

Thomas Vs. Lucy

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Court : Karnataka

Decided On : Nov-24-1993

Reported in : II(1994)DMC49; ILR1994KAR1; 1994(2)KarLJ354

Judge : S.B. Majmudar, C.J., ;M. Ramakrishna and ;R.V. Raveendran, JJ.

Acts : [Divorce Act, 1869](#) - Sections 11; [Family Courts Act, 1984](#) - Sections 16(1); [Code of Civil Procedure \(CPC\) , 1908](#) - Order 19, Rule 1

Appeal No. : C.R.C. No. 2 of 1993

Appellant : Thomas

Respondent : Lucy

Judgement :

ORDER

Raveendran, J.

1. This Reference arises out of the decree nisi dated 25.4.1992 granted by the Additional Principal Judge, Family Court, Bangalore dissolving the marriage between the petitioner and the respondent in M.C.No. 638/1991, a petition filed under Section 10 of the Indian [Divorce Act, 1869](#). ('Act' for short).

2. The petitioner is the husband and the respondent is the wife. They were married on 23.10.1988. According to the petitioner, the marriage was not consummated;

on 25.10.1989 the respondent left the house of the petitioner and went to her native place; when the petitioner went to her place and requested her to come and live with him, she refused; the petitioner learnt that the respondent had illicit relationship with one Stephen who lived next to her father's house and that she was living in adultery with the said Stephen. Hence the petitioner filed the petition for dissolution of marriage on the grounds of adultery. The respondent remained ex parte. Petitioner's affidavit was received by way of proof and on the said affidavit, the Family Court has allowed the petition by order dated 25.4.1992. We find that the order suffers from two infirmities.

3. Section 11 of the Act requires that if the petition is filed by an husband, he shall make the alleged adulterer a co-respondent to such petition, unless he is excused from so doing on one of the following three grounds specified : (a) the wife leading the life of a prostitute; (b) the husband not knowing the name of adulterer inspite of his due efforts; and (c) the death of the adulterer. In this case, the alleged adulterer is not made a co-respondent. We also find that no application has been made for dispensation of the requirement on any of the three grounds mentioned in Section 11. In fact, having regard to the nature of averments made, none of the three grounds of exception under Section 11 will be available to the petitioner. The non-imp leading of the alleged adulterer is a lacuna that affects the very jurisdiction of the Court to grant decree for dissolution. It is relevant to remember that object of Section 11 is to prevent collusive divorces and Section 11 is not a mere formality. As observed by the Allahabad High Court in WILLIAM PERCY BOWMAN v. HARRIET DOROTHY BOWMAN AIR 1942 Allahabad 223 : 'It is a matter of grave public importance that a person should not be allowed to proceed in a Court for dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion'. A petition by husband for divorce is not maintainable unless the alleged adulterer is made a co-respondent or unless the petitioner is excused by the Court at the threshold, before trial, from so impleading under one of the grounds mentioned in Section 11. Hence on this limited ground, the order of the Family Court is liable to be set aside.

4. We also find that the Family Court has received the affidavit of the petitioner as evidence in granting relief. In matrimonial matters, particularly when adultery is alleged, it is advisable to have the benefit of evidence of the petitioner in person, as the demeanour of the petitioner will be of great relevance. We may refer to Section 16(1) of the [Family Courts Act, 1984](#) which provides that evidence of any person, where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court. We may also refer to Order XIX Rule 1 of Code of Civil Procedure which provides that any Court may for sufficient reasons, order that any particular fact may be provided by affidavit. Allegations regarding adultery and dissolution of marriage are not 'formal' matters, but are matters of serious consequence and significance. Hence unless there are exceptional circumstances warranting dispensation of parole evidence, which is the general rule, the Court should record the evidence of the parties. We do not find any reason for accepting evidence by way of affidavit instead of parole evidence. Hence the practice of accepting evidence by way of affidavit, without sufficient cause by the Family Court is not satisfactory and has to be deprecated. On this ground also, we feel that the order does not deserve to be confirmed.

5. In view of the above, the order of the Family Court cannot be sustained and it is set aside. The matter is remitted back to the Family Court with direction to reconsider the matter and dispose of the same in accordance with law and the observations made above after giving an opportunity to the parties to let in evidence.