

A Vs B

Court: High Court Of Kerala

Date of Decision: Jan. 18, 1996

Acts Referred: Divorce Act, 1869 – Section 10, 15, 18

Citation: (1997) 2 DMC 373 : (1996) 2 ILR (Ker) 301

Hon'ble Judges: K. Narayana Kurup, J

Bench: Single Bench

Advocate: T.P. Kelu Nambiar and P.V. Baby, for the Appellant; P. Vijayabhanu and T.A. Unnikrishnan, for the Respondent

Judgement

K. Narayana Kurup, J.

This is a petition for nullity of marriage filed by the husband u/s 18 of the Indian Divorce Act.

2. The parties belong to the Syrian Christian community. Their marriage was solemnised on 12.2.1995 at the St. Thomas Catholicate Aramana

Church, Muvattupuzha. Admittedly, the parties resided together only for 15 days. On 27.2.1995, the respondent returned to her own house at

Trichur. The allegations of the petitioner are that the respondent was and is a schizophrenic, that she is physically under-developed, and impotent,

that these facts were suppressed from the petitioner before marriage and that, therefore, the petitioner is entitled to a decree of nullity of marriage

u/s 19 of the Indian Divorce Act on the grounds of insanity and impotency of the respondent and fraud. It is also alleged in the petition that because

of the respondent's mental and physical deficiencies, she also refused to have sexual intercourse with the petitioner and thereby failed to

consummate the marriage. The averments contained in the petition are repudiated by the respondent. According to the respondent, she is

absolutely normal-physically and mentally. Her further case is that she never refused to have sexual intercourse with the petitioner. On the contrary,

it was the petitioner who refused to have normal sexual intercourse with her. According to the respondent, the petitioner refused to have normal

sexual intercourse with her, but compelled her to have only oral sex with him or in other words, to satisfy him by performing fellatio on him. The

case of the respondent is that this deprivation of normal sexual intercourse coupled with the insistence for fellatio only amount to physical and

mental cruelty entitling her to a decree of divorce u/s 10 of the Indian Divorce Act. The respondent has narrated certain instances of physical

assault committed by the petitioner in support of her plea of cruelty. The respondent has filed a counter-affidavit and it is in the counter-affidavit

that she has raised her plea for divorce on the ground of cruelty. The petitioner has filed a reply affidavit and the respondent has filed an additional

counter-affidavit. Based on the pleadings, the following issues were framed.

1. Whether the respondent is schizophrenic before the marriage and at the time of marriage and even thereafter ?

2. Whether the respondent is physically under-developed and impotent (frigid) ?

3. Sine the marriage is not consummated as admitted by both parties whether a decree for nullity can be issued ?

4. Whether the marriage solemnised on 12th February, 1995 between the petitioner and respondent is liable to be declared as null and void as

provided in the Indian Divorce Act ?

5. Whether the respondent is entitled to get divorce on the ground of alleged cruelty ?

6. Whether the relief prayed for by the petitioner is liable to be granted on the facts and circumstances of the case as pleaded by the parties ?

7. Whether the petitioner is entitled to get his costs in prosecuting the case ?

3. The evidence in the case consists of the oral testimony of the petitioner as PW 1 and the respondent as RW 1. At the outset, it has to be noted

that the allegations of the petitioner that the respondent is insane and that this fact was suppressed from him by the parents of the respondent, that

the respondent is physically under-developed and that she had refused to have sexual intercourse with him remain in the realm of mere allegations

only without any scintilla or iota of evidence to support them. No inmate of the house of the petitioner has been examined to substantiate his

version. No medical evidence has been adduced in this regard. No prescription of a doctor or other documentary evidence has been produced in

support of the petitioner's case. In the counter-affidavit the respondent has a specific case that she was examined by two named psychiatrists and

a gynaecologist and they certified her to be perfectly normal. In the reply affidavit filed by the petitioner, he has a case that those certificates "might

have been obtained by crooked means". While in the box, it is significant to note that the petitioner had no case that the stand of the respondent

regarding the examinations or the certificates are false or obtained by crooked methods. Further, the evidence of RW 1 on these aspects were not

even challenged in cross-examination. Therefore, I find that there is no evidence to prove the alleged insanity or fraud and that issue Nos. 1, 2, 4

and 6 are found against the petitioner.

4. The non-consummation of marriage by itself being not a ground enumerated u/s 19 of the Act for a decree of nullity issue No. 3 is also found

against the petitioner.

5. Then, the main issue that remains to be considered by this Court is issue No. 5, namely, whether respondent is entitled to get a decree of

divorce on the ground of alleged cruelty. The question then is, in a petition for nullity of marriage filed by the petitioner-husband u/s 18 of the Act,

whether a relief u/s 10 of the Act can be granted in favour of the respondent. The relevant provision is contained in Section 15 of the Act which

reads as follows :

15. Relief in case of opposition on certain grounds-In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on

the ground, in case of such a suit instituted by a husband, of his adultery, cruelty or desertion without reasonable excuse, or in case of such a suit

instituted by a wife on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same

relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be

competent to give evidence of or relating to such cruelty or desertion.

From a perusal of the said section it can be seen that the said provision permits a respondent/wife in a divorce proceeding to allege adultery,

cruelty or desertion against the petitioner/husband and pray for a decree for divorce against the husband on any of those grounds, namely adultery,

cruelty or desertion without filing a separate petition. There can be no doubt regarding the application of Section 15 of the Act. This petition

unfortunately happens to be one not for a decree for dissolution on the grounds of cruelty, but for a decree of nullity of marriage. As a prelude to

the consideration of the question as to whether Section 15 can be invoked in a proceedings for declaration of nullity also, I refer to the following

decisions which have a bearing on the issue. In the decision reported in Reynold Rajamani and Another Vs. Union of India (UOI) and Another, ,

the Apex Court held as follows :

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.....".

6. A Full Bench of this Court in the decision reported in Mary Sonia Zachariah v. Union of India 1995 (1) KLT 644 has held as follows :

Life of a Christian wife who is compelled to live against her Will though in name only as the wife of a man who hates her, has cruelly treated her

and deserted her putting an end to the marital relationship irreversibly will be a sub-human life without dignity and personal liberty. It will be a

humiliating and oppressed life without the freedom to remarry and enjoy life in the normal course. It will be life without the freedom to uphold the

dignity of the individual in all respects as ensured by the Constitution in the various fields of human activity. On the whole such a life can legitimately

be treated only as a life imposed by a tyrannical or authoritarian law on a helpless, deserted or cruelly treated Christian wife quite against her Will,

which she is bound to lead till her death tormented always by the feeling that she is remaining as the wife of a man who has treated her cruelly,

hated her and deserted her for no fault of her. Such a life can never be treated as a life with dignity and liberty. It can only be treated as a

depressed or oppressed life without the full liberty and freedom to enjoy life as one would desire to lead it in the way Constitution has ensured. No

purpose whatsoever will be irretrievably broken down as a result of desertion by the husband for a continuously long period and cruelty meted out

which would justify an order for judicial separation. It will also not be in the interest of either of the parties or the society at large to continue such a

marital relationship. On the other hand, it will only be in the interest of all concerned to allow the parties to such a marriage to put an end to the

relationship legally also, when it is established that in reality it has broken down irreversibly as a result of cruelty or desertion...." The Full Bench

went on to observe as follows:

..... Thus we find that in regard to the grounds allowed by law for dissolution of marriage, there is a discriminatory treatment meted out to

Christian spouses. We do not find any constitutionally justifiable reason for denying a right of dissolution of marriage on the ground of cruelty and

desertion to Christian wives alone when spouses belonging to all other religions are granted dissolution on those grounds also independent of

adultery. The discrimination resulting from the absence of suitable provisions recognising cruelty and desertion for a reasonable period as grounds

for dissolution of marriage in the Act can in the circumstances be treated only as one based solely on religion and as such violative of Article 15 of

the Constitution. The offending portions of the provisions as already indicated are severable and they are liable to be quashed as ultra vires. We

would further hold that the remaining portions of the provisions can remain as valid provisions allowing dissolution of marriage on grounds of

adultery simpliciter and desertion and/or cruelty independent of adultery. Adoption of such a course, in our view, would help to avoid striking

down of the entire provisions in Section 10 of the Act and to grant necessary reliefs to the petitioners and similarly situated Christian wives seeking

dissolution of their marriage which has for all intent and purposes ceased to exist in reality. We would accordingly sever and quash the words

incestuous"" and "adultery coupled with"" from the provisions in Section 10 of the Act and would declare that Section 10 will remain hereafter

operative without without the above words

7. The clarion call of the Constitution Bench of the Supreme Court in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, , held in the

following terms :

Inevitably, the role of the reformer has to be assumed by the Courts because, it is beyond the endurance of sensitive minds to allow injustice to be

suffered when it is so palpable.

8. Viewed in the backdrop of the above judicial pronouncements as fortified by the Full Bench decision of this Court cited supra which has held

that cruelty by itself is sufficient for a Christian wife to pray for divorce, Section 15 of the Act deserves a pragmatic and liberal approach. The

intention of the Legislature that opposing spouses need not be driven to multiplicity of matrimonial proceedings is clear from Section 15 of the Act.

There is no provision in the Act which prevents a respondent in a proceeding for declaration of nullity of marriage to the benefit like that which is

found in Section 15. If a Court of Law finds that there is a legally valid marriage which is not liable to be declared as a nullity as in the present case,

then to deny a relief to the suffering spouse solely on the basis of the nomenclature of the petition filed by the other spouse, will result in gross

miscarriage of justice. In other words, when marriage is admitted and there is no evidence or material available to declare the marriage as a nullity,

then the spouses have the status of husband and wife as contemplated in Section 15 of the Act as also the right to reliefs on the grounds and in the

manner provided in Section 15 even though the proceedings originally initiated by a spouse, may not be for dissolution but for nullity. Such an

interpretation that tends to advance the intention of the Legislature which is in tune with the needs of the changing times recognising the needs of the

individual happiness of the adult parties directly involved will befit the role of the reformer that has to be inevitably assumed by the Courts.

9. In the light of the aforesaid discussion, I have no hesitation in holding that in a petition for nullity of marriage filed by the husband u/s 18 of the

Act it is open for the wife to allege adultery, cruelty or desertion against the petitioner husband and pray for a decree of dissolution of marriage

against the husband on any of the grounds mentioned in Section 15 of the Act, namely adultery, cruelty or desertion without reasonable excuse and

without filing a separate petition for the said purpose.

10. The question now to be considered whether the respondent wife has succeeded in establishing cruelty by adducing satisfactory evidence

before this Court in this proceeding. In the counter affidavit filed by the respondent wife, she has specifically highlighted the sexual perversity of the

petitioner husband. In the reply affidavit the petitioner has not denied those allegations. Surprisingly, on the other hand, he relies on those

allegations and contend the such activities show that he has ""sexual interest"". When the petitioner was examined as PW 1 there is not even a

whisper in his chief examination denying the allegations of forcible oral sex, and other acts of cruelty and strange behaviour exhibited by him on

24th, 25th and 26th of Feb., 1995. On the contrary, in chief examination itself he admits that even in the written statement submitted by the

respondent wife to the ecclesiastical Tribunal, she had leveled allegations of sexual perversity against him. The respondent giving evidence as RW 1

had categorically mentioned about the indifferent and inconsiderate attitude of the petitioner to the respondent from the very nuptial night onwards,

about his refusal to indulge in normal sexual intercourse and his insistence on oral sex only and about the other acts of mental and physical cruelty

meted out to the respondent. The petitioner in cross-examination has not challenged any of those statements or even suggested any motives for

imputing such acts to the petitioner. Thus, the allegations of cruelty made by the respondent stand uncontroverted and proved.

11. The legal concept of cruelty which is not defined by statute, is generally described as conduct of such character as to have caused danger to

life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. The general rule in all questions of cruelty is

that the whole matrimonial relations must be considered, that rule is of special value when the cruelty consists not of violent acts but of injurious

reproaches, complaints, accusations or taunts. It may be mental, such as indifference and frigidity towards wife, denial of company to her, hatred

and abhorrence for wife, or physical like acts of violence and abstinence from sexual intercourse without reasonable cause. See in this connection

the decision reported in Jyotish Chandra Guha Vs. Sm. Meera Guha, Relying on the decisions reported in Abbas Ali Vs. Mt. Rabia Bibi, and

Sarah Abraham v. Pyli Abraham AIR 1959 Ker. 75 a Division Bench of the High Court of J & K in the decision reported in Smt. Kamala Devi v.

Amar Nath AIR 1961 J & K 33 has held as follows :

Where evidence of physical violence is not per se sufficient to warrant a finding of cruelty, the Court is bound to take into consideration the

general conduct of the husband towards the wife and if this is of the character tending to degrade the wife and subjecting her to a course of intense

indignity injurious to her health, the Court is at liberty to pronounce the cruelty proved".

In the decision of a Special Bench reported in AIR 1989 M.P. 326, Prem Prakash Rubin v. Smt. Sarla Rubin, it has been held as follows :

Sex plays important role in matrimonial life and cannot be separated from other factors leading to a successful married life. Therefore, conduct of

husband or wife which renders the continuance of cohabitation and performance of conjugal duties impossible amounts to such cruelty.

I am winding up this judgment with an observation of Lord Denning in the decision reported in 1950 (2) All. E.R. 398 Kaslefsky v. Kaslefsky, in

which it is held as follows:

The wilful and unjustifiable refusal of sexual intercourse is destructive of marriage, more destructive, perhaps, than anything else. Just as normal

sexual intercourse is the natural bond of marriage, so the wilful refusal of it causes a marriage to disintegrate. It gives rise to irritability and discord,

to nervousness and manifestations of temper, and hence to the breakdown of the marriage.

12. In the light of the foregoing discussion, the following conclusions emerge:

1. In the petition filed by the husband for nullity of marriage no valid ground has been made out so as to declare the marriage null and void;

2. In a petition for nullity of marriage filed u/s 10 of the Act, it is open for the respondent-wife to pray for a decree for dissolution of marriage on

the ground of cruelty and relief u/s 10 of the Act can be granted to the respondent;

3. On the facts and circumstances disclosed in the case, the allegation of cruelty levelled against the petitioner stands proved; and

4. Cruelty simpliciter is a sufficient ground for granting a decree of dissolution of marriage in favour of the respondent wife.

In the result, the prayer of the petitioner for nullity of marriage is rejected and the respondent is granted a decree for dissolution of marriage on the

grounds of cruelty simpliciter.

The petition is disposed of as above. No costs.