

Shajan Vs. Biny Mathew

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Court : Kerala

Decided On : Apr-10-2001

Reported in : AIR2001Ker350; II(2001)DMC166

Judge : Mr. K.S. Radhakrishnan and; Mr. G. Sasidharan, JJ.

Acts : [Divorce Act, 1869](#) - Sections 3, 10 and 45; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 15 to 20 and 21 - Order 10, Rule 2 - Order 14, Rule 4

Appeal No. : M.F.A. No. 975 of 2000

Appellant : Shajan

Respondent : Biny Mathew

Advocate for Def. : Dr. Sebastian Champappilly, Adv.

Advocate for Pet/Ap. : M.V.S. Nampoorthy and; S. Santhosh Kumar, Adv.

Disposition : Appeal Dismissed

Judgement :

G. Sasidharan, J.

1. This appeal is filed b the respondent-husband in petition filed by wife for declaration that the marriage is a nullity or in the alternative for dissolution of marriage. The present appellant filed a Civil Miscellaneous Petition praying that he

question of jurisdiction had to be heard and decided as a preliminary issue. The learned Single Judge dismissed the C.M.P. on finding that this Court has the jurisdiction to entertain the petition. The finding arrived at by the learned Single Judge was that as per S. 45 of the Indian Divorce Act (hereinafter referred to as 'the Act'), all proceedings will be regulated by the code of Civil Procedure (hereinafter referred to as 'the Code') and hence the jurisdiction of the Court has to be decided with reference to Ss. 15 to 20 of the Code. The learned Single Judge found that since there is a prayer in the Original Petition for declaration that the marriage is a nullity on the ground that consent for the marriage was obtained by fraud, the cause of action arose on the date of marriage within the jurisdiction of this Court. The marriage was solemnised in Kerala and so the finding by the learned Single Judge is that cause of action arose within the jurisdiction of this Court and hence this Court has the jurisdiction to entertain the Original Petition. The learned Single Judge also observed that the question of jurisdiction was not raised at the appropriate time and it was raised only at a later stage.

2. The Original Petition was filed by the wife against the husband under Ss. 18 and 19 of the Act. The case of the wife was that her consent for the marriage was obtained by fraud and hence the marriage had to be declared as null and void. Dissolution of marriage was sought for by the wife alleging that the husband was cruel in his behaviour towards her. The husband contested the Original Petition by filing a counter affidavit. The wife gave evidence before the learned Single Judge as PW.1 and four witnesses were examined on her side as PWs. 2 to 5. Evidence of the wife was closed and it was after that the husband filed C.M.P. No. 12151 of 2000 praying that the question of jurisdiction may be heard as a preliminary issue.

3. The statement in the affidavit filed in support of the C.M.P. is that the husband and wife resided together in Bangalore and this Court is not having the territorial jurisdiction to entertain the Original Petition. S. 45 of the Act says that subject to the provisions contained in the Act, all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure. The learned Single Judge on the basis of what is said in S. 45 of the Act found that Ss. 15 to 20 of the Code apply to the proceedings under the Act for the purpose of determining the jurisdiction of the Court. On finding that S. 20 C.P.C. applies to proceedings under

the Act, the learned Single Judge said that proceedings have to be initiated where the defendants reside or cause of action arises. The learned Single Judge proceeded on to observe that since Original Petition was filed for declaration that the marriage was a nullity on the ground that consent for the marriage was obtained by fraud, the cause of action arose on the date of marriage and the marriage between the parties was solemnised in Kerala and hence part of the cause of action arose within the jurisdiction of the court.

4. S. 18 of the Act says that any husband or wife may present a petition in the District Court or to the High Court praying that his or her marriage may be declared null and void. S. 10 of the Act provides that a petition for the dissolution of marriage may be presented in the District Court or to the High Court. In S. 3 of the Act, the provision is that the 'High Court' means with reference to any area, in a State the High Court for that State and in case of any petition under the Act, 'High Court' means the High Court for the area where the husband or wife reside or last resided together. It is also stated that District Court means in the case of any petition under the Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction or of whose jurisdiction under the Act, the husband and wife reside or last resided together. There is provision in the Act regarding the jurisdiction of Court where proceedings under the Act can be instituted. S. 45 of the Act envisages that all proceedings under the Act between parties shall be regulated by the Code subject to the provisions contained in the Act. That means that when there are specific provisions in the ACT regarding a particular matter, that provision has to be made applicable and the provisions in the Code will not be having any application in that matter. Only when there is no specific provision in the Act regarding any particular matter relating to the proceedings under the Act, provision of the Code will become applicable. Since there is specific provision in the Act regarding the territorial jurisdiction of the Courts, where proceedings under the Act can be initiated, it is not necessary to refer to the provisions of the Code for the purpose of deciding the question of territorial jurisdiction. Territorial jurisdiction of the court has to be decided with reference to the provision in the Act which says that High Court means High Court for area where the husband and wife reside or last resided together and District Court means the Court of the District Judge within the local limit of whose ordinary jurisdiction the husband and wife reside or

last resided together.

5. S. 21 of the Code says that no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice. The above section deals with taking of objection as to the place of suing before an Appellate or Revisional Court. The Appellate or Revisional Court can entertain objection regarding the place of suing only if such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice. Even though S. 21 of the Code deals with raising objection as to the place of suing in the Appellate or Revisional Court, the provision says that objection in the Court of first instance has to be taken at the earliest opportunity. There is no provision in the Act similar to S. 21 of the Code. In so far as the Act does not contain any provision which says at what stage objection regarding place of suing can be raised, S. 21 C.P.C. which deals with that matter becomes applicable to proceedings under the Act by virtue of S. 45 of the Act. In proceedings under the Act, objection as to the place of suing has to be taken in the Court of first instance at the earliest possible opportunity. In the present case, objection regarding place of suing was taken by the husband after the wife - petitioner has adduced her entire evidence. It was when the Original Petition stood posted for the evidence of the husband that C.M.P. No. 12151 of 2000 was filed stating that the question of territorial jurisdiction had to be decided as a preliminary issue. Issue regarding territorial jurisdiction becomes necessary to be decided only if there is a contention raised that the Court has no territorial jurisdiction to entertain the petition. It is true that in the C.M.P. filed by the husband, there is a statement that this Court has no territorial jurisdiction to entertain the petition. But the pleadings do not contain the contention that the court is not having the jurisdiction to entertain the petition. The counter affidavit filed by the husband in the Original Petition does not contain the contention that this Court is not having the territorial jurisdiction to entertain the petition. The pleadings even now stand unmended. No issue regarding territorial jurisdiction to the court to entertain the petition arises out of the pleadings in the proceedings.

6. In the *Sam Manoharan v. Jasmine Henna Halen & Anr.*, 1 (1987) DMC 62, the High Court of Madras in revision found that the District Court which entertained the petition under the Act had no territorial jurisdiction to entertain the petition. The above decision was relied on for the purpose of showing that the question of territorial jurisdiction can be decided even in revision. There can be no doubt regarding the proposition that in revision also, the question of territorial jurisdiction can be considered. But the question is whether the contention regarding jurisdiction had been taken at the earliest opportunity. A reading of the above decision would make it clear that in the counter affidavit filed in the proceedings before the District Court, the contention that the Court has no jurisdiction to entertain the petition and that only another court had the jurisdiction was raised and that was considered by the District Judge who held that the District Court had the jurisdiction to try the petition. When such a question was considered by the District Judge on the basis of the contention raised in the pleadings that had to be considered by the Revisional Court. The Court of Revision can take a different view than the view taken by the District Judge and it was thus that the High Court found that the District Court had no jurisdiction to entertain the petition under the Act.

7. In the affidavit filed in support of the C.M.P., it is stated that examination of the wife and her witnesses was under O.14, R.4 read with O.10, R.2 of the Code and hence the question regarding jurisdiction may be raised and may be determined as a preliminary issue even after examination of the wife and witnesses. In the present case, examination of the wife and her witnesses was not under the above provisions of the Code for the reason that by examining them, evidence on the side of the wife was closed and the Original Petition was posted for the evidence of the husband. It is a case in which the husband appeared in Court without any protest and submitted to the jurisdiction of the Court allowing the wife to adduce her entire evidence. The husband without raising any objection regarding the territorial jurisdiction of the Court joined the issue and went to trial on the merits of the allegations in the Original Petition and he cannot subsequently come forward with a contention that the Court is not having the territorial jurisdiction to entertain the petition. This is not a case in which the husband said that there is inherent lack of jurisdiction for this Court to entertain the petition. He cross-examined the wife

and her witnesses without raising any objection regarding the jurisdiction of this Court and now comes forward with a contention that he was called upon to give evidence when the Court is not having the territorial jurisdiction to entertain the petition, that too without amending the pleadings. Hence, there is no merit in the appeal and we confirm the order of the learned Single Judge in C.M.P. No. 12151 of 2000 by which that petition was dismissed.

8. The M.F.A. is accordingly dismissed.

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