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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE HIRDESH
ON THE 22nd OF NOVEMBER, 2023
FIRST APPEAL No. 326 of 2016**

BETWEEN:-

**SMT. KHURSHEED BANO W/O LATE SHRI KALEEM
KHAN, AGED ABOUT 45 YEARS, HINDORIYA TEH. AND
DISTT. DAMOH (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI VIKALP SONI - ADVOCATE)

AND

- 1. SMT. RUKHSANA BANO W/O LATE SHRI KALEEM
KHAN, AGED ABOUT 40 YEARS, NOORI NAGAR
BAJARIYA WARD NO.7 DAMOH DISTT. DAMOH
(MADHYA PRADESH)**
- 2. STATE OF M.P. THROUGH COLLECTOR, DAMOH
DISTT. DAMOH (MADHYA PRADESH)**
- 3. CHIEF TREASURY OFFICER DAMOH DAMOH
(MADHYA PRADESH)**

.....RESPONDENTS

(SHRI SURENDRA VERMA - ADVOCATE)

***(SHRI SHESHMANI MISHRA - PANEL LAWYER FOR RESPONDENT NOS. 2
AND 3)***

.....

*This appeal coming on for hearing this day, the court passed the
following:*

ORDER

Present first appeal has been filed under Section 96 of Civil Procedure Code against the judgment and decree dated 22.03.2016 passed by IIIrd Addl. District Judge, Damoh (M.P.) in Civil suit 11-A/2015, whereby the suit filed by

the respondent/plaintiff for declaration has been decreed.

2. The fact, in brief to decide the present appeal is that the civil suit was filed by respondent/plaintiff for declaration of half share in the retiral benefit. Plaintiff and family pension of the late Shri Kaleem Khan claiming herself under the status of legally wedded wife pleaded that her Nikah with late Kaleem Khan was solemnized on 19.03.1994 in presence of witnesses. When divorce had already been taken place between appellant and late Kaleem Khan. It was further pleaded that since the name of the appellant was there in service record of Kaleem Khan as nominee, therefore, they are trying to take undue advantage in the retiral benefits and family pension of late Kaleem Khan. He further pleaded that plaintiff/respondent had filed an application before the respondent No.2 and an application before the respondent No. 2 to declare herself as a legal heirs of the late Kaleem Khan which was rejected by him on 17.07.2009 by reason that appellant was named as a nominee in the service record of the late Kaleem Khan, so he filed a civil suit for claiming 1/2 share in the retiral benefits and family pension.

3. Defendant/appellant filed her written statement and restated in the pleading that she is only legally wedded wife of late Kaleem Khan and never divorced by him during his life time. It is further pleaded that after their marriage, they were blessed with three daughters namely Tabassum, Tarannum and Fatma and one son namely Afjal and she further pleaded that plaintiff is not wife of late Kaleem Khan, so she is not entitle to any benefit of late Kaleem Khan and prayed for dismissing the suit.

4. Trial Court on the basis of the pleadings framed necessary issues and after recording of evidence, the trial Court decreed the suit to the extent of Rs.1,35,096/- of full amount of GPF fund and half of the family pension of the

late Kaleem Khan and half share of the family pension of the late Kaleem Khan and half share in any other amount which is going to be received by legal heirs of late Kaleem Khan.

5. Being aggrieved by the impugned judgement and decree of the trial Court, the instant appeal has been preferred by the defendant.

6. Learned counsel for the appellant submitted that impugned judgment and decree is illegal, arbitrary against the law and facts. He further submitted that trial Court has failed to appreciate law and evidence on record. Trial Court misconstrued, misapplied and misconceived the principle of the Code of Civil Procedure, Evidence Act and Specific Relief Act. He further submitted that trial Court erred in holding the respondent/plaintiff as legally wedded wife of late Kaleem Khan, whereby the Nikahnama was not duly proved by her in accordance with the provision of the Evidence Act. He further submitted that the trial Court on the oral and documentary evidence has no stand in proper prospective manner, thus finding of the trial Court would be set aside. He further submitted that trial Court relied on the reply of the late Kaleem Khan, which was filed in case of Section 125 filed by the defendant/appellant against late Kaleem Khan which is not a public document and not duly proved. So he prays for setting aside the impugned judgment and decree.

7. On the other hand, learned counsel for the respondent argued at length and submitted that the judgment and decreed passed by the trial Court is according to the evidence and settled principle of law, therefore, this appeal be dismissed.

8. Heard learned counsel for the rival parties and perused the available record of the trial Court.

9. After perusal of the trial Court record and evidence adduced by both the parties, it is undisputed that plaintiff is legally wedded wife of the late Kaleem Khan because it was admitted by the defendant.

10. Now the question arises whether late Kaleem Khan took divorce from the appellant.

11. Plaintiff/respondent pleaded in her pleading that her Nikah with late Kaleem Khan was solemnized on 19.03.1994 in presence of the witness when divorce has been already taken place between appellant and Kaleem Khan, which was denied by the defendant/appellant in her pleading.

12. Learned counsel for appellant submitted that it is the duty of respondent to prove this fact by leading direct evidence. On the other hand, learned counsel for the respondent pleaded that divorce had already been taken place between appellant and late Kaleem Khan and he produce evidence and he proved it by way of evidence that late Kaleem Khan had taken divorce from the appellant.

13. According to the Section 101 of Evidence Act, which discuss the burden to prove :-

"101. Burden of proof-Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Section 102 of Evidence Act reads as under :-

"102. On whom burden of proof lies - The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

14. So according to provisions of Section 101 and 102 of Evidence Act, burden of proof lies upon the plaintiff who pleaded that divorce had already taken place between the appellant and Kaleem Khan.

15. PW. 1 Ruksana Bano who stated in examination-in-chief that she is second wife of late Kaleem Khan. Her husband late Kaleem Khan divorced his first wife Khurseed Bano.

16. P.W. 2 Noor Jahan stated in examination-in-chief that late Kaleem Khan took divorce from appellant Khursheed Bano but in cross-examination, she accepted that it is true that Kaleem Khan had not been given divorce in front of her. According to the cross- examination of the PW 2 Noor Jahan she is hearsay witness on this point.

17. P.W. 3 Israt also accepted in cross-examination that late Kaleem Khan had not been given divorce to appellant in front of her.

18. So there is no direct evidence produced by plaintiff/respondent in this regard.

19. Learned counsel for the respondent submitted in reply filed by late Kaleem Khan under Section 125 of Cr.P.C. case filed by appellant stated that he took divorce from appellant.

20. Trial court in its para 16 discussed this point. He relied the reply of the late Kaleem Khan which was filed by him in a litigation arises between him and appellant in Section 125 of Cr.P.C. but this reply was not duly proved by respondent. Trial Court in his para 16 stated that this reply is a public document which need not to be proved.

21. Provision of public document is Section 74 of Evidence Act reads as thus :

74. *Public documents : The following documents are public documents*

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(1) *Documents forming the acts, or records of the acts-*

(i) *of the sovereign authority,*

(ii) *of official bodies and tribunals, and*

(iii) *of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;*

(2) *Public records kept [in any State] of private documents.*

22. Coordinate Bench of this High Court in case of Avinash Bihari Mishra vs Smt. Vimla Devi and Ors. in WP. No. 1837/2015 dated 25.07.2019 held in para 6 has held thus :-

"That copy of the plaint cannot be treated as a public document for the purposes of its admissibility without formal proof."

23. In present case, reply of the late Kaleem Khan filed in Section 125 of the Cr.PC. Case No. MJC No.41/96 was not formally proved and it cannot be treated as a public document. So trial Court treated as a public document which is erroneous, it cannot be sustained.

24. So as per the above discussion, it was found that respondent is unable to prove that late Kaleem Khan has taken divorce from appellant. So in this regard, finding of the trial Court was erroneous and is required to be set aside because it is not duly proved that the late Kaleem Khan had taken divorced from appellant.

25. Now question arises whether late Kaleem Khan informed to his department and took permission for performing second marriage with the respondent.

26. According to the M.P. Civil Service Conduct Rule 1965 Rule 22

which reads thus :-

22 (1) No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him.

27. From the rule quoted above, it is clear that government servant who has a wife living cannot contract second marriage without first obtaining the permission of government. Even if it is permissible under the personal law for the time being applicable to him. In present case, late Kaleem Khan belongs to Muslim religion in which he has right to perform second marriage, but late Kaleem Khan was a government servant and according to the Rule 22, it is the duty of late Kaleem Khan to take permission from the government to perform second marriage.

28. In present case, there is no substantial evidence produced by respondent before trial Court that late Kaleem Khan took permission from the government to perform second marriage. In case of **Gyatibai vs. Rampyaribai 2003 Vol (3) MPLJ Page 284**, Division Bench of this High Court held as thus :-

*"That a government servant cannot do second marriage without permission of the government. Then second wife of deceased government servant cannot claim to be his legally wedded wife so as entitled her claim as a second wife is hereby rejected. Co-ordinate Bench of this High Court in case of **Smt. Batasiya Maravi vs. The State of Madhya Pradesh and ors. W.P. No. 6948/2023 dated 29.03.2023** held thus :*

"That irrespective of the personal law no government servant is entitled

to conduct second marriage without first obtaining the permission of the government."

29. In present case, there is no evidence that late Kaleem Khan had taken permission from the department to perform his second marriage. Thus, petitioner's claim as second wife has no legal sanctity in as much as there is no documentary evidence on record to show that deceased Kaleem Khan divorced his first wife. In fact, in the official record name of the appellant is mentioned.

30. Therefore, in the aforesaid discussion, it was found that late Kaleem Khan had not obtained permission to perform his second marriage to respondent, then respondent is not entitled to get any benefits in regard to the service benefits of the Kaleem Khan.

31. So as per above discussion it is found that Court below committing error to decree in favour of respondent, which is erroneous and liable to be set aside.

32. So as per above discussion, appeal of appellant succeeds and judgment and decree of the trial Court is set aside.

**(HIRDESH)
JUDGE**