

Annu Thomas Vs. Mathew Thomas

Annu Thomas Vs. Mathew Thomas

SooperKanoon Citation : sooperkanoon.com/726031

Court : Kerala

Decided On : May-29-2001

Reported in : AIR2001Ker387; II(2001)DMC586

Judge : Mr. J.B. Koshy and; Mr. R. Rajendra Babu, JJ.

Acts : [Divorce Act, 1869](#) - Sections 18, 19 and 19(4); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125

Appeal No. : M.F.A. No. 1198/96

Appellant : Annu Thomas

Respondent : Mathew Thomas

Advocate for Def. : S. Sreekumar, Adv.

Advocate for Pet/Ap. : V.N. Achutakurup and; B.S. Swathikumar, Adv.

Disposition : Appeal dismissed

Judgement :

J.B. Koshy, J.

1. Appellant herein is the respondent in O.P. (Divorce) No. 4603/94 W. Husband filed a petition before this Court under S. 18 of the Indian [Divorce Act, 1869](#) praying for a declaration that the marriage between the petitioner and the

respondent as null and void on the ground that his consent to the marriage was obtained by practising fraud. Even though the marriage was solemnized in accordance with the Christian rites, it was found out that the wife was earlier married. According to the respondent, he consented to the marriage as he was made to believe that the appellant was an unmarried virgin girl. It is not disputed that the wife was earlier married according to the Christian rites on 26.10.1981 and the above marriage was subsisting and there was a child in that wedlock. It came to know only later and when petitioner questioned, respondent admitted that the child is her own child on the first wedlock and the child is put in a boarding school. In fact, the wife sought maintenance from her previous husband by filing an application under S. 125 of the Code of Criminal Procedure as M.C. No. 11/83 before the Judicial First Class Magistrate, Changanassery and maintenance was ordered. A second marriage when the first marriage was subsisting is null and void. The fact that the wife had an earlier marriage and that marriage was subsisting at the time of the second marriage is not disputed.

2. Grounds for obtaining a decree declaring the marriage null and void is mentioned null and void is mentioned in S. 19. A decree can be granted under S. 19(4) on the ground that former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force. Nullity of marriage can also be granted if consent of either party was obtained by force or fraud. The learned Single Judge found in favour of her husband.

3. The decision of the Calcutta High Court reported in *Mrs. Rose Simpson v. Binimoy Biswas* (AIR 1980 Cal. 214) was cited by the appellant stating that second marriage may be invalid but not necessarily void ab-initio. We are not considering the question whether marriage was ab-initio void. As rightly held by the learned Single Judge, husband is entitled to get a declaration that the marriage is null and void as the wife was already a legally married woman and the earlier marriage was subsisting at the time of the present marriage and the former husband is still living. S. 19(4) will apply in this case.

4. Learned Single Judge considered the question in para 10 of the judgment as follows:

'10. Reliance was placed on a decision reported in *Mrs. Rose Simpson v. Binimoy Biswas* (AIR 1980 Cal. 214) wherein it is stated that a marriage which contravenes the provision under S. 19 may be invalid but not necessarily void ab-initio. The Court has got a discretion to refuse a decree even in cases where such marriage was found to be nullity. This interpretation was given on the basis of the opening words of S. 19, 'such decree may be made on any of the following grounds'. According to the learned Judge, word 'may' indicates that relief is only discretionary and there is no compulsion on the part of the court to grant a decree of nullity, even if provisions of S. 19 are contravened. Certain guiding principles for exercise of discretion were also mentioned in the judgment. With respect, I differ from the views taken by the Calcutta High Court in the above mentioned decision. Even if the word 'may' is used in the opening part of the section, it cannot be said that the court entertains a discretion with regard to the relief to be granted. The word 'may' in certain context will mean 'shall'. When it is found that provision contained in S. 19 is violated, the courts will have to pass a decree of nullity of marriage to refuse to grant of decree when there is violation of provisions contained in S. 19 of the Indian Divorce Act.'

5. We agree with the above view. If ground under S. 19(4) is proved, Court has no discretion but has to grant a decree declaring such marriage null and void. We also differ from the view taken by the Calcutta High Court in *Rose Simpson v. Binimoy Biswas*, AIR 1980 Cal. 214, in this regard. As held in *Balsui v. Balsui*, ((1898) 78 LT 472) and *Boettcher v. Boettcher* (1949 WN 83) if the former marriage is still subsisting and is legal, court has no discretion but must annul marriage. Here, in this case, there is no dispute that earlier marriage of the appellant wife is legal and still subsisting and former husband is still living. Thus all conditions under S. 19(4) are satisfied in this case. We see no ground to interfere with the judgment of the learned Single Judge. We dismiss the appeal.