P.J. Jose Vs Ali Joseph

Court: High Court Of Kerala

Date of Decision: June 29, 1990

Acts Referred: Divorce Act, 1869 â€" Section 10, 11, 11(2)

Citation: (1990) 2 KLJ 120

Hon'ble Judges: Varghese Kaiiinath, J; T.V. Ramakrishnan, J

Bench: Division Bench

Advocate: S. Narayanan Poti, for the Appellant; C.K. Sivasankara Panicker and K.S. Radhakrishnan, for the Respondent

Judgement

Varghese Kalliath, J.
A well educated young couple with two children are before us. The husband filed a petition u/s 10 of the Indian

Divorce Act, for short, the Act, to snap the marriage tie by a decree of the court dissolving the marriage with his wife, the counter petitioner. Their

marriage was on 21-5-1979. Parties belong to Roman Catholic Community and their marriage was solemnised at the Bishop"s House, Kottayam.

After the marriage, the counter petitioner gave birth to two children. Section 10 of the Act provides that a husband may present a petition to the

District Court or to the High Court praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been

guilty of adultery. The provision for dissolution of marriage, particularly, a dissolution at the instance of the husband, is a very stringent provision.

The husband is entitled to claim divorce only if the wife is found to be guilty of adultery. Even in a case where the marriage is irretrievably broken

and the parties cannot lead with peace and tranquillity a married life, for sufficient reasons, other than the ground of adultery and even if the court is

satisfied that the marriage relationship cannot be resurrected by conciliation so long as the law provides that the court can grant a decree of

dissolution of marriage, only if the wife is found to be guilty of adultery, the position is that the court has to fold its hands, and say that the court is

helpless.

2. We are prompted to say this because with great hopes seeing that both husband and wife are very educated and two children are there who are

innocent in this dispute, we called the husband and wife to appear before us and we made a very earnest and sincere attempt with the active co-

operation of counsel appearing for the parties for a re-conciliation between the parties so as to salvage the marriage. The wife, who is now resisting

divorce said blatantly and adamantly that she is not prepared to continue the married life and she will never live with the petitioner-husband.

Though we spent some time in our anxiety to repair the impaired marriage, ultimately, we got the impression that the marriage, at any rate, has

broken irretrievably and it is not possible to re-unite the snapped marriage tie. In these circumstances, we heard the matter and we want to dispose

of the matter in accordance with law.

3. The wife plainly and clearly expressed an attitude that whatever be the consequences, she cannot live with the appellant accepting him as her

husband. At the same time, she resists the dissolution of marriage and insists that the question of dissolution of marriage has to be decided strictly in

accordance with law. We thought for a moment, what is the purpose of keeping alive a marriage where a wife cannot reconcile and accept the

other party as her husband- But, we cannot decide the case on the basis of this aspect of the matter. It will be extra judicial and may go against the

provisions of the Act. Judges will be confronted with rare circumstances like this. In Francome v. Mirror Group Newspapers Ltd (1984) 2, All ER

408 at 412-413, Lord Donaldson MR said: ""in very rare circumstances a situation can arise in which the citizen is faced with a conflict between

what is, in effect, two inconsistent laws. The first law is the law of the land. The second is a moral imperative, usually, but not always, religious in

origin. An obvious example is the priests'' obligation of silence in relation to the confessional, but others can be given. In conducting the business of

the courts, judges seek to avoid any such conflict, but occasionally it is unavoidable. Yielding to the moral imperative does not excuse a breach of

the law of the land, but it is understandable and in some circumstances may even be praiseworthy. However, I cannot over-emphasise the rarity of

the moral imperative"".

4. We have to remember that as Lord Hailsham once said : ""the rule of law is a confidence trick"". What he meant was that the rule of law depends

on public confidence and public acceptance of the system whereby Parliament makes the laws, the courts enforce them and the vast majority of

citizens accept them until, they can gel them changed.

5. It came to our notice when we examined the records that there is no compliance of section 11 of the Act. Section 11 reads thus :-

Adulterer to be co-respondent - Upon any such petition presented 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 alleged adulterer is unknown to the petitioner although he has made due efforts to discover it; (3) that the alleged adulterer is

dead,

6. In the petition, the petitioner has stated thus:-

Further, in paragraph 9 of the petition, he has stated that even though he has asked about the parentage of the children, the counter petitioner did

not disclose the same. He has also stated that he has made the necessary enquiries to find out the name of the adulterer, and his address, but he

was" unsuccessful. These things are stated in the petition as excuses for not impleading the adulterer.

7. There is a serious controversy as regards the question whether before proceeding to try a petition for divorce on the ground of adultery and if

that petition does not contain the name of the adulterer, whether it is the duty of the court to dismiss the petition, if no separate application is filed to

excuse the petitioner from not impleading the adulterer a co-respondent in the petition Certainly, in this case, no separate petition was filed stating

reasons for not impleading the adulterer a corespondent even though the facts leading to the grounds contemplated u/s 11 (2) of the Act are

narrated in the petition. On this score, the court below raised a point as point No. 1 whether the petition is maintainable, and that point has been

answered against the petitioner finding that the petition is not maintainable. In considering the point, sufficient attention is not seen made to the

averments in" the petition, by the court below. We are not saying that making averments in the petition itself is sufficient and that the court has got

power to excuse the petitioner for not impleading the adulterer a co-respondent in the petition and the petition can be tried. In fact, after finding

that the petition is not maintainable, the court below has examined the case on merits and came to the conclusion that the petitioner has failed to

establish the ground that since the solemnisation of the marriage, the wife was found to be guilty of adultery.

8. Appellant submitted that the finding on merits is absolutely perverse and unsustainable. He pointed out that the standard of proof required for

dissolution of marriage on the ground of adultery u/s 10 of the Act is not the standard of proof that is required in a criminal case. The proof is less

severe. If the court can reach to a reasonable probability that the wife is guilty, of adultery from the circumstance and other evidence, though not

direct, according to the appellant is sufficient to establish the ground of adultery u/s 10 of the Act. He has referred us to Pulikkottial Cheru

Zechariah Vs. Smt. Mary Zechariah and Another, where the Madhya Pradesh High Court held that ""adultery, therefore, can rarely be proved by

direct evidence which is looked upon only with disfavour and one has to infer adultery from attending circumstances, the inclination of the spouse

and the opportunities available. In its very nature, therefore, such, evidence must be clear, cogent and convincing and should admit only of one

inference before it can be accepted to infer adultery. Certainly, therefore, the onus to prove this charge of adultery is upon the person making it and

it is for him to satisfy the Court by adducing proper and sufficient evidence that adultery has been committed by the other spouse. As circumstantial

and presumptive evidence assumes importance in the case of adultery and direct evidence is normally not probable, uncorroborated evidence

supported by such circumstantial evidence may be enough. Falsity of defence may be no substitute. Although this charge of adultery assumes a

criminal character and demands of a rather strict proof, yet the standard of proof required is not the same as is required to prove a criminal charge.

Proof beyond reasonable doubt is now not necessary and preponderance of probabilities may decide the issue"".

9. The standard of proof in matrimonial causes to prove adultery has taken a different view in English Law after Blyth v. Slyth (1966) 1 All ER

524. Earlier in Preston-Jones Case (1951) A.C. 391) it was sounded that the standard of proof in cases of matrimonial causes and particularly, in

a petition for divorce on the ground of adultery, is proof beyond reasonable doubt. This dictum does not, now, hold the field. Dixon J. in (1948)

66 CLR 191, has elaborately considered the question of standard of proof and that seems to be in accordance with what we have quoted from

Pulikkottial Cheru Zechariah Vs. Smt. Mary Zechariah and Another, . Of course, the change of standard of proof in divorce proceedings based on

adultery will not permit the court to hold that the wife is guilty of adultery based not on a high standard of proof. Really a high standard of proof is

needed to satisfy the court that adultery has been committed, but it is not a proof beyond reasonable doubt but a standard of proof based on

balance of probability.

10. In this case, the court below found that the husband was not able to establish the ground that since the solemnization of the marriage, the wife

has been guilty of adultery. We do not want to investigate this question, though we are bound to do it in an appeal against the judgment of the first

court. We desist to do that since we feel that even if we find that the husband has established the ground, we may not be in a position to grant the

relief sought for by the husband.

11. Section 11 of the Act enjoins a responsibility on the part of the husband to make the alleged adulterer a co-respondent in the petition to this

case, it has not been done, for, (according to the appellant, on good reasons. We have adverted to the reasons stated by the appellant, but a

statement of reasons in the main petition, may not be a substitute for a legal compliance of section 11 of the Act. This aspect of the matter has been

considered by different courts. We do not want to refer to all the decisions. But, we shall refer to one decision - AIR 1942 All 223 (Bowman v.

Bowman) - wherein it is stated that ""until leave to dispense with the presence of the adulterer as 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 have been complied with.

12. A Full Bench of this Court in Idicula Jacob Vs. Mariyamma, has also considered this question and said ""the requirement of section is not a

mere formality. It is based on a matter of grave public importance (William Ferry Bowman v. Harriet Dorothy Bowman -A.I.R. 1942 All. 223).

The object is to prevent collusion between husband and wife. If Sec. 11 is not complied with the petition is not maintainable (Susanta Kumar

Mitra Vs. Sm. Himangshu Prova Mitra,

13. The discretion a court can exercise to condone the defect of filing a separate petition for excusing the petitioner from not making the adulterer a

co-respondent is, in fact, very little when trying a matrimonial cause on the ground of adultery. An analysis of the decisions of English Courts would

show (hat the English Courts have got a wider discretion in these matters. This is because the discretion of Indian courts is circumscribed by the

provisions of section 11. See AIR 1928 117 (Nagpur) .

14. In a case where the husband was the petitioner for divorce but could not name the alleged adulterers as co-respondents, sought at the time of

hearing leave to dispense with the impleading co-respondents, it was held that ""the direction for such leave must be by application to the Judge on

motion founded on affidavit before the hearing of the petition and it was further held that the court had no jurisdiction to entertain the petition before

such leave had been obtained. See Idicula Jacob Vs. Mariyamma, . Since there is no leave granted by the court below, if we follow the Full Bench

decision, we have to hold that the court had no jurisdiction to entertain the petition. If the court had no jurisdiction to entertain the petition, it

follows that the court had no jurisdiction to enquire into the merits of the case also. So, whatever the court has said on merits, need not be

considered by this court in appeal. But, it may not be proper for us to leave the matter there. To meet the ends of justice, we feel that we must

evolve a proper remedial, measure. The Full Bench in Idicula Jacob Vs. Mariyamma, said: ""..... we are faced with the predicament either of

upholding the dismissal of the petition or setting aside the dismissal and sending back the case for a proper application being made by the appellant

for excusing him from making the co-respondent a party"". (Para 9). This Court in Idicula Jacob Vs. Mariyamma, . ultimately set aside the order

and remitted the case of the lower court. We also feel that this technical difficulty faced by the appellant herein should not stand in the way of a

proper disposal to the case. So, we feel that the judgment now challenged has to be set aside and the matter has to be remitted back to the court

below so as to enable the appellant to file an application as contemplated u/s 11 of the Act for excusing the appellant from not making the adulterer

a co-respondent in the petition. We do so. This application has to be tried first and if the court is satisfied that there are sufficient grounds for

allowing the application, the court can try the main application on merits. It will be a trial de novo.

With the above observations appeal is disposed of. Case is remitted back to the court below. No order as to costs. Parties are directed to appear

before the lower court on 30th July, 1990.