

Ayyapan Vs. Vasantha

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Court : Kerala

Decided On : Jan-23-1987

Reported in : AIR1988Ker314

Judge : Sivaraman Nair and; Pareed Pillay, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1) and 21; Kerala High Court Rules, 1963 - Rule 11

Appeal No. : M.F.A. No. 705 of 1984

Appellant : Ayyapan

Respondent : Vasantha

Advocate for Def. : T.V. Ramakrishnan and; M. Ramaswamy, Adv.

Advocate for Pet/Ap. : N. Nandakumara Menon, Adv.

Disposition : Appeal dismissed

Judgement :

Pillay, J.

1. Petitioner filed O.P. (H.M.A.) 71 of 1984 under Section 13 of the Hindu Marriage Act on the allegation that his wife (respondent) had left his house without his consent and knowledge on 15-12-1979, and that when he questioned Act about it

she started ill treating him. It is also alleged that she had developed illegal intimacy with Prabhakaran Nair who is working in the office of the Superintendent of Police, Tele-Communications. Trivandrum. The District Judge did not accept the case of ill treatment alleged in the petition. It was also found that the petition is not maintainable as the alleged adulterer was not made a party to the proceedings.

2. Under Section 13(1) of the Hindu Marriage Act adultery is a ground for divorce. Section 21 of the Act empowers the High Court to make rules to regulate all proceedings under the Act. The High Court has made Rules and published the same on 24-7-1963. Rule 11 provides that in every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has, after the solemnisation of the marriage, had sexual intercourse with any person, the petitioner shall make such person a co-respondent. Rule 11 (d) enables the petitioner to apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of the co-respondent if name of such person is not known to the petitioner despite his efforts for discovery or when such person is dead. In case where the respondent being the wife is leading the life of a prostitute and the petitioner knows of no person with whom she has committed adultery or has had sexual intercourse, it is not necessary to make any one co-respondent. Rule 11(d)(iv) empowers the Court to dispense with the joinder of the co-respondent for any other reason that the Court may deem fit and sufficient to consider.

3. The question that arises for consideration is as to whether the failure to implead the alleged adulterer is fatal to the petition. It has also to be considered whether he could be impleaded at a later stage. Rule 11(a) envisages that in every petition for divorce on the ground that the respondent is living in adultery or has, after the solemnisation of the marriage, had sexual intercourse with any person, the petitioner shall make such person as co-respondent. This is a mandatory Rule. Rule 11(d) reads:--

'The petitioner may, however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of the co-respondent in cases covered by Sub-rule (a) above on any of the following grounds:--

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery.

(ii) that such person is dead,

(iii) that the respondent being the wife is leading the life of a prostitute and the petitioner knows of no person with whom she has committed adultery or has had sexual intercourse.

(iv) for any other reason that the Court may deem fit and sufficient to consider.'

Thus the position admits no doubt that in cases not covered by Rule 11(6) it is incumbent upon the petitioner to implead the adulterer as co-respondent. Having not done so when the original petition was filed before the Court and having not filed a petition supported by the affidavit under Rule 11(d), the petitioner cannot at a later stage implead the adulterer as co-respondent.

4. When the petition was pending before the trial court, no attempt was made to implead the adulterer as co-respondent. Petitioner has no case that he was not aware of the person who committed adultery with the respondent. Nor has he a case that his wife was leading the life of a prostitute and that he is not aware of the names of the persons with whom she had sexual intercourse. Admittedly no leave was obtained by the petitioner. It is pertinent to note that the petitioner's definite case is that the respondent had developed illegal intimacy with Prabhakaran Nair. His name and address are specifically stated in the petition. In view of the above position the petitioner ought to have impleaded Prabhakaran Nair as correspondent. Obviously he cannot contend that he was not aware of the name and address of the person with whom his wife was having illicit intimacy. As the adulterer was not made, a co-respondent the court below was justified in holding that the petition is not maintainable.

5. As the adulterer was not made a correspondent in the petition and as no attempt was made to dispense with it on any of the grounds envisaged in Rule 11(d) it had to be held that the petition is defective and it cannot be cured at a later stage.

6. Counsel for the petitioner submitted that an opportunity may be given to implead the co-respondent and the case may be remanded In view of the specific provisions contained in Rule 11 the above request cannot be granted. However, it is made clear that the dismissal of this petition would not be a bar to the petitioner filing a proper petition with proper persons on the party array.

7. There is no merit in the appeal and hence it is dismissed. No costs.

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