Andhra High Court
T. Sareetha vs T. Venkata Subbaiah on 1 July, 1983
Equivalent citations: AIR 1983 AP 356
Bench: P Choudary
ORDER

1. This civil revision petition is filed by sareetha, a well- known film actress of the south Indian screeen agianst an order passed by the learned subordinate Judge , cuddapah ,overruling her objection raised to the enter taining of an application filed by one venkata subbaiah, under section 9 of the Hindu Marriage Act (hereinafter referred to as 'the Act) for restitution of conjugal rights with her.

2. Sareetha while studying in a highschool and then hardly aged about sixteen-years and staying with her parents at Madras was alleged to have been given in marriage to the said venkata subbaiah, at Tirupathi on 13-12-1975. Almost immediately thereafter they were separated from each other and have been continuously living apart fromeach othe for these five-years and more. Venkata subbaish had, therefore, filed under section 9 of the Act O.P. No. 1 of 1981 on the file of the subcourt, cuddapah for restitution of conjugal rights with sareetha. Sareetha had taken a preliminary objection to the jurisdiction of the cuddapah sub-court to the entertaining of that application the contention of sareetha was that the petition filed by venkata subbaiah itself showed lack of jurisdiction on the part of cuddapah Court to try the petition and that the sub-court cuddapah ought to have declined jurisdiction. The basis for this objection was an allegation "that the marriage took place at Tirupathi and that the petitioner and respondent last resided together at madras". Sareetha relied upon this statement of venkata subbaiah to say that the cuddapah Court had no jurisdiction to entertain the petition of venkata su bbaiah. It was this preliminary objection taken by sareetha that had been overruled by the cuddapah sub-court, leading sareetha to the filing of this civil Revision petition.

3. Venkata subbaiah hails from cuddapah where he owns a house and agricultural lands. Venkata subbaiah stated in his petition for restitution of conjugal rights that after his marriage with sareetha at Tirupathi in December 1975, he and sareetha went to cuddapah and lived there together for six months and that thereafter they went to Madras and stayed at Madras with the parents of sareetha for some time. According to venkata subbaiah, their stay a cuddapah for six months was immediately after their marriage at Tirupathi and that was the place where they last resided together within the meaning of the Act. The subsequent stay at madras according to venkata subbaiah, should not be regarded as the place where they last resided together. On the other hand, sareetha contended that as she and venkata subbaiah had on the statement of venkata subbaiah himself last lived to gether at madras the cuddapah Court would have no jurisdiction to try the application of venkata subbaiah.

4. By the date of her marriage sareetha was studying in High school and was living with her parents at Madras. Venkata subbaiah hails from cuddapah. The petition of venkata subbaiah disclosed that after their marriage at Tirupathi they lived at cuddapah for six months and that thereafter they went to the parents of sareetha at madras and lived there for some time. There can be no doubt that

Madras was thier last place of living together because thereafter they parted company with each other. Those were the days when sareetha was attempting to gain access to the south Indian cinefield of which she is today one of the most talented top actresses. According to venkata subbaiah's allegations, these attempts of sareetha led to misunderstanding between him and sareetha on the one hand and also between him and the parents of sareetha on the other, and forced venkata subbaiah to return to cuddapah leaving sareetha at Madras. Thereafter venkata subbaiah and sareetha never met each other.

5. Now the plea of sareetha objecting tot he jurisdiction of cuddapah Court raised two

"The respondent admitted in para 3 of his petition that the marriage took place at Tirup

The learned subordinate judge construed the above pleadings of sareetha as not amou

6. In this C.R.P. these findings are assailed by sareetha.

7. As already noted, venkata subbaiah had specifically pleaded that they had lived t

At least one another place where they resided together prior to their residing at madras

8. But the next question whether cuddapah or Madras should be counted as the place wher

9. Section 19: "every petition under this Act shall be presented to the district Court w

(i) the marriage was solemnized or

(ii) the respondent, at the time of the presentation of the petition resides, or

(iii) the parties to the marriage last resided together or

(iv) the petitioner is residing at the time of presentation of the petition in a case where

Of its four clauses of section 19 of the Act, we are concerned in this case, with its clause (iii) which speaks of a place where the parties to the marriage last reised together the words parties to the marriage" in that clause present no difficulty and they obviously refer to the wife and husband. It is the use of the word "resided" that causes a degree of uncertainly in the ascertainment of the meaning of this clause. The word is not defined by the Act. In its dictionary sense of the word, "to reside" means, "to dwell permanently or for a length of time". (See webster's dictionary) temporary place of residence or a casual place of stay is thus excluded from being called a residence. Further in the third clause of section 19 of the Act, the "residence" spoken of is the joint residence. Combinedly read, the third clause of section 19 refers to a place where the husband and wife lived together permanently or at least for sufficinetly long period of time. Such a place can only be a place of permanent dwelling taken up by the husband and wife jointly for their matrimonial purposes. That place must be one to which the parties are bound by the solemn ties of their matrimony. That can only be the place chosen by them jointly as suitable for fulfilling their matrimonial vous of Dharma, Artha, kama and Moksha. In other words the third clause of section 19 of the Act refers to the matrimonial home of the parties to the marriage.

10. The secular description given by Ridley J., to the place of residence of a person as 'th

"..... I suppose the words "last ordinarily resided together as man and wife in Eng

These ordinarily accepted descriptions of the word reside in matrimonial cases woul

11. The petitioner's learned counsel cited several decisions of the various High Court a

12. In R. Barnet London Borough council (1981) 2 WLR 86, the divisional Court ruled

13. In the varying circumstances of a concrete case, no general principle of law can decide what relative weight should be given to these various factors of time, intention and continuity. The question therefore whether the wife and husband last resided together in a particular place, can only be decided on the particular evaluation of these changing and differing factors and not by folllowing any mechanical rule of thumb. The various decisions cited by the learned counsel cannot, therefore be taken as alying down any proposition of law. They can only be taken at best as laying down propositions of good sense.

14. In Qualcast wolverhampton Ltd. V. Hayness (1959) AC 743 Lord Denning chided the country Court for treating the decisions of th House of Lords on hte question whether the employer was

guilty of negligence or not in particular cases as laying down any proposition of law binding upon a country Court.

15. In that case, an experienced moulder who injured himself in the course of his employment sued his employer for negligence. Although the country Court found as a fact that the moulder was not wearing protective spats that were made available by the employer and which would have prevented the injury held thinking that it was bound by the authoritative decisions of the superior courts that the employer was guilty of negligence, for their failure to administer warning to the experienced moulder. The House of lords reversed that judgment holding that the question what did reasonable care demand of the employers in that particular case was not a question of law but a question of fact on which no decision of the superior courts can Act as a precedential authority Lord Denning observed in that case:

"The question that did arise was this: what did reasonable care demand of the employers in this particulr case? That is not a question of law at all but a question of fact. To solve it the Tribunal of fact - be it Judge or jury - can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken but it would be a mistake to elevate them into propositions of law.....

I can well see how it came about that they country Court Judge made this mistake. He was presented with a number of cases in which judges of the High Court had given reasons for coming to their conclusions of fact. And those reasons seemed to him to be so expressed as to be rulings in point of law; whereas they were in truth nothing more than propositions of good sense. This is not the first time this sort of thing has happebed. Take accidents on the road, I remember well that in several cases scrutton L.J. said that"if a person rides in the dark he must ride at such a pace that he can pull up within the limits of "his vision" (Baker v. E. Longhurst & sons ltd. (1933) 2 KB 461, 468. That was treated as aproposition of law until the Court of appeal firmly ruled that it was not (Tidy v. Battman (1934) 1 KB 319). Morris v. Luton corporation - (1946) KB 114). So also with accidents in factories. I myself once said that an employer must, by his foreman, "do his best to "keep (the men) up to the mark" (Clifford v. Charies H. Challen & son Ltd) (1951) 1 KB 495 Someone shortly afterwards sought to treat me as having laid down a new proposition of law, but the Court of Appeal I am glad to say, corrected the error (Woods v. Durable suites Ltd. (1953) 1 WLR 857). Such cases all serve to bear out the warning which has been given in this House before ....."We sought "to beware of allowing tests or guides which have been suggested" by the Court in one set of circumstances, or in one class of "cases, to be applied to other surroundings " and thus by degrees to turn that which is at bottom a question of fact into a proposition of law that is what happened in the cases under the workmen's compensation Act, and it led to a wagon load of "cases", See harris v. Associated portland cement Manufacturers LTd. (1939) AC 71 by Lord Atkin. Let not the same thing happen to the common law, lest we be crushed under the weight of our own reports".

The question which is the place where the husband and wife last resided together

16. In this case, the finding of fact is that the parties had lived for six months a

PART II.

17. This leads me to the consideration of the other half of this case which raises an impor

Section 9: Restitution of conjugal rights:

"When either the husband or the wife has without reasonable excuse withdrawn from the societ

Explanation: Where a question arises whether there has been reasonable excuse for withdrawal

Order 21 Rule 32 of C.P.c. Decree for specific performance for restitution of conjugal ri

"(1) where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property, or in the case of a decree for the specific perofrmance of a contract, or for an injunction) by his detention in the civil prison, or by the attachment of his property, or by both.

(2).....

(3) Where any attachment under subrule (1) or sub-rule (2) has remained in force for (six Months) if the Judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the Judgment-debtor has obeyed the decree, and paid all costs of executing the same which he is bound to pay, or where, at the end of (six months) from the date of the attachment on application to have the property sold has been made or if made has been refused, the attachment shall cease.

Rule 33. Discretion of ocurt in executing decrees for restitution of conjugal rights:

(1) Notwithstanding anything in R. 32, the Court either at the time of passing a decree (against a husband) for the restitution of conjugal rights or at any time afterwards may order that the decree (shall be executed in the manner provided in this rule).

(2) Where the Court has made an order under sub-rule (1), it may order that in the eve

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for th

(4) Any money ordered to be paid under this rule may be recovered as though it were p

A combined residing of the above substantive and procedural provisions relating to th

18. It cannot be denied that among the few points that distinguish human exist

"I have sought love, first because it brings ecstasy-ecstasy so great that I would

Forced sex, like all forced things is a denial of all joy yet in conceivable cases

19. There is even graver implications for the wife. An Act of foerced sex is no less potent than an Act of consensual sex in producing pregnancy and procereating offspring. The only difference lies in the fact that the latter is with her consent while the former is without her consent. In the process of making such a fateful choice as to when where and how if at all she should beget, bear deliver and rear a child, the wife consistent with her human dignity should never be excluded, conception and delivery of a child involves the most intimate use of her body. The marvel of creation takes place inside her body and the child that would be born is of her own flesh and blood. In a matter which is so intimately concerns her body and which is so vital for her life, a decree of restitution of conjugal rights totally excludes her.

20. The origin of this remedy for restitution of conjugal rights is not to be found in the British common law it is the medieval Ecclesiastical law of England which knows no matrimonial remedy of desertion that provided for this remedy which the Ecclesiastical courts and later ordinary courts enforced. But the British Law commission presided over by Mr. Justice scarman, (as he then was) recommended recently on 9-7-1969 the abolition of this uncivilized remedy of restitution of conjugal rights accepting that recommendation of the British Law commission the British parliament

through section 20 of the Matrimonial proceedings and property Act, 1970 abolished the right to claim restitution of conjugal rights in the English courts. Section 20 of that Act reads thus:

"No person shall after the commencement of this Act be entitled to petition the High Court or any country Court for restitution of conjugal rights".

But our ancient Hindu system of Matrimonial law never recognised this institution of conjugal rights althought it fully upheld the duty of the wife to surrender to her husband. In other words, the ancient Hindu law treated the duty of the Hindu wife to abide by her husband only as an imperfectobligation incapable of being enforced against her will . It left the choice entirely to the free will of the wife. In Bai Jiva v. Narsingh Lalbhai (ILR 1927 Bom 264 at p. 268) a division Bench of the Bombay High Court judicially noticed this fact in the following words:

"Hindu law itself even while it lays down the duty of the wife of implicit obedience and return to her husband, has laid down no such sanction or procedure as compulsion by the courts to force her to return against her will".

21. This could have been only because of its realisation that in a matter so intimately concerned the wife or the husband the parties are better left alone without state interference. What could happen to the fate of a person in the position of Tara Bai (the respondent in the abovementioned madhya pradesh Appeal) who was forced to go back to her husband even after declaration of dislike and abhorrence towards her husband could have been well considered by the ancient Hindu Law. With the Brithish occupation of this country the whole legal position was drastically altered. The British indian courts wrongly equating the Ecclesiastical rule of this matrimonial remedy with equity good conscience and justice, thoughtlessly imported that rule into our country and blindly enforced it among the Hindus and the Muslims. Thus, the origin of this uncivilised remedy in our ancient country is only recent and is wholly illegitimate. Section 9 of the Act had merely aped the british and mechanically reenacted that legal provision of the British Ecclesiastical origin. The plain question that arises is whether our parliament now functioning under the constitutional constraints of the fundamental rights conceived and enacted for the preservations of human dignity and promotion of personal liberty, can legally impose sexual cohabitation between unwilling opposite sexual partners even if it be during the matrimony of the parties.

22. The Hindu marriage Act was enacted by our parliament in the year 1955 and the legislative competence of the parliament to enact section 9 of the Act under item 5 of the List III of the VII schedule to the Constitution is undoubted. But the question is whether that provision runs foul of part III of the Constitution. The petitioner attacks section 9 of the Act on the ground that granting of restitution of conjugal rights violates the petitioner's rights guaranteed under articles 14, 19 and 21 of part III of our constitioner attacks section 9 of the Act on hte ground that granting of restitution of conjugal rights violates the petitioner's rights guaranteed under articles 14, 19 and 21 of part III of our Constitution. Let us, therefore, first examine the content of Article 21 Article 21 of the Constitution guarantees right to life and personal liberty against the state action. Formulated in simple negative terms, its range of operation positively any person of his life or personal liberty except according to the procedure liberty except according to the procedure established by law is of

far reaching dimensions and of overwhelming constitutional significance. Article 21 prevents the state from treting the human life as that of any other animal. It is now well established by the decisions of the Supreme Court that the word 'life' occuring in the above Article 21 has spiritual significance as the word life occuring in the famous 5th and 14th Amendments to the American Constitution does. In those constitutional provisions of the American Constitution the life is interpreted by Mr. Justice field in this dissenting judgment in Munn v. Illinois, (1877) 24 L Ed p. 17 to mean and signify "more than a person's right to lead animal or vegetative existence. Field J., said in the above munn's case "by the term life as here used something more is meant than mere animal existence". The contrast drawn by field J., emphasising the difference between existence of a free willing human and that of an unfree animal was accepted by our Supreme Court first in kharak singh v. State of U.P. and next in Govind v. State of M.P. transforming Article 21 of our Constitution into a charter for civilization In Kharak singh v. State of U.P. (supra) Rajagopala Ayyangar J., for the majority and subba Rao, J., for the concurring miniority accepted the above meaning and significance given to the word 'life' by observing that the expression life' used in that Article cannot be confined only to the taking away of life, that is causing death." Subbarao J., in the same case gave greater importance to the words "personal liberty", occuring in Article 21 of the Constitution. But both held that Art. 21 of our Constitution to be the source for the protection of our personal liberty and life in the elevated sense. Subbarao J., perceptively observed that right to privacy forms a part of the guaranteed right of personal liberty in Art. 21 of the constitution. In a scientific age, psychological fears and restraints generated by the use of scientific methods, he feared, may constitute even greater denial of personal liberty then mere crude physical restrainsts of a bygone age.

23. In a later decision of the Supreme Court in Govind v. State of M.P. , (supra) Mathew J., taking the lead given by the minority Judgment of subbarao j.,in the abovementioned Kharak singh's case and adverting to the american legal and philosophical literature on right to privacy and to the american cases reported in Griswold v. Connecticut, (1965) 14 L Ed 2 d 510 and Jane Roe v. Henry wade, (1973) 35 L Ed 2d p. 147 ruled that Article 21 of our Constitution embraces the right to privacy and human dignity. The centrepiece of the judgment in Govind's case is to hold that right to privacy is part of art. 21 of our Constitution and to stress its constitutional importance and to call for its protection. The learned Judge then examined the content of the right to privacy and observed that "any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage motherhood, procreation and child rearing." The learned Judge stressed the primordial importance of the right to privacy for human happiness and directed the ocurts not to reject the privacy-dignity claims brought before them except where the countervailing state interests are shown to have overweighing importance. He observed that "there can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realised as Brandies J., said in his dissent in Olmstead v. United states of America, (1927-277 US 438, 471) the significance of man's spiritual nature of his feelings and of hisintellect and that only a part of the pain, pleasure satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government a sphere where he should be left alone". The learned Judge also stated "there can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior". Govind's case (Supra) thus firmly laid it down that

Article 21 protects the right to privacy and promotes the individual dignity mentioned in the preamble to our Constitution . Govind's case also lays it down that the ocurts should protect and up-hold those important constitutional rights except where the claims of those rights for protection are required to be subordinated to superior state interests.

24. However it must be admitted that the concept of right to privacy does not lend itself to easy logical definition This is so partly because as Tom Gaiety said in his Article "Redefining privacy" (12 Harv civ Rts. - Civ. Lib rev p. 233,) the concept was thrown up in great haste from a miscellany of legal rock and staone and partly because of the inherent difficulties in defining such an elusive concept. The difficulty arises out of the fact that this concept is not unitary concept but is multidimensional susceptiable more for enumeration than definition. But it can be confidently asserted that any plausible definition of right to privacy is boudn to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body's inviolability and integrity and intimacy of personal identity including marital privacy A few representative samples would bear this out. Gaiety defined privacy as "an autonomy or control over the intimacies of personal identity." Richard B. Panker in his " A definition of privacy", quoted in "philosophy and public Affairs" (1975 Vol 4 No. 4 p. 295-314 wrote:

".....Privacy is control over when and by whom the various parts of us can be sensed by tohers. By "sensed" is meant simply seen, heard touched smelled or tasted".

Gary L. Bostwick writing in california Law review Vol. 64 P. 1447 suggests that "privacy is divisible into three components (a) repose (b) sanctuary and (c) intimate decisions of these three components he holds, that the last one is an eminently more dynamic privacy concept as compared to repose and sanctuary (P. 1466) prof. Tribe in his American constitutional Law. P. 921. Stressed another fundamental facet of the right to privacy problem. He wrote, inter alia.

"Of all decisions a person makes about his or her body the most profound and intimate

25.Applying these definitional aids to our discussion it cannot but be admitted that a decre

26. A few decided American cases have also taken the same view of the constitutional

27. The observations of Justice Mc reynolds in Meyer v. Nebraska, (1923) 67 L Ed 1042 hi

"Without doubt, it denotes not merely freedom from bodily restraint but also the

In Griswold v. Connecticut, (1965) 14 L Ed 2d 510 Mr. Justice Douglas, while invalidat

"Yet the marital couple is not an independent entity with a mind and heart of its

This is a clear recognition of the legal position that right to privacy belongs to a per

28. The above cases of the American Supreme Court clearly establish the proposition that th

29. Examining the validity of S. 9 of the Act in the light of the above discussion, it shou

30. Duncan Derrett in his "modern Hindu Law" para 306 however, while approving the abol

"In India, where spouses separate at times due to misunderstandings, failure of mutual

With respect I am unable to agree with this recommendation Firstly Derrett did not examin

"But it is difficult to believe that the goal of fostering mutuality and trust in a m

I therfore hold that there are no overwhelming state interests to justify the subordi

31. On the basis of my findings that section 9 of the Hindu Marriage Act providing for t

32. The protection to life and personal liberty contained in Art. 21 of our Constitution

33. In both these aspects the rule in Gopalan's case was found to be unsatisfactory al

"That though our Constitution did not have a "due process" clause as in the American C

In the same case Desai J., observed that:

The word 'law in the expression procedure established by law' in Article 21 has been in

The above quotations are taken from Mithu v. State of Punjab which referred to those c

34. In Mithu v. State of Punjab (supra) the Supreme Court went even farthest where i

"These decisions have expanded the scope of Article 21 in a significant way and it i

Explaining the scope of expansion which Article 21 has undergone by reason of Bank Nat

"If a law were to provide that the offence of theft will be punishable with the penalty

In Mithu's case the Supreme Court implied that imposition of death sentence even under se

"Where a person did not knwo of the duly to register and where there was no proof of the

After Mithu's case, it is not easy to assert that Article 21 is confined any longe

35. In a imperfect word where the clash of competing interests is the only certainly

"Each new claim to constitutional protection must be cnsidered against a backgrou

(Justice Harlan, in, poe v. Ullman, (1916) 6 Led 2d p. 989 at 1020).

The constitutional doctrine of privacy is not only life giving but also is lifesaving.

36. Following the reasonaing adopted in the above mithu's case, section 9 of the Hindu

37. The constitutional validity of section 9 of hte Act when examined on the touch-stone of

38. Of course section 9 of the Act does not in form offend the classification test. I

"Bare equality of treatment regardless of the inequality of realities is neither justice

(See M. Match works v. Asst. Collector).

The question is how this remedy works in life terms In our social reality, this matr

The reason for this mainly lies in the fact of hte differences beween the man and the wor

39. Section 9 of the Act has also to be examined fo rits constitutional validity from the point of view of the test of minimum rationality. The American constitutional writes and Court decisions on the equality clause of the American 14th Amendment recognize the inadequacies of the mere classification theory of minimum rationality not merely as an additional test to the above theory of classification but even as basic to the whole of the 14th Amendment. Writing for a division Bench of this Court in A. Laxmana Murthy v. State (aIR 1980 Andh pra 293 at 298) I expressed our view of inadequacies of the theory of classification in these words:-

'Hitler's classification of all jews into a separate category for purposes of butchering them and Nazalities' classification of all landlords into a separate category for purpose of exterminating them cannot, therefore be faulted on this theory of equal protection clause".

Our Supreme Court had accepted the theory of minimum rationality in E.P. Royappa v. Tamil Nadu in the following words:-

"From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other to the whim and caprice of an absoulte monarch. Where an Act is arbitrary it is implicit in it that it is enequal both according to political logic and constitutional law and is therefore violative of Article 14". .....They require that state action must be based on valent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality".

But our Supreme Court called the test as test of arbitrariness and followed it in the subsequent decisions in maneka Gandhi case and the International Air port case , and Ajay Hasia v. Khalid Mujib and Air India v. Nergesh The theory of minimum rationality test which is heavily criticised by seervai in his latest constitutional Law, 3rd Edition page 272 is described by prof. Tribe as requiring all legislation to have "a legislative public purpose or set of purposes based on some conception of general good". (See his American constitutional Law, page 995) Examined from this point of view, it is clear that whether or not section 9 of the Hindu marriage Act suffers from the vice of over-classification as suggested in the preceding paragraph it promotes no legitimate public purpose based on any conception of the general good. It has already been shown that section 9 must thereofe

be held to be arbitrary and void as offending art. 14 of the consitution.

40. In the view I have taken of the constitutional validity of section 9 of the Hindu Marriage Act, I declare that section 9 is null and void. As a corollary to that declaration, I hold that O.P. No. 1 of 1981 on the file of subordinate Judge, cuddapah, filed by venkata subbaiah for the relief of restitution of conjugal rights with sareetha is legally incompetent. Accordingly, I prohibit the Court of the subordinate Judge, cuddapah from trying O.P. No. 1/81.

41. The civil Revision petition is allowed, but without costs.

42. Revision allowed.