

Ruth Vs. Dr. M. Danial

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Court : Karnataka

Decided On : Nov-29-1993

Reported in : ILR1994KAR4; 1994(2)KarLJ347

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

Acts : [Divorce Act, 1869](#) - Sections 11 and 15

Appeal No. : C.R.C. No. 9 of 1993

Appellant : Ruth

Respondent : Dr. M. Danial

Advocate for Def. : M.S. Purushothama Rao, Adv.

Judgement :

ORDER

Raveendran, J.

1. This Reference arises out of a decree-nisi granted by the Additional District Judge, Mandya on 10.9.1992, in M.C.No. 1/1991, a petition presented under Section 10 of the Indian [Divorce Act, 1869](#) ('Act' for short) by a Christian wife against the husband. Petitioner and respondent were married on 9.5.1974 and there are two children out of the wedlock.

2. Petitioner sought dissolution of marriage alleging cruelty by the husband and also alleging that there was no cohabitation for more than two years between them. The respondent filed objections denying cruelty as alleged by the petitioner. On the other hand, he contended that petitioner was having illicit intimacy with someone and was leading an adulterous life. He did not name the alleged adulterer, but merely described him as a Political personality of the locality stating that his name could not be mentioned on account of his 'threatening and powerful nature'. On the above allegations, the respondent stated that he had no objection for dissolution of the marriage, so as to safeguard the interest of himself and his children.

3. Petitioner examined herself as P.W.1 and gave evidence about the cruel conduct of the respondent in imputing adultery. She denied having committed adultery. In the cross-examination she denied having any illicit intimacy with a Municipal Councillor of that area; but admitted that she was acquainted with a Municipal Councillor and that on 1.9.1991 she had gone to Mysore along with the said Municipal Councillor and that the said Municipal Councillor was visiting their house even when the husband was in the house; and she also admitted that she used to go out of the house with the Municipal Councillor.

4. As against this evidence, the respondent examined himself as R.W.1. He denied having treated the petitioner with cruelty. On the other hand he alleged that petitioner had developed illicit intimacy with a Municipal Councillor and stated that she had admitted such illicit intimacy to him; that she had gone with the said Municipal Councillor to Mysore; that he saw her and the Municipal Councillor standing together on several occasions; that on 10.4.1992 the petitioner went to Bangalore with the said Municipal Councillor and returned only next day and admitted to the respondent that she had stayed with the Municipal Councillor in Hotel Woodlands at Bangalore.

5. In support of his case he also examined two local leaders of his community as R.Ws. 2 & 3. They also stated that the petitioner moving around with the said Municipal Councillor and their efforts to see that the petitioner mends her ways, were futile. They also stated that the petitioner had admitted to them that she

had spent a night at Mysore with her male friend. Lastly, respondent examined his minor son as R.W.4 who stated that his mother was friendly with a Municipal Councillor and that he had seen the motor-cycle of the said Municipal Councillor standing in front of his house several times.

6. On this evidence, the Court below has passed an order dated 10.9.1992 dissolving the marriage between the petitioner and respondent and the said decree-nisi is before us for confirmation under Section 17 of the Act. The petitioner, though served, did not appear before us. On the other hand, the respondent appeared through Counsel and supported the decree-nisi for dissolution relying on Section 15 of the Act.

7. Under Section 10 of the Act, the ground on which husband can seek dissolution is different from the grounds on which a wife can seek, dissolution. The said Section is extracted below:

'When husband may petition for dissolution-

Any 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.

When wife may petition for dissolution.-

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery,

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro,

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.'

8. In a petition by wife, mere cruelty or desertion cannot be a ground for dissolution of marriage unless such cruelty or desertion is coupled with adultery on the part of the husband. Neither in the petition nor in her evidence, the petitioner has alleged or made out, any adultery on the part of the respondent-husband. Hence the trial Court rightly held that petition for dissolution filed by the wife is not maintainable and is liable to be rejected.

9. However, the trial Court has, thereafter, proceeded to consider whether the relief of dissolution of marriage can be granted to the respondent, in the proceedings initiated by the petitioner. The trial Court held that the respondent had made out a case of adultery against petitioner and relying on Section 15 of the Act, the trial Court has granted a decree of divorce to the respondent. The point that arises for our consideration is whether the trial Court was justified in granting a decree for dissolution in favour of the respondent,

10. Section 15 of the Act providing for grant of relief to the opponent in certain cases reads as follows:

'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 suit instituted by a husband, of his adultery, cruelty, or desertion without reasonable excuse, or, in case of such 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 to give evidence of or relating to such cruelty or desertion.'

What is the position by applying the said Section to the facts of this case? This is a petition by wife. The husband has alleged adultery against the petitioner-wife.

Section 15 provides that in a case instituted by the wife, if the respondent-husband opposes the relief sought by the wife on the ground of her adultery, the Court may in such a proceeding, give to the respondent, on his application, the same relief to which he would have been entitled in case he had presented a petition seeking such a relief. In this case though the respondent has not made a separate application for grant of any relief, based on the averments in the statement of objections, his prayer that a fair decision may be given on the facts of the case and statement that the dissolution may be granted to safeguard his interests, may be treated as an application for dissolution.

11. The next aspect to be examined for applying Section 15 is whether respondent would have been entitled to such a relief if he had presented a petition for the relief of dissolution. In other words, the objection filed by the respondent has to be virtually treated as a petition for dissolution of marriage against the wife under Section 10 of the Act and only if he is found to be entitled to relief on such premises, he would be given the same relief in the wife's petition, by applying Section 15 of the Act.

12. When an husband files a petition for dissolution on the ground of adultery of the wife, Section 11 of the Act requires that the alleged adulterer should be made a co-respondent to the petition, unless he is excused from so doing on one of the following three grounds;

(i) that the wife is leading the life of a prostitute, and that the husband knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the husband, although he has made due efforts to discover it;

(iii) that the alleged adulterer is dead.

In this case, if relief has to be given to the husband under Section 15 of the Act, it necessarily follows that the requirements of Section 11 should be fulfilled. The respondent has not taken any steps to implead the alleged adulterer as a party to the proceedings. He has not even named the alleged adulterer. Nor has he made

any application for being excused from impleading the alleged adulterer, on any of the grounds mentioned in Section 11. In fact, none of the three grounds on which exemption can be granted, exists in this case. It is not the case of the husband that the wife is leading the life of a prostitute; nor is it his case that he does not know the name of the alleged adulterer; nor is it his case that the alleged adulterer is dead. His case is that he knows who the adulterer is, but out of fear, he is not naming him. But, the requirement under Section 11 is mandatory.

13. If the husband (respondent) wants any relief in a proceeding initiated by his wife, to that extent, his prayer has to be treated as a petition by the husband. Though Section 11 is inapplicable in a case, where relief is sought by a wife, it becomes applicable to a petition by wife, where the relief is not granted to the wife but is proposed to be granted to the respondent-husband, treating it as a petition for dissolution, by him. Hence compliance with Section 11 cannot be avoided.

14. In *D. THOMAS v. TARA* : AIR1978 Mad415 a Full Bench of Madras High Court held that a petition filed by the husband, without making the alleged adulterer a co-respondent, is not maintainable in law and the prescription in Section 11 is a mandate which cannot be avoided by a husband seeking decree on the ground of adultery. In *IDICULA JACOB v. MARIYAMMA* : AIR1976 Ker89 , a Full Bench of Kerala High Court held the alleged adulterer should be made as a co-respondent in a petition for dissolution by the husband, it was held that the trial Court could not have proceeded in the absence of the alleged adulterer and consequently the matter was remitted to the trial Court for complying with Section 11 of the Act.

15. In *WILLIAM PERCY BOWMAN v. HARRIET DOROTHY BOWMAN*, AIR 1942 Allahabad 223 the importance of compliance with Section 11 of the Act is stated thus:

'Section 11 makes it obligatory on a husband when the petitions for dissolution of marriage on the ground of adultery to make the alleged adulterer a co-respondent, unless he is excused from doing so on one of three grounds mentioned therein. The object of Section 11 is to prevent any form of collusive divorce. It is, therefore, not a mere formality to dispense with the presence of the adulterer as a co-respondent. It is a matter of grave public importance that a person should not be

allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion.

xxx xxx xxxUntil leave to dispense with the presence of the adulterer as correspondent 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.'

16. The mandatory requirements of Section 11 of the Act not having been fulfilled, it is not possible to grant any relief to the husband in a proceeding initiated by the wife, by relying on Section 15 of the Act. Hence, the decree-nisi for dissolution granted by the trial Court cannot be sustained and the same is hereby set aside.

17. At this stage, the learned Counsel for the respondent submits that the matter be remitted back instead of driving the respondent to a fresh proceedings which will be time consuming. We, therefore, remit the matter to the trial Court for disposal in accordance with law. The petitioner and the respondent will be entitled to place such additional material as may be advised and the respondent may also, if he is so advised, seek the impleading of the alleged adulterer a co-respondent to the proceedings.

18. Having regard to the fact that the petition is already three years old, the trial Judge is directed to dispose of the matter within four months from the date of receipt of the papers and copy of this order.