

(1998) 06 KL CK 0042

High Court Of Kerala

Case No: C.R.P. No. 816 of 1998

Jomu Kurian

APPELLANT

Vs

Siby and Another

RESPONDENT

Date of Decision: June 2, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 20
- Divorce Act, 1869 - Section 50
- Kerala Family Courts Rules, 1989 - Rule 12

Citation: AIR 1998 Ker 360 : (1998) 3 RCR(Civil) 463

Hon'ble Judges: S. Sankarasubban, J

Bench: Single Bench

Advocate: Mathew John, for the Appellant;

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Sankarasubban, J.

This Civil Revision Petition is filed against the order dated 30th September. 1997 in I.A. No. 1650/97 in O.P. No. 131/96. Petitioner is the wife while the first respondent is the husband. Original Petition was filed for divorce under the Indian Divorce Act. In the petition for divorce, notice was ordered to the respondents and the case was posted to 13-8- 1996 for return of notice. The notice so sent was returned with the endorsement that the address shown was not correct. Thereafter, notice was sent through Court and the same was returned with the endorsement that the respondents were residing in Bombay. Petitioner collected the address of the respondents in Bombay. On 20-11-1996 notice was taken to the respondents correct address in Bombay by registered post as well as through Court. These notices were again returned unserved on 16-6-1997. Since the address in the above notice was correct, it was clear that the respondents were deliberately avoiding the notice.

Petitioner filed I.A. No. 1650/97 for appropriate orders seeking substituted service of notice by paper publication. The above request was rejected by the District Judge by order dated 30th September, 1997, which reads as follows :

"Since the proceeding is under Indian Divorce Act and in the absence of specific provision enabling simultaneous service, I am not inclined to allow the petition."

It is against that this revision petition is filed.

2. Learned counsel for the petitioner Shri Mathew John brought to my notice Sections 45 and 50 of the Indian Divorce Act. u/s 45 of the Indian Divorce Act, subject to the provisions contained all proceedings under the Act between the parties are to be regulated by the Code of Civil Procedure. Section 50 of the Act deals with service of petition. It states that every petition under the Act shall be served on the party to be affected thereby, either within or without India, in such manner as the High Court by general or special order from time to time directs, provided that the Court may dispense with such service altogether in case it seems necessary or expedient to do so. It is true that Section 45 makes the CPC applicable. But Section 50 insists that the notice shall be served on the party. Thus personal service is contemplated under the Section. The question is whether in such circumstances, the Court has got power to order notice by publication. The proviso to Section 50 gives discretion to dispense with personal service incase it seems necessary or expedient to do so.

3. In John Over Vs. Muriel Alleen Isidore Over, a Full Bench of the Bombay High Court held as follows :

"But I may express the hope that this case will be looked upon as an exception and not as the rule, and that the learned District Judge will not lightly excuse a party from making any enquiry which he can reasonably be asked to make, nor if necessary from effecting personal service of the petition, should circumstances render that course desirable in preference to the practice, often prevailing in our Courts, of service by registered post."

In Garao Sangma Vs. Rangji Mechik, it is observed thus at Page 277 :

"Although u/s 50 the Commissioner has a discretion to dispense with the service in a proper case he must record proper order in the matter."

In V. Barnard Vs. Mrs. Averil May Tresslor Barnard, a Full Bench of the Madras High Court held as follows at Page 437 of AIR:

"As a general rule service of divorce proceedings or proceedings connected with matrimonial affairs is required to be made personally, and substituted service is not usually ordered unless the Court is satisfied that every possible step was taken to effect personal service."

4. It cannot be said that the Court dealing with the proceedings under the Indian Divorce Act, has no power to order service of notice by publication. But the caution that is made is that the service should be effected by personal service and only when the Court is satisfied that personal service is not possible, then service by publication should be ordered. Hence, the learned District Judge was quite wrong in holding that he cannot order service by publication. The Court below ought to have looked into the circumstances detailed by the petitioner and decided the question one way or other.

5. In the above view of the matter, I set aside the order of the Court below. Court below is directed to consider the I.A, in view of the above directions. Before parting with the case, I want to observe that it was not brought to my notice that any general order or special order has been made by the High Court of Kerala or any Rules are made by the High Court in regard to service of petition under the Indian Divorce Act. But so far as the Family Courts, are concerned, they have been expressly given the power to order substituted service under Rule 12 of the Family Courts (Kerala) Rules. Hence, such a procedure is available for the proceedings under the Indian Divorce Act in the Family Court.

Civil Revision Petition is disposed of as above.

Give a copy of this order to the Registrar, High Court of Kerala.