

Soya Vs. A.K. Mohanan

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Court : Kerala

Decided On : Oct-04-2005

Reported in : 2(2006)DMC298

Judge : K.A. Abdul Gafoor and; K. Hema, JJ.

Acts : Kerala Hindu Marriage Rules, 1963 - Rule 11; ;Kerala Hindu Marriage Act, 1955

Appeal No. : M.F.A. No. 1488 of 1996

Appellant : Soya

Respondent : A.K. Mohanan

Advocate for Def. : P. Vijaya Bhanu, Adv.

Advocate for Pet/Ap. : Rajit, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Abdul Gafoor, J.

1. Wife, faced with a decree of divorce on the ground of adultery, is the appellant. The main contention urged is that there is no cogent evidence to arrive at a finding that she was guilty of adultery in order to grant divorce. The only available

evidence in support of the allegation was the interested testimony of respondent-husband and certain letters alleged to have been written by the step-father of the appellant to the father of the husband-respondent. Exts. A5 to A10 are the letters. All these letters, except AS and A7, are addressed to the father of the husband and one is written by the brother-in-law. Neither the brother-in-law nor the step-father of the wife was examined. The father of the husband was also not examined. In such circumstances, such letters did not have acceptability in evidence as being not properly proved as known to law. On the other hand, Exts. A5 and A7 are addressed to one Mohanan, who is none other than the husband. Exts. A5 and A7 do not reveal any instance of adultery except that her conduct was not good. That does not have any evidentiary value to attach corroboration to the interested testimony of the husband. Therefore, this is a case of no evidence and, therefore, the appeal has to be allowed.

2. It is further contended that the only ground urged for divorce is adultery. It was mandatory in terms of Rule 11 (a) of the Hindu Marriage (Kerala) Rules, 1963 to implead the alleged adulterer as co-respondent. The only way out to avoid such impleadment is any of the situations made mention of in Clause (d) of Rule 11. There is no averment that the adulterer is dead or that the wife was leading the life of a prostitute. So, the situations under second or third limb do not arise. On the other hand, it is the specific case of the husband that the wife had been seen in adulterous action along with his own brother Mani. He saw the incident while he was coming from his work place. Therefore, he knows the name of the alleged adulterer. Rule 11(d)(i) provides that the person who files application can avoid his impleadment, if the name of such person is unknown to him. There was no occasion for him to seek dispensation of the impleadment when the alleged adulterer is his own brother whose name is known to him. Therefore, the Court below ought not to have entertained the petition to dispense with such impleadment, Counsel for the appellant submits.

3. It is submitted on behalf of the respondent that the letters, Exts. A5 to A7, have been produced to corroborate the testimony of P.W. 1. Therefore, the Court below was justified in coming to the conclusion that the 'appellant had committed adultery in order to grant a decree of divorce. It is further submitted that in the petition filed

under Clause (d) of Rule 11, it has been specifically submitted that immediately after the incident his brother had gone away and he was not seen thereafter. It was, in the above circumstances, specific averment was made that his whereabouts were not known. Therefore, that shall have to be taken to fall within the fold of Rule 11 (d)(iv).

4. In terms of Rule 11 (a), it is mandatory that the co-adulterer shall be a party in a petition for divorce on the ground of adultery. It can be dispensed with only in any of the circumstances mentioned in Clause (d) of Rule 11 which provides that exemption can be sought for only in case the name of the alleged adulterer is not known. Coming to the facts situation of this case, it is admitted that when the name of the alleged adulterer is known to the petitioner before the Court below, the adulterer being his own brother. Necessarily, he has a duty to implead him. A situation under the fourth option of Clause (d) of Rule 11 arises only if the situation does not come within the fold of Clauses (i) to (iii). When the name is thus known to the respondent, he could have impleaded the alleged co-adulterer in the last known address, service of which could have been effected taking appropriate steps. Therefore, this is a case where an application under Clause (d) of Rule 11 ought not to have been allowed by the Court below.

5. A Division Bench of this Court in *Kunhiraman v. Santha* : AIR1998 Ker189 , has held that in case of such non-impleadment of the alleged adulterer, the petition shall have to be dismissed. It is profitable to quote para 3 of the decision cited above, which reads as follows:

This case is filed by the husband for divorce on the ground that the respondent is living in adultery with one Kunhiraman and also with others. Therefore, the appellant shall implead the person or persons who had sexual intercourse with the respondent as co-respondent in the petition by stating the name, occupation and place of residence of such person or persons so far as they can be ascertained. In this case, the appellant though presented his case on the ground of living in adultery has not impleaded the co-respondent or respondents which is mandatory. Therefore, the petition filed by the appellant is not in accordance with the Act and the Rules framed thereunder by the High Court of Kerala. Therefore, the appeal

has no merits and we dismiss the same on the ground of non-impleading of the co-respondent/respondents in the petition filed before the Family Court. The dismissal of this appeal will not stand in the way of the appellant from filing a fresh petition by impleading proper persons.

6. Therefore, for that reason alone, the appeal is to be allowed setting aside the impugned judgment. Consequently the petition for divorce on the ground of adultery filed by the respondent stands dismissed.

In the light of the dismissal of the petition for divorce on that ground, we need not consider other grounds urged in this appeal.

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