

S. Mallaiah Vs. Eisther and anr.

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Court : Andhra Pradesh

Decided On : Apr-15-1994

Reported in : 1994(2)ALT356; I(1995)DMC179

Judge : Syed Shah Mohammed Quadri, ;Eswara Prasad and ;B.S. Raikote, JJ.

Acts : [Indian Divorce Act, 1869](#) - Sections 10 and 17; [Special Marriage Act, 1954](#) - Sections 27-1

Appeal No. : R.C. No. 201 of 1991

Appellant : S. Mallaiah

Respondent : Eisther and anr.

Advocate for Def. : None

Advocate for Pet/Ap. : J. Kanakaiah, Adv.

Judgement :

Syed Shah Mohammed Quadri, J.

1. This is a reference under Section 17 of the Indian Divorce Act. The parties are Indian Christians. The petitioner and the first respondent were married according to Christian rites at Church in Uppal on 17.10 1985. The petitioner alleges that he is a Hindu and therefore the marriage was null and void. He also states that he

was impotent on the date of the marriage and continues to be so on the date of the application. On the ground that the first respondent committed adultery with the second respondent he sought divorce under Section 27-1(a) of the Special Marriage Act. He examined four witnesses; of them the petitioner is P.W. 1, P.Ws. 2 and 3 are his tenants and P.W. 4 is the Doctor who issued medical report. Ex. P 3, to the effect that the petitioner is impotent. The first respondent examined herself as R.W. 1 and four other witnesses, R.Ws 2 to 5. On considering the evidence of the petitioner the learned Additional Chief Judge did not choose to rely on the evidence of P.W.1. However, on the basis of the evidence of P.Ws 2 and 3 he held that the first respondent was living in adultery with the second respondent and granted decree for divorce under Section 10 of the Indian Divorce Act. He also found that the Special Marriage Act was not correctly quoted in the petition and that mere wrong reference of a Section or the Act would not disentitle the petitioner to a decree for divorce.

2. Shri Kanakaiah, learned Counsel for the petitioner, contends that the Trial Court found the first respondent guilty of adultery with the second respondent and, therefore, the decree of divorce granted under Section 10 of the Indian Divorce Act, may be confirmed under Section 17.

3. Respondents remained ex parte in this Court.

4. We have gone through the evidence on record. P.W. 1 claims that he did not convert himself as Christian and he continues to be a Hindu though this version is supported by P.W. 2, it is contradicted by P.W. 3. He also states that he was impotent on the date of marriage and continues to be so. That part of the case of the petitioner is not believed by the learned Trial Judge and in our view rightly. Probably for this reason that learned Trial Judge did not rely on the evidence of P.W. 1. However, the Trial Court relied on the evidence of P.Ws 2 and 3 in so far as the case of P.W. 1 relates to allegation of adultery against the first respondent P.W. 2 is a tenant in a portion of the house of the petitioner. P.W. 1 in his statement deposed that he learnt from P.Ws. 2 and 3 and another lady by name Devamma that the second respondent used to come to his house every day after 8-30 a.m. after he left his house to attend to his work in National Institute of

Nutrition; he also stated that the house was being bolted from inside by the first respondent. The story is not supported either by P W 2 or P.W. 3. P.W. 2 stated that she observed an outsider coming to the house of the petitioner after the petitioner left for office and that the petitioner himself saw the outsider in his house. The story set up by the petitioner that the door used to be bolted from inside was not spoken to by P.W. 2.

5. Now coming to the evidence of P.W. 3 he only narrated the incident of one day. He did not say that the second respondent used to come every day. What all he stated is that after two or three months from the date of marriage of the petitioner with the first respondent, he noticed second respondent entering the house of the petitioner in the absence of the petitioner and taking to the first respondent and he was there for two or three hours. He further stated that he narrated this to the petitioner and there was a row between the first respondent and the petitioner. Here again we notice that the story set up by the petitioner that his house used to be bolted from inside is not supported by this witness. Further, this witness also contradicts the evidence of the petitioner that he was not a Christian on the date of the marriage.

6. Adultery is a very serious allegation. Appreciation of evidence in such cases must be careful and proper. It is only when the evidence is cogent, consistent and irrefragible that the finding of adultery could be recorded. But where the evidence of the petitioner is lacking in corroboration and is inconsistent and unnatural, no finding of adultery could be recorded even when the second respondent, the alleged adulterer, remained ex parte. It was contended on behalf of the first respondent-wife before the learned Trial Judge that P.Ws. 2 and 3 have not categorically stated that they saw the respondents having sexual intercourse and that just because they were seen inside the house it could not be inferred that they were having illicit intimacy. The learned Judge agreed with this contention and observed.

'It is no doubt true that P.Ws. 1 to 3 have not deposed that they saw R-1 and R-2 having actual sexual intercourse. But they have stated on oath that they saw R-1 and R-2 staying inside the house for hours together.';

he further observed,

"there is no reason for them (P.Ws. 1 to 3) to attribute unchastity to the first respondent unless it is true.'

First of all a reading of the evidence of P.Ws. 2 and 3 does not show that they had attributed unchastity to the first respondent. Even if that be so, we do not approve the approach of the Trial Court on such a serious allegation as adultery that unless the first respondent is unchaste there was no reason for P.Ws. 2 and 3 to attribute unchastity. This would be putting the cart before the horse. The correct approach ought to be unless P.Ws. 2 and 3 are found to be truthful witnesses their testimony cannot be accepted. The Trial Court ought to have first determined, whether on the evidence on record the allegation of adultery against respondent 1 and 2, as spoken to by the witnesses, is established and then to record the finding that the first respondent is guilty of adultery. It is not a correct approach to say that unless the fact spoken to is correct the witnesses, would not have spoken the way they had. The evidence of P.W. 1 contains bundle of lies. This itself is enough in the absence of independent evidence in support of the plea of adultery against the first respondent, to reject that plea. There is nothing in the evidence of P.Ws. 2 and 3 to establish the plea of adultery against the first respondent. On the basis of the statement of these witnesses that the adulterer was seen along with the first respondent wife in the house of the petitioner in his absence one cannot jump to the conclusion that the respondents are guilty of adultery; it would be a wild guess, an imagination of a suspicious mind but cannot be finding of Court of law to support a decree of divorce on the ground of adultery.

7. In our view the evidence on record does not establish the allegation of adultery against the respondents. For this reason we are unable to confirm the decree for dissolution of marriage granted by the Trial Court. The reference is, therefore, rejected and it is answered accordingly.