

Kerala High Court

Joseph vs Mary on 21 July, 1999

Equivalent citations: I (2000) DMC 554

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Bench: A Lakshmanan, S Sankarasubban, C Rajan

JUDGMENT AR. Lakshmanan, Atg. C.J.

1. Petitioner, who is the husband of the respondent Mary, filed the petition for divorce under Section 10 of the Indian Divorce Act on the ground of adultery. According to the petitioner, the marriage between him and the respondent was solemnised on 17.6.1974 in accordance with their customary rites and that he and the respondent were residing together from the date of marriage and in that wedlock five children were born to them. It is stated that since his father was taking treatment in the hospital at Manipal, he stayed in the hospital to help his father and during that period one Johny Thottupurath aged 25 came to the house of the petitioner almost every night and had adulterous intercourse with the respondent. The eldest daughter of the petitioner is stated to be the eye-witness. The said Johny subsequently committed suicide. It is further averred that on 15.1.1988 the respondent left the matrimonial home without the knowledge and consent of the petitioner and she was moving from place to place with different persons. It is alleged that during 1992-93 she was residing with one Joseph Kizhakkekara, whose whereabouts are not known to anyone who ought to know it and that the respondent is leading a loose life. It is also stated that there is no collusion between the parties.

2. The respondent filed a counter affidavit denying the allegations as baseless. It is submitted that she does not know any person by name Joseph Kizhakkekara. The allegation that the respondent is leading a loose life is also denied. It is averred that she was treated with cruelty by the petitioner and that the petitioner is having illicit relationship with a number of women. Hence the respondent prayed for dismissal of the petition.

3. The Principal District Judge, Thalassery formulated the following points for consideration in the petition :

"(1) Whether the respondent committed adultery.

(2) Whether petitioner has committed any act which disentitled him from claiming relief.

(3) Whether the petitioner is entitled to get decree of divorce.

(4) Relief and cost."

The petitioner examined himself as P.W. 1 and his eldest daughter Sheena as P.W. 2. Exts. A1 and A2 were also marked on his side. The respondent examined herself as R.W. 1. No exhibits were marked. The learned District Judge, on the basis of the evidence adduced before him, came to the conclusion that the respondent is guilty of adultery. To come to the said conclusion the learned District Judge relied on the evidence adduced by P.W. 2, who is none other than the eldest daughter

of the petitioner, who was aged 21 and married at the time of giving evidence. The learned District Judge also held that there was no effective cross-examination challenging the evidence of P.W. 2 regarding the relationship between the respondent and the other persons named in the petition. Counsel for the respondent pointed out certain contradictions in the evidence of P.Ws. 1 and 2. The arguments advanced by Counsel for the respondent that P.W. 2 is highly interested in P.W. 2, that she is completely under the control of her father and that under his influence she is giving false evidence against mother, were also not accepted by the learned District Judge. The District Judge also rejected the case of the respondent that the petitioner deserted the respondent. The District Judge held that there is nothing in evidence to show that the petitioner committed adultery and it was he who deserted the respondent. According to the learned District Judge, there is nothing on record to show that the petition was filed in collusion between the petitioner and the respondent. Relying on the evidence of the petitioner to the effect that he is unable to find out the whereabouts of Joseph Kizhakkekara and hence he is not able to make the adulterer a party, the District Judge held that the adulterer could not be arrayed as a party respondent in the Original Petition. In the result, the learned District Judge granted a decree in favour of the petitioner dissolving the marriage between the petitioner and the respondent subject to confirmation by this Court as provided in Section 17 of the Indian Divorce Act.

4. When the matter came up for hearing before us, the Bench felt that the non-impleadment of the adulterer is vital to the case and is against the mandatory provision under Section 11 of the Indian Divorce Act. We are of the view that the procedure adopted by the District Judge does not comply with the mandate under Section 11 of the Act. According to the petitioner, he was told by his eldest daughter that her mother had spent some nights with one Johny Thottupurath, who subsequently committed suicide. In so far as Joseph Kizhakkekara is concerned, it is averred in paragraph 4 of the petition that in the end of 1992 and for the year 1993 she (the respondent) was residing at Velakkannoor with one Joseph Kizhakkekara, who had very recently migrated to Karnataka and his whereabouts were not known to any one who ought to know his whereabouts. However, the petitioner has not filed any petition under Section 11 of the Indian Divorce Act. Section 11 reads thus:

"11. Adulterer to be co-respondent--Upon any such petition by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court:

- (1) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;
- (2) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it; or (3) that the alleged adulterer is dead."

5. Section 12 also provides that Courts should be satisfied of absence of collusion. The standard of proof required in divorce cases under the Act is that the Judge should be satisfied beyond any reasonable doubt as to the commission of the matrimonial offence. This is the clear requirement of Section 14.

6. In Halsbury's Laws of England meaning of 'adultery' has been given as follows :

"For the purpose of relief in the matrimonial jurisdiction, adultery means consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex not the other spouse."

A Full Bench of the Orissa High Court in the decision reported in *Madhusmitha Nayak v. Simadri Nayak*, AIR 1997 Ori. 162, held in a similar case that the Judge of the Family Court did not at all apply his mind to the provisions of Section 10 of the Act and did not consider the case of the parties in the background of that section. The Full Bench held as follows :

"A Christian marriage can be dissolved only under the provisions of a statute of general application to such marriages. Grounds for dissolution of marriage enumerated in Section 10 cannot be extended. In view of the provisions of Sections 12, 13, 14 and 47 of the Act, a decree for divorce on consent of the parties is not permissible. It is only on the proof of misconduct as envisaged by Section 10 of the Act that a decree for divorce is permissible subject to the restrictions contained in Sections 16 and 17 of the Act. Further, object of Section 11 being the prevention of any form of collusive divorce, it is not a mere formality to dispense with the presence of the co-respondent. In the case at hand, alleged adulterer has not been impleaded as a co-respondent. Until leave to dispense with the presence of the co-respondent, the suit cannot proceed. In the absence of an application under Section 11 for executing the petitioner-husband from not making the adulterer co-respondent in the petition, the Court has no jurisdiction to entertain the petition.

4. Therefore, the matter is remitted back to learned Judge, Family Court to rehear the case and dispose it of in accordance with law within three months from the date of appearance of parties."

In the case on hand no application for leave to dispense with the presence of the co-respondent was ever filed and orders passed. The section says that unless leave to dispense with the presence of the co-respondent is granted, the petition cannot proceed and that the Court has no jurisdiction to entertain the petition.

7. A learned Single Judge of the Allahabad High Court (Braund, J.) in the decision reported in *William Percy Bowman v. Harriet Dorothy Bowman*, AIR (29) 1942 All. 223, held that Section 11 makes it obligatory on a husband when he petitions for dissolution of marriage on the ground of adultery to make the alleged adulterer a co-respondent, unless he is excused from doing so on one of the three grounds mentioned therein. In the said case a letter was produced by the husband to the effect that the wife has admitted adultery, but refused to divulge the name of the adulterer. The learned Judge held that the letter from the wife to the husband admitting adultery is not enough for purposes of Section 11 and that the husband must show that he had made due efforts to discover the name of the adulterer. The learned Judge further held that Section 11 makes it obligatory on the husband, when a petition for dissolution of marriage on the ground of adultery is filed, to make the alleged adulterer a co-respondent unless he is excused from doing so on one of the three grounds mentioned therein. In conclusion the learned Judge observed as follows :

"In the present case all there is, is a mere letter written by the wife to the husband in which she refused to divulge the name of the co-respondent. There is no evidence whatever that the petitioner has made the slightest effort to discover who the co-respondent is. The matter does not quite end there because it has been established both by the practice of English Courts and by a long series of cases that until leave to dispense with the presence of co-respondent has actually been obtained, the suit cannot proceed. It is not sufficient to apply for leave at the trial. A formal application has to be made before the trial and it has to be supported by proper evidence that the conditions of Section 11 of the Act have been complied with. For these reasons, I cannot treat the present suit as being in a fit condition to proceed to trial and I cannot, therefore, settle any issues in it. All I can do at this stage is to adjourn the settlement of issues for a period of six weeks, in order to enable a proper application to be made."

8. We shall now see an analogous provision, viz. Section 13 of the Hindu Marriage Act, which provides for a petition being presented by either the husband or the wife for dissolution of marriage by a decree of divorce on the ground that the other party has, after the solemnisation of the marriage, had voluntary sexual intercourse with another person other than his or her spouse and has after the solemnisation of the marriage treated the petitioner with cruelty, etc. It must be noticed that after the amending Act of 1976, a petition for divorce can lie at the instance of the husband or the wife if the other party has after the solemnisation of the marriage, committed even a single act of adultery, and that to bring a case under this section it is not necessary to show that the respondent is living in adultery.

9. The High Court of Kerala has framed rules in exercise of the powers conferred under Sections 14 and 21 of the Hindu Marriage Act, 1955 and Article 227 of the Constitution of India to regulate the proceedings under the Act, viz., the Hindu Marriage (Kerala) Rules, 1963. Rule 11 of the said rules deals with necessary parties in a petition for divorce or judicial separation on the ground that the respondent is living in adultery or has, after the solemnisation of the marriage, had sexual intercourse with any person, and provides that in every such petition the petitioner shall make such person a co-respondent. The petitioner is also given liberty to apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of the co-respondent in cases covered by Sub-rule (a) on any of the following grounds :

"(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery;

(ii) that such person is dead;

(iii) that the respondent being the wife is leading the life of a prostitute and the petitioner knows of no person with whom she had committed adultery or has sexual intercourse;

(iv) for any other reason that the Court may deem fit and sufficient to consider."

Rule 7(4) of the above rules provides that in every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on

the ground that his wife has, after the solemnisation of the marriage, had sexual intercourse with any person or persons other than him, the petitioner shall state the name, occupation and place of residence of such person or persons so far as they can be ascertained. It is pertinent to note that High Court of Kerala has not framed any rules to regulate the proceedings under the Indian Divorce Act.

10. A Division Bench of this Court comprising of A.R. Lakshmanan, J. (as he then was) and K.V. Sankaranarayanan, J. in the decision reported in Kunhiraman v. Santha, 1998 (1) KLT 556, held as follows :

"Rule 7(4) states that in every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has, after the solemnisation of the marriage, had sexual intercourse with any person or persons other than him, the petitioner shall state the name, occupation and place of resident of such person or persons so far as they can be ascertained. Rule 11 of the rules deals with "necessary parties". Rule 11(a) says that in every petition for divorce or judicial separation on the ground that the respondent is living in adultery or had, after the solemnisation of the marriage, had sexual intercourse with any person, the petitioner shall make such person a co-respondent. This case is filed by the husband for divorce on the ground that the respondent is living in adultery with one Kunhiraman and also with others. Therefore, the appellant shall implead the person or persons who had sexual intercourse with the respondent as co-respondent in the petition by stating the name, occupation and place of residence of such person or persons so far as they can be ascertained. In this case, the appellant though presented his case on the ground of living in adultery has not impleaded the co-respondent or respondents which is mandatory. Therefore, the petition filed by the appellant is not in accordance with the Act and the Rules framed thereunder by the High Court of Kerala."

The object of Section 17 of the Act is to guard against any infringement of public policy and public morality. The said section deals with confirmation by the High Court of a decree for dissolution passed by the District Judge, which reads as follows :

"17. Confirmation of decree for dissolution by District Judge--Every decree for a dissolution of marriage made by District Judge shall be subject to confirmation by the High Court.

Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference, the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference, the opinion of the Senior Judge shall prevail.

The High Court, if it thinks further enquiry or additional evidence to be necessary, may direct such enquiry to be made, or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by District Judge, and the High Court shall thereupon make an order confirming the decree for dissolution of

marriage, of such other order as to the Court seems fit:

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time-to-time directs.

During the progress of the suit in the Court of the District Judge, any person suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time-to-time directs, to apply to the High Court to remove the suit under Section 8, and the High Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in Section 16 shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary, to enable him to make a decree in accordance with the justice of the case."

11. The procedure under Section 17 does not call for any application by either party or personal appearance before the High Court. The High Court is also generally reluctant to interfere with the findings of the District Court unless such findings are perverse. Review of evidence is made in public interest. This Court, in our opinion, is entitled to review the entire matter and to come to an independent finding as to whether the facts proved on record justifying the grant of a decree for divorce or not. It has been consistently held by this Court and other High Courts that it is essential in the interest of justice to notify every application for confirmation of the decree of a District Judge to the respondent and co-respondent even though they were duly served with notice of the petition in the Court below, but did not choose to appear. Some Courts have held a different view regarding service of notice on the respondent in such circumstances on the ground that confirmation of the decree is mere continuation of the proceedings commenced before the District Judge and no notice of confirmation is contemplated by the statute. But this Court always issues notices to the parties before confirmation or otherwise and before the case is taken up, intimation is also sent to the parties in regard to the posting of the case before the Full Bench and the date of hearing. In our opinion, such a procedure is essential in the interest of justice. In our view, this Court, in proceedings under Section 17 of the Act, is entitled or rather obliged to review the whole evidence and come to an independent finding as to whether the District Judge is justified in granting a decree for divorce or not. This appears to be the clear intention and policy behind the legislative mandate contained in Section 17 of the Act. That apart, this Court should also be satisfied beyond any reasonable doubt as to the commission of any matrimonial offence, which is the clear requirement of Section 14 of the Act.

12. We are of the opinion that in the case on hand the quantity and quality of the evidence on record does not justify the grant of a decree for divorce in favour of the petitioner. This apart, the mandatory requirement under Section 11 has also been given a go-bye. We, therefore, decline to confirm the decree granted by the District Judge and remit the matter to the District Court, Thalassery. The District Judge shall re-hear the case after observing the formalities under Section 11 of the Act and dispose of the same in accordance with law as expeditiously as possible.

The Registry is directed to dispatch the records to the District Court, Thalassery, forthwith.