. The conclusion, arrived at by the lower Court is wrong and the appellant must be held to be the legitimate son of Made Gowda.

7. The claim as put forward by the plaintiff in the plaint is untenable as she cannot be the owner of the properties to the exclusion of the defendant. Her rights against the defendant are only those of a step-mother against a step-son as a sole surviving coparcener. As no relief is sought on this footing the suit has to be and is hereby dismissed in reversal of the decree of the lower Court. As

the document put forward by the defendant in support of his case is found to be shady, he is disentitled to costs. Parties will therefore bear their own costs throughout. Court-fee on plaint filed in lower Court will be recovered from respondent (plaintiff).
Appeal allowed.