Reynold Rajamani & Anr vs Union Of India & Anr on 30 July, 1982

Equivalent citations: 1982 AIR 1261, 1983 SCR (1) 32, AIR 1982 SUPREME COURT 1261, (1982) MARRILJ 498, (1982) MATLR 359, (1982) 95 MAD LW 141, 1982 CRI APP R (SC) 223, 1982 UJ (SC) 570, (1982) 2 DMC 268, (1982) 8 ALL LR 649, 1982 (2) SCC 474

Author: R.S. Pathak

Bench: R.S. Pathak, O. Chinnappa Reddy, Baharul Islam

PETITIONER:
REYNOLD RAJAMANI & ANR.

Vs.

RESPONDENT:
UNION OF INDIA & ANR.

DATE OF JUDGMENT30/07/1982

BENCH:
PATHAK, R.S.
BENCH:
PATHAK, R.S.
REDDY, O. CHINNAPPA (J)
ISLAM, BAHARUL (J)

CITATION:
1982 AIR 1261 1983 SCR (1) 32
1982 SCC (2) 474 1982 SCALE (1)566

ACT:
Indian Divorce Act 1869, Ss. 7, 10 - `Mutual consent' whether a ground for divorce.
Interpretation of Statutes-Matrimonial statutes - Legislation by incorporation - Post 1947 British laws whether incorporated into Indian law.

HEADNOTE:
The appellants, who were husband and wife belonging to the Roman Catholic Community were married under section 27 of the Indian Christian Marriage Act 1872. They filed a joint petition under Section 28 of the Special Marriage Act for a decree of divorce by mutual consent in the District

Court. The trial court dismissed the petition on the ground that section 28 of the Special Marriage Act could not be availed of. The Supreme Court allowed the appellants to amend their joint petition to enable them to rely on section 7 of the Indian Divorce Act 1869 read with section 1 (2)(d) of the Matrimonial Causes Act 1973 of England and to seek divorce on the ground that they had been living separately for more than two years and had not been able to live together and that the marriage had broken down irretrievably, and that therefore they were entitled to a decree of divorce. The District Court however dismissed the petition holding that they were not entitled to rely on section 1 (2)(d) of the English Statute. In appeal the High Court affirmed the view taken by the trial Court.

In the appeal to this court it was contended on behalf of the appellants: (1) that the trial court and the High Court were wrong and that section 7 of the Indian Divorce Act 1869 incorporated the provisions of section 1(2)(d) of the Matrimonial Causes Act 1973 and that the appellants were entitled to the benefit of the ground for divorce as set forth in the latter enactment, and (2) that the Letters Patent jurisdiction enjoyed by the High Court in Matrimonial matters is sufficiently extensive to enable the High Court to make a decree for divorce.

Dismissing the appeal,

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HELD: [By the Court]

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Mutual consent is not a ground for divorce under the Indian Divorce Act 1869. The provisions of section l(2)(d) of the Matrimonial Causes Act 1973 of England cannot be read into section 7 of the Indian Divorce Act, 1869. [39 A]

[Per Pathak and Baharul Islam, JJ.]

1. Whether a provision for divorce by mutual consent should be included in the Indian Divorce Act is a matter for legislative policy. The courts cannot extend or enlarge legislative policy by adding a provision to the statute which was never enacted there. It is for Parliament to consider whether the Indian Divorce Act, 1869 should be amended so as to include a provision for divorce by mutual consent. [38 C-D; 39 F]

2. The Letters Patent jurisdiction enjoyed by the High Court in matrimonial matters cannot be construed to include a ground for divorce not specifically set forth in section 10 of the Indian Divorce Act, 1869. [39 E]

M. Barnard v. G.H. Barnard A.I.R. 1928 Cal. 657; Miss Shireen Mall v. John James Taylor A.I.R. 1952 Pb. 277: T.M. Bashiam v. M. Victor A.I.R. 1970 Mad. 12; aad A. George Cornelius v. Elizabeth Dopti Samadanam A.l.R. 1970, Mad. 240. approved.

[Per Chinnappa Reddy and Baharul Islam, JJ.]

Legislation whenever made by Parliament of a foreign state cannot automatically become part of the law of another

sovereign state. Whatever interpretation of section 7 of the Indian Divorce Act, 1869 was permissible before August 15, 1947 when the British Parliament had plenary powers of legislation over Indian territory, no interpretation is now permissible which would incorporate post-1947 British laws into the Indian laws. [39 G-H; 40 A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2631 of 1982.

Appeal by special leave from the judgment and order dated the 3rd October, 1980 of the Delhi High Court in C.. (Main) No. 184 of 1980.

Miss Lily Thomas, K S. Gill and S.K. Arora, for the Appellant.

S.T. Desai and Miss A. Subhashini for the Respondent. The following Judgments were delivered;

PATHAK J. The appellants, who belong to the Roman Catholic community, were married on December 30, 1967 in Podannur in the State of Tamil Nadu under s. 27 of the Indian Christian Marriage Act, 1872. On July 26, 1979 they put in a joint petition under s. 28 of the Special Marriage Act for a decree of divorce by mutual consent in the Court of the learned District Judge, Delhi. On March 11, 1980 the trial court dismissed the petition on the ground that s. 28 of the Special Marriage Act could not be availed of. The appellants filed 'a writ petition in the High Court of Delhi which having been dismissed they proceeded in appeal to this Court. In the appeal they applied for permission to amend the joint petition to enable them to rely upon s. 7 of the Indian Divorce Act, 1869 read with s. 1 (2) (d) of the Matrimonial Causes Act, 1973 of England. The amendment was allowed, and the appellants filed an amended joint petition i n the trial court - seeking divorce on the ground that they had been living separately for more than two years and had not been able to live together and their marriage had broken down irretrievably and therefore they were entitled to a decree of divorce under the aforesaid provisions. On August 16, 1980 the trial court dismissed the petition holding that the appellants were not entitled to rely on s. I (2) (d) of the English statute. The appellants took the matter to the High Court or Delhi and the High Court has affirmed the view taken by the trial court.

In this appeal Miss Lily Thomas, appearing for the appellants, contends that the trial court and the High Court are wrong and that in reading s. 7 of the Indian Divorce Act, 1869 the provisions of s. I (2) (d) of the Matrimonial Causes Act, 1973 must be deemed to be incorporated therein and therefore the appellants are entitled to the benefit of the ground for divorce set forth in the latter enactment. In deference to Miss Thomas's vehement submissions and having regard to the importance of the question we heard her at length but we indicated that the point raised by her did not carry conviction, and we reserved judgment in order to give a fully reasoned order Shortly thereafter, Miss Thomas's put in an application asserting that she had information that the Government of India was proposing to amend the matrimonial law in relation to the Christian

community in India and praying that in the circumstances judgment may not be delivered for sometime. There has, however, been no Change in the law since, and it is appropriate, we think, that judgment should be pronounced now without further delay.

The main contention raised by Miss Thomas is that the appellants are entitled to the benefit of s. 7 of the Indian Divorce Act and therefore, by reason of that provision, to rely on s. 1 (2) (d) of the Matrimonial Causes Act, 1973. There is no doubt that if the provisions of s. 1 (2) (d) of the English statute can be read in s. 7 of the Indian Divorce Act and the appellants can establish that the conditions set forth in s. i (2) (d) are made out the appellants will be entitled to claim a decree of divorce. But we are not satisfied that s. I (2) (d) of the English statute can be read in s. 7 of the Indian Divorce Act Sub- ss. (l) and (2) of s. I of the Matrimonial Causes Act, 1973 provides:-

> "(I) Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.
>
> (2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say-
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition,
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as "two years' separation") and the respondent consents to a decree being granted;
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred to. as "five years' separation)."

The circumstances set forth in sub-s. (2) of s. 1 constitute the basis for holding that the marriage has broken down irretrievably. Can these provisions be deemed incorporated in s. 7 of the Indian Divorce Act ? S. 7 provides:-

> "7. Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles

> and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:
>
> Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded."

The section requires that in all suits or proceedings under the Indian Divorce Act the High Court and District Courts shall "act and give relief on principles and rules" which conform as nearly as may be to the principles and rules on which the Court for Divorce anc Matrimonial Causes of England acts and gives relief. What is contemplated is the manner in which the court will exercise its jurisdiction for the purpose of disposing of a pending suit or proceeding The expression "principles and rules" does not mean the grounds on which a suit or proceeding may be instituted. The grounds are ordinarily placed in the suit or proceeding when the petitioner comes to court and invokes its jurisdiction. It is after the suit or proceeding is entertained that the question arises of deciding on the norms to be applied by the court for the purpose of disposing of it. If it were otherwise, plainly there would be a conflict with s. 10 of the Indian Divorce Act. For s. 10 sets fourth the limited grounds on which a petition may be presented by a husband or wife for dissolution of the marriage.

It cannot be denied that society is generally interested in maintaining the marriage bond and preserving the matrimonial state with a view to protecting societal stability, the family home and the proper growth and happiness of children of the marriage. Legislation for the purpose of dissolving the marriage constitutes a departure from that primary principle, and the Legislature is extremely, circumspect in setting forth the grounds on which a marriage may be dissolved. The-history of all matrimonial legislation will show that at the outset conservative attitudes influenced the grounds on which separation or divorce could be granted. Over the decades, a more liberal attitude has been adopted, fostered by a recognition of the need for the individual happiness of the adult parties directly involved. But although the grounds for divorce have been liberalised, they nevertheless continue to form an exception to the general principle favouring the continution of the marital tie. In our opinion, when a legislative provision specifies the grounds on which divorce may be granted they constitute the only conditions on which the court has jurisdiction to grant divorce. If grounds need to be added to those already specifically set forth in the legislation, that is the business of the Legislature and not of the courts. It is another matter that in construing the language in which the grounds are incorporated the courts should give a liberal construction to it. Indeed, we think that the courts must give the fullest amplitude of meaning to such a provision. But it must be meaning which the language of the section is capable of holding. It cannot' be extended by adding new grounds not enumerated in the section.

When therefore s. 10 of the Indian Divorce Act specifically sets forth the grounds on which a marriage may be dissolved, additional grounds cannot be included by the judicial construction of some other section unless that section plainly intends so. That, to our mind, s. 7 does not. We may point out that in M. Barnard v. G.H. Barnard(l) the Calcutta High Court repelled a similar contention and held that s. 7 could not be construed so as to "import into Indian Divorce

Jurisprudence any fresh ground for relief other than those set forth in s. I()" and that "the only grounds on which a marriage may be dissolved are those set forth in s. 10 of the Act...". The Punjab High Court in Miss Shireen Mall v. John James Taylor(2) has also taken the view that the grounds set forth in s. 10 of the Indian

(l) AIR 1928 Cal. 657.

(2) AIR 1952 Pb. 277.

Divorce Act cannot be enlarged by reference to s. 7 of the Act. So also has a Special Bench of the Madras High Court in T.M. Bashiam v. Victor(l) and a Single Judge of that Court in A. George Cornelius v. Elizabeth Dopti Samadanam.(2) Miss Thomas appeals to us to adopt a policy of "social engineering" and to give to s. 7 the content which has been enacted in s. 28 of the Special Marriage Act, 1954 and s. 13B of the Hindu Marriage Act, 1955, both of which provide for divorce by mutual consent. It is possible to say that the law relating to Hindu marriages and to marriages governed by the Special Marriage Act presents a more advanced stage of development in this area than the Indian Divorce Act. However, whether a provision for divorce by mutual consent should be included in the Indian Divorce Act is a matter of legislative policy. The courts cannot extend or enlarge legislative policy by adding a provision to the statute which was never enacted there.

Reference is made by Miss Thomas to s. 2 (ix) of the Dissolution of Muslim Marriage Act, 1939 which empowers the court to dissolve a Muslim marriage on any ground other than those already enumerated in the section "which is recognised as valid for the dissolution of marriages under Muslim law." No such provision is contained in s. 10 of the Indian Divorce Act.

Learned counsel of the appellants has referred us to B. Iswarayya v. Swarnam Iswarayya(3) and George Swamidoss Joseph v. Miss Harriet Sundari Edward.(4) Nothing said in those cases helps the appellants. The first case was concerned with the question whether an appellate court can increase the amount of alimony payable by the husband to the wife without an appeal by her. And the second deals with the question whether the Indian Courts can make a decree nisi for nullity absolute within a shorter period than that specifically mentioned in the Indian Divorce Act.

(1) A.l.R. 1970 Mad. 12.

(2) A.l.R. 1970 Mad. 240.

(3) A.I.R. 1931 Privy Council 234.

(4) A.l.R. 1955 Mad. 341.

We are not satisfied that s. 7 of the Indian Divorce Act can be read to include the provisions of s. I (2) (d) of the Matrimonial Causes Act, 1973. This contention of the appellant must fail.

Learned counsel for the appellants then points out that a Christian marriage can be registered under the Special Marriage Act, 1954 and that there is no reason why a marriage registered under the Indian Christian Marriage Act should not enjoy an advantage which is available to a marriage registered under the Special Marriage Act. Reliance is placed on the constitutional prohibition against discrimination embodied in Article 14 of the Constitution. Assuming that the marriage in this case could have been registered under the Special Marriage Act, 1954, inasmuch as it was solemnised in 1967 it was open to the parties to avail of that Act instead of having resort to the Indian Christian Marriage Act, 1872. In the circumstances, it is not open to the appellants to com plain of the disadvantage now suffered by them.

It is also urged by the appellants that the Letters Patent jurisdiction enjoyed by the High Court in matrimonial matters is sufficiently extensive to enable the High Court to make a decree for divorce on the ground now pleaded. We have examined the matter carefully and we do not see how that jurisdiction can be construed to include a ground which is not specifically set forth in E s. 10 of the Indian Divorce Act.

We are not satisfied that this appeal can succeed. It is for Parliament to consider whether the Indian Divorce Act, 1869 should be amended so as to include a provision for divorce by mutual con- sent. The appeal fails and is dismissed but in the circumstances there is no order as to costs.

CHINNAPPA REDDY, J. I agree with my brother Pathak, J. that 'mutual consent' is not a ground for divorce under the Indian Divorce Act and that the provisions of s. 1(2)(d) of the British Matrimonal Causes Act, 1973 cannot be read into the Indian Divorce Act merely because of s. 7. lt is unthinkable that legislation whenever made by the Parliament of a foreign state may automatically become part of the law of another sovereign State. Legislation by incorporation can never go so far. Whatever interpretation of s. 7 was permissible before August 15. 1947 when the British Parliament had plenary powers of legislation over Indian territory, no interpretation is now permissible which would incorporate post-1947 British laws into Indian law.

My brother Pathak J. has pointed out that the history of matrimonial legislation has been towards liberalisation of the grounds for divorce. Inevitably so. The history of matrimony itself, in the recent past, has been a movement from ritual and sacrament to reality and contract even as the history of the relationship of the sexes has been from male dominance to equality between the sexes. But the world is still a man's world and the laws are man-made laws, very much so. We have just heard that in an advanced country like the United States of America, the Equal Rights for Women Amendment could not be successfully pushed through for failure to obtain the support of the necessary number of States. Our constitution-makers and our Parliament have certainly done better. We have constitutional and legal equality for the sexes. But even so, economic and social equality between the sexes appears to be a very distant goal. One has only to read the daily sickly reports of 'dowry deaths' and 'atrocities on women' to realise that women, in our country, are yet treated as commodities and play-things. The root cause of the inequality between the sexes, like other class inequalities, is their social and economic inequality. All inequality will end when social and economic inequality ends. It isl therefore, obvious that true equality between the sexes and else where is possible only when economic and social inequalities disappear. Our Constitution proclaims, in the Preamble, the

establishment of a socialist State where there will be justice, social, economic and political, as our constitutional goal and this is reiterated in the Fundamental Rights' and Directive Principles' Chapters. But, the march towards equality' and economic and social justice is still a 'long march' and meanwhile, what of divorce by mutual consent ? Yes, I agree with Miss Lily Thomas that divorce by mutual consent should be available to every married couple, whatever religion they may profess and however, they were married. Let no law compel the union of man and woman who have agreed on separation. If they desire to be two, why should the law insist that they be one ? But I have a qualification, The woman must be protected. Our society still looks askance at a divorced woman. A woman divorcee is yet a suspect. Her chances of survival are diminished by the divorce. So, the law which grants the decree for divorce must secure for her some measure of economic independence. It should be so whatever be the ground for divorce, A whether it is mutual consent, irretrievable break down of the marriage, or even the fault of the woman herself. Every divorce solves a problem and creates another. Both problems need to be solved, no matter who is responsible for the break down of the marriage. If the divorce law is to be a real success, it should make provision for the economic independence of the female spouse. After all, Indian- society today is so constituted that a Woman is generally helpless and her position become worse if she is divorced. It is necessary that the law should protect her interest.; even if she be an erring spouse, lest she become destitute and a dead loss to society.

N.V.K. Appeal dismissed.