

Sherly Thomas Vs. Johny

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Court : Kerala

Decided On : Nov-29-2001

Reported in : I(2002)DMC703

Judge : R. Rajendra Babu, J.

Acts : [Divorce , 1869](#) - Sections 8, 10, 10A, 16, 17, 18, 19 and 20; Hindu Marriage Act - Sections 13 and 13B

Appeal No. : O.P. No. 21040 of 1998

Appellant : Sherly Thomas

Respondent : Johny

Advocate for Def. : Sebastian Champappilly and; Kurien Antony Edassery, Advs.

Advocate for Pet/Ap. : G.S. Reghunath and; Mohan Jacob George, JJ.

Disposition : C.M.P. allowed

Judgement :

R. Rajendra Babu, J.

1. The important question for consideration is whether a joint petition under Section 10A of the Divorce Act can be entertained before the High Court in a pending case filed by one of the spouses for dissolution of their marriage.

2. The wife filed O.P. 21040/98 for dissolution of the marriage between the petitioner and the 1st respondent alleging the grounds of cruelty, desertion and adultery. It was alleged that the marriage between the petitioner and the 1st respondent was solemnized on 21.4.1988 at St. George Forane Church, Kaipuzha, Kottayam, as per the religious rites among Christian community and thereafter they lived in the house of the 1st respondent. A child was born on 7.9.91 out of the above wedlock, and the 1st respondent was always cruel towards the petitioner and she was subjected to physical as well as mental cruelty. Thereafter he deserted the petitioner and the child from January, 1998 onwards, and the 1st respondent was leading an adulterous life with respondents 2 and 3 and hence the petitioner sought for a decree for dissolution of the marriage.

3. The 1st respondent filed an objection denying all the allegations raised against him, and contended that he was not leading an adulterous life as alleged, but the petitioner was leading an adulterous life. On the basis of the contentions put forward by the parties, elaborate evidence had been let in by both sides. On the side the petitioner PWs. 1 to 4 were examined whereas R.Ws. 1 to 12 were examined on the side of the respondents. Documents were also produced and got marked on both sides. After the amendment to the Indian Divorce Act which had come into effect w.e.f. 3.10.2001, the petitioner and the 1st respondent filed C.M.P. 53500/2001, a joint petition under Section 10-A of the Divorce Act for dissolution of the marriage by mutual consent. Thereafter the petitioner and the 1st respondent were examined and both of them had given evidence that they have voluntarily agreed for a dissolution of the marriage as it has become impossible for them to lead a matrimonial life together.

4. Heard the learned counsel for the petitioner and the 1st respondent.

5. The question for consideration is whether this Court (High Court) can pass an order dissolving the marriage between the petitioner and the 1st respondent on their mutual consent under Section 10-A of the Divorce Act when the statute says that the petition has to be filed before the District Court. CMP 53500/2001 was filed under Section 10A of the Divorce Act by mutual consent of both the husband and the wife for dissolution of the marriage. As per Section 10-A of the Divorce Act, a

joint petition by the husband and the wife for dissolution of the marriage has to be filed before the District Court. Section 10-A does not authorise the filing of a joint petition before the High Court. The learned counsel for both sides submitted that such a petition can be filed before the High Court, as a matter for dissolution of the marriage was already pending before this Court and hence there is no statutory bar for entertaining such a petition. In this context it would be relevant to consider the amendments effected to the Indian Divorce Act. As per Section 10 of the Indian Divorce Act (prior to the amendment), a petition for dissolution of marriage could be filed either before the District Court or before the High Court whereas after the amendment to Section 10, a petition for dissolution of marriage could be filed only before the District Court. The provision for filing a petition before the High Court under Section 10 of the Indian Divorce Act had been deleted by the amendment. As per Section 18 of the Indian Divorce Act (prior to the amendment), a husband or wife was entitled to present a petition before the District Court or before the High Court praying for a declaration of the marriage as null and void. But, by the amendment, the jurisdiction of the High Court for entertaining a petition for declaring the marriage null and void had been taken away and the jurisdiction was limited only to the District Court. Further, the powers conferred under Section 19 for the High Court to pass a decree of nullity of marriage on the ground that the consent of either party was obtained by force or fraud also has been taken away and the jurisdiction was given to the District Court. Thus a consideration of the above provisions would make it clear that the jurisdiction for filing a petition under Section 10 or 18 of the Act before the High Court had been taken away and such petitions are to be filed only before the District Court. Thus, after the present amendment, the High Court is lacking jurisdiction for entertaining petitions under Section 10 as well as 18 of the Divorce Act. It is in this context we have to consider the petition under Section 10-A by which the parties were entitled to file a joint petition for dissolution of the marriage by mutual consent. Thus the statute had conferred jurisdiction to the District Court for entertaining a joint petition under Section 10-A of the Divorce Act for dissolution of marriage on mutual consent.

6. The learned counsel for both the parties submitted that the provision for dissolution of the marriage by mutual consent under Section 10A of the Divorce Act is exactly similar to Section 13B of the Hindu Marriage Act except regarding the

period of living separately and as such the principle laid down in those cases under Section 13B of the Hindu Marriage Act can be safely adopted. Reliance was placed on the decision of a Division Bench of this Court in *Janardhanan v. Syamala Kumari* (1990 (1) KLJ 231). That was a case where a joint petition was filed by the parties (spouses) while a petition under Section 13 of the Hindu Marriage Act for dissolution of the marriage was pending before Court. There this Court held:

'Nowhere has it been stated in the Act that a petition filed under Section 13B cannot be presented in a proceeding initiated under Section 13 of the Act. Nor is it necessary to present the same as an Original Petition unconnected with the pending proceedings - what is not provided in law need not be read into it for the purpose of deciding whether an action is maintainable in law. No endeavour should be spared to save an action from the attack of maintainability if it is legally possible. Hence we hold that the joint petition cannot be thrown overboard merely because the same was not filed as an Original Petition, or because it was filed in the same proceedings in which a decree for divorce is sought for on another ground.'

7. Learned counsel for both sides submitted that O.P. 21040/98 was filed as early as on 29.10.98 and they were living separate for more than two years and contesting the petition for divorce for more than two years and there was absolutely no chance for rapprochement between the parties. As both the spouses were living separate for more than two years, the joint petition by the spouses under Section 10-A is in compliance of the statutory requirement. It was further submitted that as there was no chance of any reunion of the spouses, the court can pass an order dissolving the marriage between the parties without waiting for the statutory period of six months as provided under Section 10-A. The above provision in Section 10A of the Divorce Act is exactly identical with the provision in Section 13-B of the Hindu Marriage Act. This court has consistently held that in appropriate cases the parties need not be directed to wait for the statutory period of six months and without the same a decree can be granted dissolving the marriage on mutual consent. Reliance was placed on the decision of this Court in *Visalakshi v. Shivaraman Nair* (1991 (1) KLT 910). There a Division Bench of this Court had the occasion to consider whether the parties should be directed to wait for the period of six months as provided under Section 13-B. There it was held:

'The provision has been enacted to water down the rigour of the requirements of the provisions of the Hindu Marriage Act and to enable spouses to part amicably where the marriage has broken down and the spouse cannot be reconciled. Break-down of marriage has not been accepted as a ground sufficient to pass a decree for divorce before the incorporation of Section 13B. The purpose of the provision is obviously to save the spouses from the ruinous consequences of marriage which have broken down and cannot be saved. The legislative policy disclosed in the requirement that the court should wait for six months is to give an opportunity to the parties to see if the marriage can be saved. That is why the legislature prescribed postponement of the passing of the order on the petition filed under Section 13B of the Act. In case like the present one where the parties are before the appellate court after having fought a battle in the trial court and where the court is satisfied that the parties had sufficient time to think over their own future and have come to a definite conclusion that the marital relationship has to be terminated, the court should take a liberal view of the procedure requirement and refrain from insisting on the waiting period of six months.'

A similar approach was taken by this Court in *Manojkumari v. Bhasi* (1998 (2) KLT 858) wherein it was held:

'On reading the petition and on hearing the counsel on both sides, we are satisfied that the marriage between the parties has irretrievably broken and it is practically and emotionally dead. In such circumstances the life of the spouses shall not be allowed to put in perpetual agony and despair. When such circumstance is brought to the notice of this Court, it is for it to find out a final solution on principles of justice and equity. Now, the parties are before us after a prolonged litigation mutually agreeing not to live in unison but to separate themselves permanently. If that be the welfare of the parties, this Court need not stand against it. The procedural requirement can be waived in view of the mutual consent recorded in writing. In view of the observation in *Visalakshi's* case, *supra*, we are not insisting for the procedural requirements in this case. We therefore propose to decide this petition seeking a decree for divorce on mutual consent by ourselves and not by remitting it to the trial court. We also dispense with the waiting period of six months as required for the culmination of the divorce process'.

The same approach was made by this Court in *Sreelatha v. Deepthy Kumar* (1998 (1)KLT 195). So far as the present case is concerned, the spouses were contesting the matter raising allegations of adultery against each other and trying to establish by examining several witnesses. The circumstances would establish that the marriage between the parties had irretrievably broken and it was practically and emotionally dead. They filed the petition stating that they are not able to live together any more and were living separate for more than three years. They have further averred in the petition that all the financial claims had been settled and the custody of the child shall be with the mother and the father shall have the right of visitation for the time being. It was further prayed in the petition that the statutory period of waiting for six months may be waived. In such circumstances I do not think that any purpose shall be achieved by directing the parties to wait for a period of six months after filing the petition under Section 10A, and the procedural requirement of waiting for six months can be waived in the present case.

8. Section 13B of the Hindu Marriage Act stipulate that the joint petition under Section 13B has to be filed before the District Court. In the decisions cited supra i.e., 1991 (1) KLT 910, 1998 (1) KLT 195 and 1998 (2) KLT 858, petitions under Section 13B was filed before the High Court wherein the matter was pending in appeal. In all the above cases the petition under Section 13B was accepted and divorce granted waiving the statutory period of waiting for six months. Hence I think it proper and just to adopt the same procedure and to accept the joint petition under Section 10-A.

9. The learned counsel for the petitioner submitted that in view of the extraordinary jurisdiction conferred on the High Court under Section 8 of the Divorce Act, this Court is fully competent to entertain the petition under Section 10-A of the Act as it can be deemed to be a petition filed before the District Court and withdrawn to this Court for adjudication under Section 8 of the Act. Section 8 of the Act says that the High Court may, whenever it thinks fit, remove and try and determine as a court of original jurisdiction, any suit or proceeding instituted under this Act in the court of any District Judge within the limits of its jurisdiction under this Act. In view of the above provision the High Court can withdraw any petition pending before the District Court and try it and dispose of it exercising its original

jurisdiction. As a petition for dissolution of marriage has been pending before this court and it is filed in the pending case, it can be disposed of exercising the extraordinary jurisdiction conferred under Section 8 of the Act.

10. By the amendment of the Indian Divorce Act, Sections 17 and 20 of the Act have been deleted. As per the old Act, the orders passed by the District Court under Sections 10 and 18 were liable for confirmation by this Court. By deleting Sections 17 and 20 of the Act, the orders passed by the District Court need not be confirmed and those orders were final. But so far as an order passed by the High Court is concerned, by Section 16 of the Act it was treated as a decree nisi and confirmation by the same court was necessary. A waiting period of six months also had been stipulated by which a confirmation order could be passed only after six months from the date of the decree nisi. The above provision in the statute still remains and every order passed by the High Court is liable to confirmation and as such an order has to be treated as a decree nisi. When no specific provision is made to treat an order passed under Section 10A on mutual consent by the parties as absolute in view of Section 16 of the Act, every order passed by the High Court, not being an order on appeal from an order passed by the District Court, is liable for confirmation. Hence an order passed by this Court under Section 10-A also is liable for confirmation and has to be treated only as a decree nisi. On a consideration of the entire circumstances I do not think that the joint application filed by the parties is collusive, and it can be accepted and acted upon and hence I think it just and proper to grant just and appropriate relief to the parties by accepting the CMP filed by the parties for dissolution of the marriage on mutual consent.

11. In the result C.M.P. 53500/2001 is allowed and the marriage between the petitioner and the 1st respondent is dissolved by a decree nisi.