

Suo Motu Reference in the Matter of Divorce Act

Court: High Court Of Kerala

Date of Decision: April 1, 2002

Acts Referred: Divorce (Amendment) Act, 2001 " Section 10, 16, 17, 18, 20
Divorce Act, 1869 " Section 45, 55

Citation: (2002) 2 DMC 753 : (2002) 2 KLJ 418 : (2003) 1 RCR(Civil) 546

Hon'ble Judges: B.N. Srikrishna, C.J; G. Sivarajan, J

Bench: Division Bench

Advocate: Sebastian Champappilly, Molly Jacob, Tony George Kannanthanam and George Cherian Thiruvalla, for the Appellant;

Judgement

B.N. Srikrishna, C.J.

This reference has been made for judicial determination of the following questions which vitally concern the

jurisdiction of this Court in matrimonial matters where the parties are Christians. The questions which arise for consideration and determination of

this Court are as under:

1. Whether there is exclusion of the original jurisdiction of the High Court in matrimonial matters under the Divorce Act by virtue of the provisions

of Sections 7, 8 and 20 of the Family Courts Act?

2. " How far the amendments effected to the erstwhile Indian Divorce Act have interfered with or curtailed the original jurisdiction of the High

Court in matrimonial matters under the Divorce Act?

3. If there is exclusion, how the petitions under the Indian Divorce Act in which decree nisi have been passed by the High Court should be dealt

with?

4. Whether the Original Petitions under the Divorce Act, pending in the High Court, which are at the stage of prior to decree, should be transferred

to the concerned Family Courts/District Courts for being dealt with in accordance with law?

5. In places where there is no Family Court, whether the District Court exercising the powers of the Family Court, can deal with the petitions so

transferred?

6. Whether the original jurisdiction of the High Court in matrimonial matters under the Divorce Act is still preserved by virtue of Ss. 4 and 6 of the

said Act?

7. Considering the wider powers now given to the District Court to pass a decree absolute at the first instance itself while the High Court can only

pronounce a decree nisi at the first instance u/s 16 of the Divorce Act, which has to be made absolute after the expiry of six months from the date

of decree, will it be appropriate to relegate the parties to the concerned Family Court/District Court by ordering return of the petitions filed after

3.10.2001?

8. In view of the deletion of Ss. 17 and 20 requiring confirmation by the High Court of decrees passed by the District Court/Family Court, what

further step is to be taken with regard to the matters pending for confirmation by the High Court in which decrees were passed prior to 3.10.2001

?

2. The Indian Divorce Act, 1869 was enacted to amend the law relating to persons professing the Christian religion and confer upon certain courts

the jurisdiction on matrimonial matters. Even prior to the enactment of the Indian Divorce Act, 1869, the High Courts in India exercised jurisdiction

in matrimonial matters under the enabling provisions of the High Courts Act and the provisions of the Letters Patent establishing the High Court.

Under the Act, jurisdiction was concurrently conferred on the High Court as well as the District Court in matrimonial matters. The Act also

contained certain provisions which restricted the grounds on which a Christian woman could seek dissolution of marriage. Some of the High Courts

struck down these restrictive provisions as discriminatory and hit by Article 14 of the Constitution of India. The Law Commission of India in its

164th Report inter alia recommended that Parliament may enact a comprehensive law governing marriage and divorce and other allied aspects

applicable to Christians in India. The Commission also highlighted the difficulties faced and inadequacies in the Indian Divorce Act as brought to

light by several judgments of the High Courts. Since there was no consensus amongst the members of the Christian community on the proposal for

unified law on marriage and divorce, Parliament thought it fit to make certain amendments in the Indian Divorce Act to remove the glaring features

of discrimination brought to light. The Indian Divorce (Amendment) Act, 2001, (Act No. 51 of 2001) was enacted by Parliament for this purpose

and brought into force from 3rd October, 2001.

3. The amending Act of 2001 has changed the title of the Act from "Indian Divorce Act" to "Divorce Act". Prior to the coming into force of this

amending Act, the High Court and the District Court had concurrent jurisdiction to entertain petitions for dissolution of marriage u/s 10 on the

grounds specified therein, for pronouncing a decree of nullity u/s 18 on the grounds specified in Section 19, for making a decree for judicial

separation u/s 23, for ordering permanent alimony after making the decree absolute declaring a marriage to be dissolved u/s 37, to enquire into

antenuptial and post-nuptial settlement u/s 40, to make orders to the custody of children after a decree for dissolution or nullity u/s 43, to make

orders with regard to the custody, maintenance and education of minor children u/s 44 after a decree of dissolution or nullity of marriage has been

passed. Section 4 of the amended Act declares that the jurisdiction now exercised by the High Courts in respect of divorce a mensa et toro and in

all other causes, suits and matrimonial matters can be exercised by such Courts and by the District Courts subject to the provisions of the Act.

Section 6 of the Act provides that all suits and proceedings in cases and matters matrimonial when the Act came into operation would have to be

dealt with and decided by the High Court, so far as may be, as if they had been originally instituted under this Act. Section 8 gave the High Court

extra ordinary jurisdiction in appropriate cases to remove and try and determine originally any suit or proceeding instituted under the Act in the

District Court within the limits of the jurisdiction of the High Court. It also had the power to transfer such suits or proceedings from one District

Court to another. Section 9 empowers the High Court upon a reference to decide a question of law.

4. As a result of the Amending Act of 2001, with effect from 3.10.2001, sweeping changes have been made in the Indian Divorce Act, 1869. In

Sections 10, 18, 22, 27, 32, 37, 40, 44 and 55 of the Act, the words "High Court" have been deleted and the sections as amended indicated that

Original Petitions for matrimonial reliefs under the Act are to be filed in the District Court. Under the unamended Act, there was a two step

procedure for dissolution of a marriage. If the decree for dissolution of marriage was made by the High Court, then, it was to be at the first instance

a decree nisi, to be made absolute after a period of not less than six months. After six months, the decree nisi had to be considered and made into

a decree absolute or reversed. If, however, the decree for dissolution of marriage had been made by a District Court, it had to come up for

confirmation under the unamended Section 16 before the High Court, which would, after further hearing, confirm the decree for dissolution of

marriage or pass such other appropriate order as it deemed fit.

5. Act No. 51 of 2001 has left untouched Sections 4 and 6 of the Indian Divorce Act, 1869. Thus, even after its amendment by the Act 51 of

2001, Ss. 4 and 6 read as under:

4. Matrimonial jurisdiction of High Courts to be exercised subject to Act, Exception.- The jurisdiction now exercised by the High Courts in

respect of divorce a mensa et toro, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts, and by the District

Courts subject to the provisions in this Act contained, and not otherwise: except so far as relates to the granting of marriage licenses, which may be

granted as if this Act had not been passed".

6. Pending Suits.- All suits and proceedings in cases and matters matrimonial which when this Act comes into operation are pending in any High

Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act".

Thus, it may appear that the jurisdiction of the High Court in matrimonial matters has been left in tact. The question, however, arises as to what is

this original jurisdiction? As we have already pointed out, Sections 10, 18, 23, 27, 32, 37, 40, 44 and 45, which deal with the procedure for filing

of Original Petitions for relief, have specifically excluded the words "High Court". The result is that such petitions would now have to be presented

only before the District Court. Section 16 of the Act which deals with confirmation of a decree nisi, still remains. However, Section 17 of the Act

has been amended and to read as under:

17. Power of High Court to remove certain suits.- During the progress of the suit in the Court of the District Judge, any person suspecting that any

party 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 u/s 8, and the Court shall thereupon, if it think 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".

The combined effect of reading Ss. 16 and 17 as amended would suggest that the High Court has the power to remove suits from the Courts of

District Judge on grounds specified in Section 16 to try them, as if it was a court of original jurisdiction. When that happens, the provisions of

Section 16 with regard to making of a decree nisi and confirmation thereof after a period of not less than six months would be applicable. Barring

this limited jurisdiction, there does not appear to be any other scope for exercise of Original Jurisdiction by the High Court in matrimonial causes

under the Act.

6. As a result of the coming into force of the Family Courts Act, 1984, the jurisdiction of the District Court to entertain the matrimonial causes has

been taken away. Section 20 of the Family Court Act, 1984 provides that the provisions of the said Act would have effect notwithstanding

anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other

than the said Act. Section 7 of the Family Courts Act vests exclusive jurisdiction in the Family Court, wherever it has been established, and

declares it to be a District Court for the purpose of exercising matrimonial jurisdiction. The jurisdiction of the Family Court is delineated in Section

7 of the Family Court Act, 1984 in respect of suits and proceedings of the type specified in Clauses (a) to (g) of the Explanation to Section 7(1). It

also has been vested with the jurisdiction of a Magistrate of First Class under Chapter IX of the Code of Criminal Procedure, 1973, and such

other jurisdiction as may be conferred on it by any other enactment. Section 8 of the Family Courts Act, 1984 provides that where a Family Court

has been established in any area, no District Court or any subordinate civil court in relation to such area shall have or exercise any jurisdiction in

respect of any suit or proceeding of the nature referred to in the Explanation to Section 7(1). Sub-section (c) of Section 8 provides that every suit

or proceeding of the nature referred to in the Explanation to Section 7(1), which is pending before the District Court or Courts subordinate thereto,

shall stand transferred to the Family Court on the day on which it is established. The combined effect of the Act No. 51 of 2001 read with the

provisions of Ss. 20, 7 and 8 of the Family Courts Act, 1984, is that, in the areas in which Family Courts have been established, the original

jurisdiction in matters arising under the Divorce Act, 2001, would vest exclusively with the Family Courts. In areas where no Family Courts have

been established, such jurisdiction would lie with the District Court. The jurisdiction of the High Court is a special jurisdiction, which it may

exercise if the circumstances contemplated in Section 17 arise; in such cases, the procedure for making a decree nisi in the first instance and

making it absolute after the specified period as in Section 16 would continue to apply. Where a decree is made by the District Court or the Family

Court, the cumbersome procedure of having such decrees confirmed by the High Court has been done away with. Such decrees would be subject

to appeal u/s 19 of the Family Court, 1984; or if the decree has been made by the District Court, by reason of Section 45 of the Divorce Act,

2001 read with Section 55 thereof, it shall be subject to an appeal as provided under the Code of Civil Procedure, 1908, subject to a further

appeal to the Supreme Court u/s 56, where a decree (other than a decree nisi) has been made by the High Court.

7. We have had the benefit of hearing the submission of Dr. Sebastian Champappilly, Mr. George Cherian (Thiruvalla), Mr. Tony George

Kannanthanam and Smt. Molly Jacob. The counsel have urged different points of view and their learned submissions helped in throwing light on the

legal position resulting from the amending Act. We are not inclined to accept the view that the original jurisdiction of the High Court in matrimonial

matters has fully remained in tact, and not taken away even after the coming into force of Act 51 of 2001. In our view, the original jurisdiction has

been very much curtailed and now is exercisable only u/s 17 of the Act.

8. The next question for consideration is whether Act 51 of 2001 has retrospective effect. There appears to be serious disagreement amongst

counsel on this issue. While some of the counsel have urged that the Act should not be made applicable to the proceedings which were pending in

the High Court prior to 3rd October, 2001, some urge that there is no reason why it should not be made applicable retrospectively. Mr. Tony

George Kannanthanam strongly contended that the procedure with regard to confirmation of decrees, where a decree was passed by a District

Court or the procedure of confirmation by a special Bench where the decree nisi was passed by the High Court contemplated under Ss. 16, 17

and 20, are discriminatory as against Christians and result in imposition of cumbersome procedure, which achieve no useful purpose. He

contended that, it is precisely the reason why the amendment was brought into effect. He strongly urged that this Court should hold that the

procedure for confirmation of decrees prescribed in Ss. 16, 17 and 20 of the unamended Act should be declared as violative of Article 14 and

ultra vires of the Constitution, That is not an issue which we propose to consider in the present reference. In the present reference, we have

confined our attention only to the position of law emerging as a result of the coming into force of the Act 51 of 2001.

9. It is a basic canon of construction of statutes that no statute shall be construed to have retrospective operation unless such a construction

appears very clearly in the term of the Act, or arises by necessary and distinct implication. It is also an accepted principle that presumption against

retrospectively does not apply in the case of a statute affecting the procedure in courts.

10. Act 51 of 2001 contains no express provision suggesting that it was intended to operate retrospectively, nor do we see any other compelling

reason to take the view that it was intended to operate retrospectively. In our view, the provisions of Act 51 of 2001 operate prospectively, from

the date when the Act was brought into force, ie., from 3.10.2001. The immediate question that arises is how are the proceedings, which were

pending at different stages, be disposed of. The proceedings might have been pending before the District Court or High Court at various stages.

We can envisage the following contingencies:-

- (a) Proceedings pending before the District Court, which had not culminated in a decree;
- (b) Proceedings which had culminated in a decree of the District Court and are pending confirmation before a High Court;
- (c) Proceedings which are pending before the High Court in which a decree nisi has not been made;
- (d) Proceedings in the High Court in which decree nisi has been made and are pending confirmation.

11. The most practical and pragmatic view which would save considerable inconvenience, expenditure and hardship to the litigants is to hold that

all proceedings, whether pending in the District Court or the High Court, initiated under the provisions of the unamended Act, which had not

resulted into a decree shall be governed and disposed of in accordance with the amendments made by the Act No. 51 of 2001. If such

proceedings were pending before the District Court in areas where a Family Court has been established, they shall forthwith be transferred to the

Family Court for hearing and disposal by the Family Court. The decrees made by the District Court or Family Court in such cases shall be subject

to right of appeal as indicated, without the requirement of any confirmation as provided in the unamended Act. Where decrees had been made by

the District Court or decrees nisi had been made by the High Court, which were pending confirmation before the High Court, practical

considerations of convenience and avoidance of hardship to the litigants dictate that such proceedings be disposed of following the procedure of

confirmation as before. This is particularly so, because taking a contrary view would preclude the procedure of confirmation and also deny the right

of appeal in such cases.

12. We now proceed to answer the questions referred to us as under:

Points 1, 2 and 6:

1. Whether there is exclusion of the original jurisdiction of the High Court in matrimonial matters under the Divorce Act by virtue of the provisions

of Ss. 7, 8, and 20 of the Family Courts Act?

2. How far the amendments effected to the erstwhile Indian Divorce Act have interfered with or curtailed the original jurisdiction of the High Court

in matrimonial matters under the Divorce Act?

6. Whether the original jurisdiction of the High Court in matrimonial matters under the Divorce Act is still preserved by virtue of Ss. 4 and 6 of the

said Act?

As a result of the amendments carried out by Act No. 51 of 2001, the original jurisdiction of High Court in matrimonial matters under the Divorce

Act is taken away except to the limited extent retained u/s 17. The original jurisdiction is now confined to the special power of the High Court u/s

17 to be exercised in the circumstances indicated therein. We approve of the view taken by the learned Single Judge of this Court in *Sherly*

Thomas v. Johny, 2002 (1) KLT 467, wherein it has been held that, after the amendment of Ss. 10 and 18 of the Indian Divorce Act, the High

Court lacks jurisdiction to entertain petitions under Sections 10 and 18 of the Divorce Act. Apart from the limited area u/s 17, the original

jurisdiction in matrimonial matters under the Divorce Act now rests exclusively with the Family Courts, in areas where they are in existence, and in

other areas with the District Courts.

Point No. 3:

If there is exclusion, how the petitions under the Indian Divorce Act in which decree nisi have been passed by the High Court should be dealt

with"?

In matters where decrees nisi have been passed by the High Court, the decrees nisi would have to be confirmed by the High Court by following

the procedure prescribed u/s 16 of the Divorce Act.

Point No. 4:

Whether the Original Petitions under the Divorce Act, pending in the High Court, which are at the stage of prior to decree, should be transferred

to the concerned Family Courts/District Courts for being dealt with in accordance with law?

All Original Petitions under the Indian Divorce Act pending in the High Court on 3.10.2001, at stages prior to decree nisi should forthwith be

transferred to the appropriate Family Court/District Court for being dealt with in accordance with law. The decrees made in such transferred cases

shall be subject to the provisions of the Family Court's Act/CPC for the purpose of the appeal and shall not be required to be confirmed as under

the unamended Act.

Point No. 5:

In places where there is no Family Court, whether the District Court exercising the powers of the Family Court, can deal with the petitions so

transferred?

Where there is no Family Court, such pending proceedings shall stand transferred to the District Court to be dealt with in accordance with law,

subject to the right of appeal conferred under Ss. 45 read with 55 of the Divorce Act.

Point No. 7:

Considering the wider powers now given to the District Court to pass a decree absolute at the first instance itself while the High Court can only

pronounce a decree nisi at the first instance u/s 16 of the Divorce Act, which has to be made absolute after the expiry of six months from the date

of decree, will it be appropriate to relegate the parties to the concerned Family Court/District Court By ordering return of the petitions filed after

3.10.2001 ?

Since the Amending Act has come into force from 3.10.2001, all petitions filed in the . High Court must necessarily be transferred to the Family

Court/ District Court if they are at the stage prior to the making of a decree nisi. This will entail them the advantage of avoiding the two step

procedure of a decree nisi followed by confirmation and enable the petitioners to get a decree absolute at the first instance from the Family

Court/District Court, subject to appeal as indicated. In any event, the High Court ceases to have original jurisdiction on and after 3rd October,

2001.

Point No. 8:

In view of the deletion of Ss. 17 and 20 requiring confirmation by the High Court of decrees passed by the District Court/Family Court, what

further step is to be taken with regard to the matters pending for confirmation by the High Court in which decrees were passed prior to

3.10.2001?

In cases where decrees were already passed prior to 3.10.2001, which are pending for confirmation before the High Court, considerations of

practical convenience and avoidance of hardship to the litigants dictate that the High Court should immediately take up such matters and dispose

them of in accordance with the procedure in Section 16. Any other view, would mean depriving the litigant of the benefit of confirmation of the

decree as also the right of appeal which would not be available in their cases.