

Kerala High Court

Janardhanan vs Syamala Kumary on 15 January, 1990

Equivalent citations: II (1990) DMC 128

Author: Thomas

Bench: Thomas, Manoharan

JUDGMENT Thomas, J.

1. The appellant, a husband, filed a petition in the lower court for a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 (for short 'the Act') on the ground that his wife has after solemnisation of the marriage, had voluntary sexual intercourse with another person. The wife (1st respondent) who resisted the petition, however, admitted her marriage with the appellant, but denied all the allegations relating to her character. While the original petition was pending, both the husband and wife filed a joint petition and prayed for a decree of divorce in terms of the said petition. Learned Sub Judge dismissed the original petition as well as the joint petition as per the impugned order. Hence this appeal at the instance of the husband.

2. The original petition was filed by the appellant in the lower court on 18-2-1985. The above mentioned joint petition was filed on 9-4-1987. The averments in the joint petition, inter alia, are that the marriage between the parties was solemnised on 13-5-1969 and three children were born to them,, and that due to differences of opinion between the spouses they have been living separately for more than three years and that all possibilities of living together have become foreclosed and hence they have mutually consented to have a decree of divorce. The parties have withdrawn all other contentions raised earlier. It is also stated in the joint petition that monetary claims against the husband were settled as between them and provisions were made regarding custody of the children. The husband and wife were examined in court as witnesses and both of them spoke in support of the averments in the joint petition.

3. In dismissing the joint petition, learned Sub Judge advanced mainly three reasons. First is that since both parties made the motion on the joint petition only after the expiry of eighteen months of the presentation of the original petition, no order could be passed under Section 13B of the Act. The second reason is that since the joint petition was not verified in the manner provided by law the petition is defective and cannot be entertained. The third reason is that even if the joint petition was filed as a compromise petition envisaged in Order XXIII Rule 3 of the Code of Civil Procedure (for short 'the Code'), the same cannot be acted on in divorce proceedings under the Act.

4. Learned counsel for the appellant, while contending that none of the aforesaid grounds can be sustained, further pointed out that the joint petition was actually verified by one of the parties. Of course the verification is not strictly in accordance with all the requirements mentioned in Order VI Rule 15 of the Code. One of the parties has signed below the declaration "all facts stated above are true to my knowledge and information." Under Order VI Rule 15 of the Code it is enough that the pleading is verified by one of the parties pleading. The requirement in Sub-rule (2) that the person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true, has not been complied with in the joint petition. However, the preponderance of judicial authorities is in

favour of the view that if substantial compliance thereto is made a pleading does not become invalid merely because of some differences in the pleading. (*Rivers Steam Navgn. Co. v. Khanta Kumari*, AIR 1934 Calcutta 632, *Bhikaji Keshao v. Brijlal Nandlal*, AIR 1955 SC 610). We hold that the verification in the joint petition is in substantial compliance with the legal requirements.

5. Section 13B of the Act says that a petition for dissolution of marriage may be presented to the court by both the parties to a marriage together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Section 19 of the Act says that every petition under the Act shall be presented to the District Court. (The Sub Court in which the petition was presented is also a District Court as per the definition since the State Government has specified it by a notification). Section 20(1) requires inter alia, that every petition presented shall state the facts on which the claim is to be founded and shall also state that there is no collusion between the spouses. Nowhere has it been stated in the Act that a petition filed under Section 13B cannot be presented in a proceeding initiated under Section 13 of the Act. Nor is it necessary to present the same as an original petition unconnected with the pending proceedings - what is not provided in law need not be read into it for the purpose of deciding whether an action is maintainable in law. No endeavour should be spared to save an action from the attack of maintainability if it is legally possible. Hence we hold that the joint petition cannot be thrown overboard merely because the same was not filed as an original petition, or because it was filed in the same proceedings in which a decree for divorce is sought for on another ground.

6. The other contention that the joint petition can be treated as a compromise petition and hence a decree should be passed in terms of the compromise is not easy of acceptance. In regular civil proceedings compromise between parties regarding their disputes can get legal recognition as per Order XXIII Rule 3 of the Code. The said rule is that where it is proved to the satisfaction of the court that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the court shall order such agreement on compromise and shall pass a decree in accordance therewith.

7. But compromise between parties in divorce proceedings, agreeing with each other to dissolve the marriage was never regarded in law as consistent with public policy. Even evidence given by parties admitting matrimonial offences was frowned at by the courts. Lord Mansfield expressed his disapproval against such admission of parties themselves in divorce proceedings way back in 1777 (vide *Goodright's case* (1) COWP 591). The same was the stand adopted by the House of Lords in *Russel v. Russel*, (1924) AC 687. The legislative policy in India has not changed from the aforesaid approach. That is why the statutes governing law of divorce even now insist that the court should guard against collusion between parties for wangling unmerited decrees. The Hindu Marriage Act with all its progressive innovations still retains the provision which cautions the court to guard against collusion between spouses. Marriage as an institution has a bearing on the society and in divorce proceedings the parties are not actually restricted to the spouses alone since their children are also affected persons. This is one of the main reasons which stands against such compromises. Section 13B in the Act is not to be understood as *carte blanche* granted by Parliament to the spouses to dissolve the marriage on mutual agreement. The said provision contains certain other postulates

also despite the dominance of mutual agreement factor therein. Section 23 of the Act emphasises that the court can pass a decree only on satisfaction that any of the grounds for granting relief exists. The said section imposes a duty on the court to consider and decide on the existence or non-existence of certain other factors enumerated therein. The closing words in Section 23(1) reflects the Parliament's concern in the matter. Those words are these : " then, and in such a case, but not otherwise, the court shall decree such relief accordingly". The prohibition incorporated in the paranthetical clause is eloquent and cannot be overlooked.

8. Section 21 of the Act only permits the application of the rules in the code in a restricted manner. Section 21 says that "subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908". This means that other provisions in the Act will override the rules in the Code in all proceedings under the Act. We are of the view that the postulates in Section 23(1) of the Act are inconsistent with Order 23 of the Code and as such the parties cannot, in divorce proceedings, seek the assistance of the court to pass a decree of divorce in terms of any compromise. True, mutuality of consent has been recognised, but the legislature added some more factors which should be associated therewith, such as the fact that the spouses have been living separately for one year or more and that they have not been able to live together. Mutual agreement by itself is not accepted as a ground for granting decree for divorce. One of us (Thomas, J.) has observed in *Anirudhan v. Prasanna Kumari*, 1989 (1) KLT 42 that the procedure prescribed in Section 13B(2) of the Act over rides the rules in Order XXIII Rule 1(5) of the Code. We concur with the aforesaid view.

9. In *Mahendra v. Sushila* (AIR 1965 S.C. 364) the majority view permitted the court to take into consideration the admissions made in the pleadings in divorce proceedings for the purpose of deciding about the satisfaction whether the ground exists or not. At the same time Their Lordships observed thus : "The rule that in divorce cases .... the court usually does not decide merely on the basis of admissions in pleadings of the parties, is a rule of prudence and not a requirement of law. That is because the parties might make collusive statements admitting allegations against each other in order to gain the common object that both desire, for persona! reasons A decision on such admission would be against public policy and is bound to affect not only the patties to the proceedings, but also their issues, if any, and the general interest of the society". The Bombay High Court has held in *State v. Sharanappa Malappa*(1977 Bombay Law Reporter 143) that provisions in Order 23 of the Code are inconsistent with Section 23 of the Hindu Marriage Act and hence the former cannot be applied in proceedings under the Act. *Vimadalal, J.* has observed in the said decision thus:--

"Considering these statutory provisions, apart from the authority, it appears to me to be clear that only those provisions of the Code of Civil Procedure would be applicable which are not, in any manner, contrary to the provisions of the Hindu Marriage Act itself. In that view of the matter, in my opinion, even on a plain reading of Sections 21 and 23(1) it is clear that Order XXIII, Rule 3 of the Code of Civil Procedure which enjoins that the Court must pass decree in accordance with a compromise arrived at between the parties is not applicable to proceedings under the Hindu Marriage Act, 1955, by reason of the provisions of Section 23(1)(a) of the said Act which lay down in

mandatory terms that before a Court can grant a decree under the said Act, it must be satisfied that one or other of the statutory grounds for granting relief exists in the case before it. It is only on the Court being so satisfied that it gets the jurisdiction to grant a decree under the said Act, and it cannot pass a decree "otherwise" as the concluding portion of Section 23(1) clearly states. The word "otherwise" which occurs there must naturally and necessarily comprise a decree by consent and the Court cannot, therefore, pass a consent decree unless it is itself satisfied that one or other of the grounds for granting the relief sought by the petitioner exists."

10. Learned counsel for the appellant has invited our attention to another decision of the Bombay High Court in *Sudhakar Vinayak Joshi v. Sulabha Sudharkar Joshi and Anr.*, I (1986) DMC 336. A single Judge of the Bombay High Court in that decision took the view that "continuance of Section 23(1)(c) is the result of legislative inadvertance and the said section has got to be regarded as dead letter because the legislature has itself provided, by subsequent amendment of the Act bringing Section 13B of the Act on the statute book, that two souls can mutually agree to part from each other amicably without bitterness and without acrimony". The rationale adopted by the learned single Judge is that Section 23(1)(c) was thereon the statute even before the insertion of Section 13 B and hence the Parliament would have lost sight of the fact that those two provisions are mutually inconsistent. With respect, we are unable to concur with the aforesaid view. It must be borne in mind that Parliament which inserted Section 13B by Act 68 of 1976 has also brought about consequent changes in Section 23 through the same amending statute by providing that when a divorce is sought on the ground of mutual consent, the court has to be satisfied that such consent has not been obtained by force, fraud or undue influence. It cannot be presumed that the Parliament would have omitted to notice the other rules enumerated in Section 23 while bringing in the new innovative provision of Section 13 B. The presumption is that the legislature is aware of the implications of every provision including every clause and every punctuation given in the frame of provisions. There is no inherent evidence in the Act to rebut the aforesaid presumption. On the other hand, the addition of a safety clause in Section 23 for the sole purpose of application of Section 138 would rule out the possibility of any parliamentary inadvertance in the matter.

11. The remaining reason of the learned Sub Judge does not merit any discussion because the motion on the joint petition was made before the expiry of the statutory period of eighteen months. Learned Sub Judge obviously went wrong in reckoning the aforesaid period from the date of institution of the earlier proceedings under Section 13 of the Act.

12. We are satisfied from the joint petition submitted by the parties that the spouses have been living separately for a period of more than one year and that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. The consent has been voluntarily given by the parties and the petition has not been presented or prosecuted in collusion with each other. We, therefore, allow this appeal and set aside the lower court decree. The joint petition filed by the parties is treated as one presented under Section 13B of the Act and a decree for divorce dissolving the marriage between the appellant and the first respondent is passed thereon. No costs.