2025:KER:72048

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MR.JUSTICE P. KRISHNA KUMAR

MONDAY, THE 29TH DAY OF SEPTEMBER 2025 / 7TH ASWINA, 1947

MAT.APPEAL NO. 630 OF 2018

AGAINST THE JUDGMENT DATED 30.04.2018 IN OP NO.743 OF 2015 OF FAMILY COURT, THALASSERY

APPELLANT/RESPONDENT:

KIZHAKKAYI DASAN
AGED 61 YEARS
S/O.LATE KRISHNAN,
CLOTH MERCHANT, RESIDING AT
KIZHAKKAYIL HOUSE, KOLAVALLOOR AMSOM,
KANNANKODE DESOM, KUNNOTHUPARAMBA
PANCHAYATH, P O THOOVAKKUNNU,
THALASSERY TALUK, KANNUR DISTRICT.

BY ADVS.
SHRI.K.P.HAREENDRAN
SRI.PRAJIT RATNAKARAN

RESPONDENTS/PETITIONERS:

1 KUNIYIL CHEEROOTTY
D/O.KORUMBAN, AGED 55 YEARS,
NO OCCUPATION, RESIDING AT KUNIYIL HOUSE,
KOLAVALLOOR AMSOM, KANANKODE DESOM,
KUNNOTHUPARAMBA PANCHAYATH,
P.O.THOOVAKKUNNU, THALASSERY TALUK,

KANNUR DISTRICT -670 101.

2 SABINA
D/O.CHEEROOTTY, AGED 28 YEARS,
NO OCCUPATION,RESIDING AT KUNIYIL HOUSE,
KOLAVALLOOR AMSOM,KANANKODE DESOM,
KUNNOTHUPARAMBA PANCHAYATH,
P.O.THOOVAKKUNNU, THALASSERY TALUK,
KANNUR DISTRICT -670 101.

THIS MATRIMONIAL APPEAL HAVING COME UP FOR HEARING ON 17.09.2025, ALONG WITH RPFC.126/2020, THE COURT ON 29.09.2025 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MR.JUSTICE P. KRISHNA KUMAR

MONDAY, THE 29TH DAY OF SEPTEMBER 2025 / 7TH ASWINA, 1947

RPFC NO. 126 OF 2020

AGAINST THE ORDER DATED 11.02.2020 IN MC NO.349 OF 2018 OF FAMILY COURT, THALASSERY

REVISION PETITIONER/RESPONDENT:

KIZHAKKAYIL DASAN
AGED 60 YEARS
S/O.LATE KRISHNAN,
RESIDING AT KIZHAKKAYIL HOUSE,
KOLAVALLUR AMSOM, KANNANKOD DESOM,
KUNNOTHPARAMBA, P.O.THUVAKKUNNU,
THALASSERY TALUK, KANNUR DISTRICT-670693.
(KOLAVALLUR POLICE STATION)

BY ADVS.
SHRI.K.P.HAREENDRAN
SMT.N.SHAMNA

RESPONDENT/PETITIONER:

KUNIYIL CHEEROOTTY
D/O.KORUMBAN, AGED 54 YEARS
(W/O.KIZHAKKAYIL DASAN, AGED 52 YEARS
SHOWN IN THE ORDER)
RESIDING AT KUNIYIL HOUSE,

KOLAVALLUR AMSOM, KANNANKOD DESOM,
KUNNOTHPARAMBA, P.O. THOOVAKKUNNU,
THALASSERY TALUK,
KANNUR DISTRICT-670693.
(WITHIN THE LIMIT OF KOLAVALLUR POLICE STATION)

THIS REV.PETITION(FAMILY COURT) HAVING COME UP FOR HEARING ON 17.09.2025, ALONG WITH MAT.APPEAL.NO.630/2018, THE COURT ON 29.09.2025 DELIVERED THE FOLLOWING:

2025:KER:72048

CR

SATHISH NINAN & P. KRISHNA KUMAR, JJ.

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Mat.Appeal No.630 OF 2018 &

R.P.(FC)No.126 OF 2020

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Dated this the 29th day of September, 2025

JUDGMENT

P.Krishna Kumar, J.

The decree declaring the respondents herein as the wife and daughter of the appellant, is under challenge in this appeal.

2. The respondents filed a suit against the appellant seeking a declaration that they are his wife and daughter. The suit was initially decreed in favour of the respondents, but was reversed in appeal. When the matter was taken up in second appeal, this Court set aside the judgments and, after framing additional issues, remanded the case for disposal based on findings on those additional issues. The parties were also permitted to amend their pleadings and adduce

further evidence. Meanwhile, with the establishment of the Family Court, Thalassery, the case was transferred to that court. By the judgment now under challenge, the Family Court allowed the claim of the respondents.

3. The brief facts necessary for the disposal of this case are as follows: The parties belong to the Hindu Thiyya community. The respondents contended that the first among them, Cheerootty, married the appellant, Dasan, on 23.10.1988, in accordance with the religious customs prevailing in their community, and that the second respondent was born in the wedlock on 30.11.1989. They alleged that Cheerootty and her daughter were later driven out of the matrimonial home by the appellant and his family members, and that he failed to maintain them. It was further stated that Cheerootty was married to one Balan when she was about 12 years old, and that the marriage was dissolved about six months later by a customary divorce, on observing the then prevalent formalities and rituals. A declaration was sought

that the first respondent is the legally wedded wife of Dasan and that the second respondent is their daughter.

4. The appellant denied the above averments in his pleadings. He contended that there was no marriage between him and Cheerootty, that they had never lived together, and that the second respondent was not his child. He further argued that, since the marriage between Cheerootty and Balan was not dissolved in accordance with law, she could not claim to be his legally wedded wife. It was also pleaded that no such customary dissolution of marriage, as pleaded, existed in their community.

5. The evidence in this case consists of the oral testimony of PW1 to PW9, DW1 to DW6, RW7 and RW8, and Exts. A1 to A6, B1 to B18, and X1 and X2 series. After the remand, apart from recalling PW1, PW9 was examined. Ext.X6 was marked in evidence on the side of the first respondent. On the side of the appellant, RW7 and RW8, who are his present wife and child, were examined.

6. We have heard the learned counsel for the appellant. In spite of service of notice on the respondents, they remained absent.

7. In the earlier round of litigation, the trial court's finding that the first respondent had married the appellant in accordance with their custom was upheld by the first appellate court. So also, it was held that the second respondent was born to the appellant in the first respondent. This court in the second appeal, while setting aside the judgment, did not interfere with the said findings, but remanded the case for adjudication on certain limited issues. The issues which were directed to be tried are:

(i) Whether a customary divorce as alleged was prevalent in the community to which the parties belong?

(ii) Whether the marriage between the first respondent and Balan was dissolved by such customary divorce?

The remand order permitted the trial court to frame additional issues if necessary, based on the amended pleadings. However, apart from the above issues, the trial court framed an additional issue, namely, whether the marriage between the first respondent and the appellant was solemnised in accordance with the custom prevailing in the community and found it in favour of the 1st respondent. Since the evidence regarding the marriage between the 1st respondent and the appellant is overwhelming, no attempt is made before this court to challenge the correctness of the finding.

8. When there is a statute in place providing for marriage, divorce, the grounds of divorce and the forum, could there be a customary divorce? If at all there is such a custom, does the law recognise such a customary divorce? The answer lies in Sections 4 and 29(2) of the Hindu Marriage Act (‘the Act’, for short). The Sections read thus:

> "Section 4. "Overriding effect of Act: - Save as otherwise expressly provided in this Act-
>
> (a) any test, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."
>
> Section 29(2) : "Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act."

When the above provisions are read together, it becomes evident that a customary divorce is saved and the provisions in the Act will not affect that right.

9. The term 'custom' is defined in Section 3(a) of the Act as follows:

> "Section 3(a): the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the

> force of law among Hindus in any local area, tribe, community, group or family:
>
> Provided that the rule is certain and not unreasonable or opposed to public policy;
>
> Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;"

In short, the term *custom* under the Act signifies a rule or practice,

(a) which has been observed continuously and uniformly,

(b) observed for a long period,

(c) thus, has obtained the force of law among a group of Hindus, and

(d) must be certain, reasonable and not opposed to public policy.

Thus, the statute itself makes it clear that a practice becomes a *custom* only when, by common adoption and long, unvarying habit, it has come to have *the force of law*.

10. The authoritative precedents on the subject have to be examined for a proper understanding of the above principle. It is well settled that the right to obtain dissolution of a Hindu marriage on the basis of such custom can be accepted by the Court only if the party asserting it succeeds in proving that the custom has prevailed in the community with the essential attributes of antiquity, continuity, and reasonable certainty. Antiquity and continuity are indispensable features of a practice for it to mature into a legally acceptable custom. The burden of proof in this regard lies entirely upon the person who relies upon the existence of such a custom.

11. In **Bhimashya and Others v. Janabi (Smt) Alias Janawwa** [(2006) 13 SCC 627], the Apex Court held:

> "A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. **A custom to be valid must have four essential attributes. First, it must be immemorial ; secondly, it must be reasonable ;**

> **thirdly, it must have continued without interruption since its immemorial origin, and; fourthly, it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.** (See Halsbury, 4th Edn., Vol. 12, para 401, p.2 & para 406,p.5.)"

(Emphasis added)

12. In **Gokal Chand v. Parvin Kumari** [AIR 1952 SC 231], the Supreme Court declared that:

> "A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that 'a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' should not be strictly applied to Indian conditions."

13. In ***Pushpavathi Vijayaram v. P. Visweswar*** [AIR 1964 SC 118], the Apex Court stated that the existence of a custom must be demonstrated through clear and unambiguous evidence so that the Court may be assured not only of its actual existence but also that it possesses the necessary conditions of antiquity and certainty. It was held that:

> "The law in regard to the proof of customs is not in doubt. As observed by the Privy Council in the case of Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar (14 Moo IA 585.), "it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.""

14. The Supreme Court in ***Salekh Chand v. Satya Gupta*** [(2008) 13 SCC 119], while dealing with the claim of adoption under the Hindu Adoptions and Maintenance Act, 1956, held as under: (SCC pp. 130-31, paras 21-24):

> "Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the alleged custom should be forthcoming. A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case. Where, however a custom is repeatedly brought to the notice of the courts, the courts, may hold that the custom was introduced into law without the necessity of proof in each individual case."

15. This court in ***Kandathy and Ors. v. Kuttymammi*** [1970 KLT 799] held that:

> "7. All systems of law, the Hindu law and English Common law included recognise the binding force of customary law. But what are the attributes of a custom before it can be exalted into a rule of law? Antiquity is essential for a custom to be obligatory. "But antiquity", as Allen, in an illuminating passage, observes, "is a relative term, and if it were applied as a test without qualification, every custom would necessitate indefinite archaeological research." The arbitrary rule about the age of a custom having to be immemorial, "time whereof the memory of man runneth not to the contrary" does not apply to India. The custom to be valid must be uniform and continuous, so that the conviction of the members of the community that they are acting in accordance with law, when they obey the custom, should be clearly shown. No hard and fast rule as to the period during which the custom has prevailed can be insisted upon. If it has existed for a long time long enough in the circumstances of the case there is a presumption of antiquity. Although the onus of proof of antiquity is upon the person who sets up the custom, the degree of proof depends on many factors. Take this case as an illustration. Evidence of acts proving the custom, decisions of Panchayats and of Courts, upholding such acts, statements of competent persons of their belief that such acts are legal and valid are the usual materials on which a Court acts, but if we are dealing with a rule of custom, relating to inheritance and succession to members of a community who, until recently, did not have

> properties to inherit or to succeed to, proof of custom may be hard to compile. In those cases "The rules of evidence are liberal in matters of such antiquity, but they remain rules of evidence and, with every willingness to admit all such inferences as can properly be drawn, we must distinguish clearly between reasonable inference and plausible conjecture. The party setting up the custom must have the benefit of all legal presumptions, but he can take nothing by any resort to mere surmise, however ingenious, and his proof, though scanty, must still be 'rational and solid'. Again, when the existence of a custom for some years has been proved by direst evidence, it can be shown to be immemorial by hearsay evidence and such evidence is allowable as an exception to the general rule (See AIR. 1925 P.C. 213). ”

16. Section 13 of the Evidence Act delineates *inter alia* the factors relevant to establish the existence of a custom. It provides that, facts relevant for proving a right or custom are: (a) transactions by which the right or custom was created, claimed, modified, recognized or asserted; and (b) instances in which such right or custom was claimed, recognized or exercised. Thus, where a party relies on a customary right, evidence may be given of past transactions or instances showing that such a custom has been continuously and uniformly asserted or recognized in their community for a

considerable period. A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case. [See ***Salekh Chand v. Satya Gupta*** (supra)]

17. The existence of a custom can also be proved in the manner provided in Section 48 of the Indian Evidence Act, which reads as follows:

> "48. Opinion as to existence of right or custom, when relevant – When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.
> *Explanation*. – The expression 'general custom or right' includes customs or rights common to any considerable class of persons."

Thus, the person through whom the existence of a custom is to be proved should be one who would be likely to know of its existence, if it existed.

18. In the above context. Section 32 of the Indian Evidence Act is also of significance. Section 32(4) permits

even written or verbal statements or opinions of a deceased person to be relevant when they relate to the existence of a custom, if made before the controversy arose and by a person who would naturally have been aware of such matters. It reads:

> "32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant – Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:
> xx xx xx
> (4) or gives opinion as to public right or custom, or matters of general interest. – When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen."

To prove a custom it is not necessary that a person should have personally witnessed instances establishing the custom, since even hearsay evidence is admissible regarding the statement or opinion of a person about the existence of a

custom, provided, the conditions of Section 32 of the Evidence Act are satisfied. [See also ***Kandathy and Ors. v. Kuttymammi*** (supra)]. Therefore, broadly stated, the evidence adduced to prove the existence of a custom should be in the nature referred to above.

19. In ***Saraswathi Ammal v. Jagadambal and Another*** [(1953) 1 SCC 362], the Supreme Court held that:

> "A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same custom."

The above view fortifies the necessity of rational and solid proof of the existence of a particular custom in the community and locality of the party claiming the existence of the custom.

20. It is also well settled that, if a right is claimed based on a custom, it must be pleaded and proved with meticulous details. In ***Kochan Kani Kunjuraman Kani v.***

Mathevan Kani Sankaran Kani [MANU/SC/0477/1971:AIR 1971 SC 1398], the Apex Court declared that:_

> "It is well established that in the matter of custom a party has to plead in specific terms as to what is the custom that he is relying on and he must prove the custom pleaded by him. He cannot be permitted to prove a custom not pleaded by him. In Abdul Hussain Khan v. Bibi Sona Dero45, I.A. 10., the Judicial Committee observed "*It is therefore Incumbent upon the plaintiff to allege and prove the custom on which he relies.*" That was also the view taken by this Court in Thakur Gokalchand v. Parvin Kumari MANU/SC/0077/1952: [1952]1SCR825 The reason for this rule is obvious. Anybody who puts forward a custom must prove by satisfactory evidence the existence of the custom pleaded, its continuity and the consistency with which it was observed. **A party against whom a custom is pleaded must have notice as to what case he has to meet. The opposite party apart from rebutting the evidence adduced by the plaintiff may be able to prove that the custom in question was not invariably followed."**

(Emphasis added)

21. Let us now consider the pleadings and evidence in the present case. In the plaint, the first respondent had originally stated in paragraph 7 that, *"the first marriage of the first plaintiff with the above Balan was dissolved by customary form of divorce by observing all the formalities*

of custom and rituals prevailed at that time and now, among the Thiyyas of North Malabar.” By amending the plaint after the remand, the first respondent further pleaded in detail the rituals which were required to be performed for the customary marriage as well as customary divorce. It reads as follows:

> “Since thiyyas of north Malabar following marumakkathayam law of inheritance customary marriage with cousin was allowed as per custom. The custom followed at that time was that in the presence of holy lamb (Nilavilakku) which represent holy fire both the bride and bride groom is required to be sit down facing east direction in the presence of close relatives, then perform the ritual of ‘ayana’ the prenuptial blessings by all the relatives of both the parties older in age of both the parties to the marriage by putting rice in the head and shoulders of the bride and bridegroom, then performance of ‘vivaham’ the wedding ceremony in which both the parties to the marriage are required to stand up in face-to-face posture in the east-west direction, then exchange garlands each other, then bride-groom present ‘pudava’ (sari) to the bride, then ritual of ‘sapthapati’ by taking rotations seven in number, by bride groom accompanied by bride, by catching the hand of the bride by bridegroom, in seven times around the holy lamb, then post marriage blessings by relatives. The marriage was dissolved by performing special ceremonies. In the custom of divorce both the husband and wife are required to sit before the holy lamb (Nilavilakku) in the presence of close relatives of both sides, then both husband and wife

> required to take each cotton cord of lightened "Nilavilakku" in the opposite direction to their own side and put it off."

The appellant filed an additional written statement denying all the above contentions. According to him there was no such custom.

22. After the remand, PW1 was recalled and examined to prove the above. In her additional affidavit, in tune with her pleadings, she described the rituals and ceremonies performed during the customary divorce. However, there was only a vague statement regarding the existence of such a customary divorce in her community. She stated as follows:

> "യഥാർത്ഥത്തിൽ ഞാനും എന്റെ അമ്മാവന്റെ മകനായ ബാലനുമായുള്ള വിവാഹം വടക്കേ മലബാറിലെ നിലവിലുള്ള തിയ്യ സമുദായ പാരമ്പര്യ വിവാഹബന്ധം വേർപ്പെടുത്തൽ ആചാരപ്രകാരം (തിയ്യ Customary Divorce) വേർപ്പെടുത്തിയിട്ടുള്ളതാണ്. . . . Customary Divorce എന്റെ സമുദായത്തിൽ സർവ സാധാരണമാണ്."

In cross-examination, the appellant specifically denied the above statement, contending that there was no such custom or usage at any point of time and that divorce among members of

the Hindu Thiyya community could only be obtained through court. It was further suggested to the first respondent in cross-examination that no one in their community had dissolved a marriage according to the custom set up. During cross examination, the first respondent was unable to mention the name or address of any person who had got their marriage dissolved by following the alleged custom. She conceded that she could not examine anyone who had obtained such a customary divorce, before the court.

23. Despite the denial by the appellant of the existence of any custom, after remand, to prove the issues additionally framed, apart from re-examining herself, the only further witness examined by the first respondent was PW9, a merchant in Mysore who had worked together with Balan and who claimed to have participated in the ceremony of the customary dissolution. In tune with the version of PW1, he also described the details of the ceremony observed by the first respondent and Balan. What he stated about the existence of

such a custom in their community at the relevant time, was only as follows:

> "ഇങ്ങനെ വിവാഹം നടത്താറുണ്ട്, ബന്ധം വേർപെടുത്താറുമുണ്ട്. അങ്ങനെ ബന്ധം വേർപ്പെടുത്തിയവരുടെ പേരുകൾ ഓർമ്മയില്ല."

In cross-examination he conceded that he had not witnessed any such ceremonies other than the one in respect of Balan and the 1st respondent.

24. As noted earlier, the respondent failed to produce evidence of even a single instance of divorce in her community following the alleged custom. PW1 was only 12 years old at the time of the alleged practice. PW9 has no claim that he is a community leader. Neither of them could cite any instance of customary divorce other than the one in question. Their testimony falls short of the requirements of Sections 32(4) and 48 of the Evidence Act, since they cannot be said to be persons likely to know of the existence of such a custom, nor did they state anything reflecting the opinions or statements of persons falling within the scope of Section

32(4). In the absence of clear and reliable proof regarding antiquity, continuity, and reasonable certainty of the custom claimed, the alleged ceremony, if at all held, cannot be accepted as sufficient proof of custom within the meaning of Section 29(2) of the Act.

25. In fact, even before the remand and retrial, the respondents had adduced evidence suggesting that, in their community, a marriage could be dissolved by a customary practice. PW5 had deposed that such a practice existed in the Thiyya community. PW6, Balan, to whom the first respondent was married, deposed that their marriage was dissolved through such a tradition. PW8 stated that he was a community leader and had participated both in the marriage of the first respondent with Balan and in the customary dissolution of their marriage. According to him, such a convention was prevalent in their community. Despite these statements, none of the witnesses was able to cite even a single instance, apart from that of the first respondent and Balan, where a

marriage had been dissolved through such a procedure. Therefore, even if their statements are accepted at face value, they are not sufficient to establish the existence of a custom. One or two instances of such practice, or the occasional adoption of a local practice by certain community members, will not qualify it as a custom having the force of law. A Division Bench of the Calcutta High Court in ***Biswanath Agarwalla v. Dhapu Debi Jajodi and Ors.*** [AIR 1966 Cal 13] held that a custom cannot be established by a few instances of recent origin. The Court relied on the decisions in *K. Abbayya v. Venkata Papayya*, ILR 29 Mad 24, and *Hashim Ali v. Abdul Rahman*, ILR 28 All 698. In ***Yamanaji H. Jadhav v. Nirmala*** [(2002) 2 SCC 637], the Apex Court reiterated this principle in the context of the Act, holding as follows:

> "As per the Hindu Law administered by courts in India, divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised 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. …. It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequence of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognisable by a court unless specifically permitted by law."

As observed above, a customary divorce is an exception to the general law and can be accepted only with utmost care, caution, and reliable evidence. These aspects were overlooked by the Family Court. The sufficiency of the evidence on the first issue framed at the time of remand, already noted earlier, has not been considered. It is relevant to note that the respondents had earlier raised a contention that in ***Achu v. Chandkurhan*** (1958 KLT 916) this Court had found that

customary marriage was prevalent among Thiyyas of North Malabar. However, relying on the observation of the Supreme Court in ***Saraswathi Ammal v. Jagadambal*** (supra) that *"a community living in one particular district may have evolved a particular custom, but from that it does not follow that the community living in another district is necessarily following the same custom"*, this Court remanded the case to the trial court after framing the aforesaid issues. Significantly, in *Achu v. Chandkurhan* (supra), the parties were Thiyyas hailing from Ernad Taluk in Malabar (presently Malappuram District). The first respondent belongs to Thalassery Taluk of Kannur District. Thus, she was not only bound to plead but also to prove the existence of a customary divorce among Thiyyas of her locality. As noted earlier, the additional evidence adduced after the remand is wholly insufficient to establish that such a custom existed in her community in that locality. When the first respondent failed to prove the factum of the customary divorce pleaded, the marriage with the appellant could only be treated as void, in

view of Section 11 r/w Section 5(i) of the Act.

26. Hence, the judgment insofar as it upheld the validity of marriage between the 1st respondent and the appellant is liable to be set aside. However, in view of Section 16 of the Act, the legitimacy of the child will not be affected even if the marriage is void or voidable. Section 16 provides that notwithstanding the nullity of a marriage under Section 11, any child of such marriage shall be legitimate. Therefore, the declaration granted with regard to the second respondent warrants no interference.

27. Along with the above appeal, Dasan filed a revision petition challenging the order passed by the Family Court in a proceeding initiated by the respondent - Cheerootty under Section 125 of the Code of Criminal Procedure (‘the Code’, for short). As per the said order, the Family Court ordered monthly maintenance of Rs.5,000/-. It was allowed on the

basis of the findings in the judgment impugned in the above appeal that the first respondent is the wife of Dasan.

28. An order for maintenance under Section 125 of the Code can be issued in favour of a "wife" who is unable to maintain herself when the "husband" having sufficient means neglects or refuses to maintain her. A woman who contracts a marriage with a man during the subsistence of her earlier marriage cannot be regarded as a 'wife' within the meaning of Section 125 of the Code of Criminal Procedure.

29. In **Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav** [(1988) 1 SCC 530], the Apex Court held that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is not entitled to the benefit of Section 125 of the Code. This view was reaffirmed by the Apex Court in **Savitaben Somabhai Bhatiya v. State of Gujarat** [(2005) 3 SCC 636]. Therein it was held that, however desirable it may be

to take note of the plight of an unfortunate woman who unwittingly enters into wedlock with a married man, there is no scope to bring within the expression 'wife' a woman who is not lawfully married. Therefore, when it is found that the marriage between Dasan and Cheerootty is void, the order impugned in the revision petition for maintenance is also liable to be set aside.

30. Nevertheless, in ***Sukhdev Singh v. Sukhbir Kaur*** (2025 SCC OnLine SC 299), the Apex Court declared as follows:

> "28. Accordingly, we answer the questions as follows:
>
> (a) A spouse whose marriage has been declared void under Section 11 of the 1955 Act is entitled to seek permanent alimony or maintenance from the other spouse by invoking Section 25 of the 1955 Act. Whether such a relief of permanent alimony can be granted or not always depends on the facts of each case and the conduct of the parties. The grant of relief under Section 25 is always discretionary; and
>
> (b) Even if a court comes to a prima facie conclusion that the marriage between the parties is void or voidable, pending the final disposal of the proceeding under the 1955 Act, the court is not precluded from granting maintenance pendente lite

> provided the conditions mentioned in Section 24 are satisfied. While deciding the prayer for interim relief under Section 24, the Court will always take into consideration the conduct of the party seeking the relief, as the grant of relief under Section 24 is always discretionary."

In view of the law laid down by the Apex Court as above, it is open to the first respondent to make an application before the Family Court for permanent alimony, irrespective of the fact that her marriage is void. Similarly, as the Apex Court has held that the courts are not precluded from granting maintenance *pendente lite* in such cases on satisfaction of the conditions mentioned in Section 24 of the Act. Taking cue from the same, we direct that the amount, if any, paid by the appellant pursuant to the said maintenance order shall be treated as maintenance *pendente lite*, as we find that the conditions mentioned in Section 24 are satisfied in the present case.

31. In the result, the appeal is allowed in part and the impugned judgment is set aside so far as it relates to

the declaration that the marriage of the first respondent with the appellant is valid. The original petition will stand dismissed to the said extent.

R.P.(FC) No.126/2020 is also allowed. The order in M.C.No.349/2018 of the Family Court, Thalassery is set aside, subject to the above observations.

No order as to costs.

Sd/-

SATHISH NINAN
JUDGE

Sd/-

P. KRISHNA KUMAR
JUDGE

sv