

Linish P. Mathew Vs. Mruthula Mathew

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Court : Kerala

Decided On : Jul-20-2012

Judge : K.T. Sankaran & M.L. Joseph Francis

Appeal No. : Mat.Appeal.No.453 of 2011 (A) & Cross Objection No.49 of 2011 and Mat. Appeal No. 454 of 2011

Appellant : Linish P. Mathew

Respondent : Mruthula Mathew

Judgement :

K.T. Sankaran, J.

The question of law involved in these appeals is whether it is necessary to pass a decree nisi under Section 16 of the Divorce Act, 1869 (Act IV of 1869), where a joint application is filed by the husband and wife under Section 10A of the Divorce Act for dissolution of marriage by mutual consent, in a pending appeal against the decree passed by the District Court.

2. The respondent (wife) filed O.P.(Div.) No.1064 of 2008 on the file of the Family Court, Alappuzha against the appellant (husband) for declaring their marriage to be null and void and in the alternative for a decree of divorce. The Family Court dismissed the prayer for declaration of nullity of marriage. However, the Family Court granted a decree of divorce and declared that the marriage between the parties will stand dissolved with effect from the date of decree. Challenging the

decree passed by the Family Court, the husband filed Mat. Appeal No.453 of 2011. The wife filed Cross Objection No.49 of 2011 in Mat. Appeal No.453 of 2011 challenging that part of the decree of the Family Court by which the Family Court refused to declare the marriage as null and void.

3. The wife filed O.P.No.1065 of 2008 before the Family Court, Alappuzha against her husband and father-in-law for recovery of money given to the respondents at the time of marriage and value of gold ornaments which were allegedly appropriated by the respondents therein. The Family Court allowed O.P.No.1065 of 2008 in part and granted a decree for recovery of Rupees Ten lakhs from the respondents in the Original Petition. The claim for value of gold ornaments was dismissed. Challenging the judgment and decree of the Family Court in O.P.No.1065 of 2008, the respondents therein filed Mat. Appeal No.454 of 2011.

4. The parties entered into a compromise in the mediation process. As per the compromise, the husband agreed to pay a sum of `10,75,000/- to the wife in full and final settlement of the decree in O.P.No.1065 of 2008. It is stated in the Memorandum of Compromise that the parties have been living separately for more than three years and the marriage has been irretrievably broken down. The parties agreed to dissolve the marriage by mutual consent and they agreed to file a joint petition under Section 10A of the Divorce Act before the High Court in the pending appeal. Accordingly, the husband and wife filed a joint petition dated 2.11.2011 under Section 10A of the Divorce Act. In the joint petition filed under Section 10A of the Divorce Act, it was specifically stated that there was no collusion between the parties and that the petition was filed on free will of the parties. A Division Bench of this Court, as per the order dated 22.11.2011, directed to post the cases on 25.5.2012, that is, after a period of six months. When the appeals came up for hearing on 25.5.2012, the parties were present. They stated that they stand by the compromise and the joint petition. They stated that they have complied with all the terms and conditions of the compromise.

5. When the appeals came up for hearing, a question arose as to whether a decree for dissolution of marriage could be passed straight away or whether it is necessary to pass a decree nisi as provided under Section 16 of the Divorce Act.

That question was argued in detail by the counsel.

6. Before the amendment by the Indian Divorce (Amendment) Act 2001 (Act 51 of 2001), the title of the Act was "The Indian Divorce Act". The word "Indian" was omitted by the Amendment Act 51 of 2001. By the Amendment Act 51 of 2001, drastic amendments were made to the Indian Divorce Act. The amendments were made on the basis of the recommendations of the Law Commission of India. The Law Commission suggested that amendments were required to the Act in order to remove the discrimination against women and gender inequality. Section 10A was inserted by the Amendment Act 51 of 2001. Before the amendment, a petition for dissolution of marriage under Section 10 of the Indian Divorce Act or a petition for decree of nullity under Section 18 of the Act could be filed either before the District Court or before the High Court. After the amendment by Amendment Act 51 of 2001, the original jurisdiction of the High Court was taken away. Before the amendment, a decree of divorce passed by the District Court was required to be confirmed by the High Court under Section 17 of the Act. A decree could be confirmed by the High Court only after the expiry of a period of not less than six months from the date of decree. Section 17 was substituted by the amendment and now it is not necessary to confirm the decree (passed by the District Court) by the High Court.

7. Section 8 of the Divorce Act provides for the extraordinary jurisdiction of the High Court. It provides 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 the Act in the Court of any District Judge within the limits of its jurisdiction under the Act. Section 17 of the Act, as amended, provides for removal of a case from the District Court to the High Court on the application of any person suspecting that the parties to the suit have been acting in collusion for the purpose of obtaining a divorce. On such removal of the case from the District Court to the High Court, the High Court can try and determine the case as a Court of original jurisdiction and the provisions of Section 16 shall apply to such suit. Section 16, before the amendment and after the amendment, provides that every decree for dissolution of marriage made by a High Court shall in the first instance, be a decree nisi. Such decree nisi shall not be made absolute till after the expiration of

such time, not less than six months from the pronouncing thereof. The question to be resolved is whether a decree nisi is compulsory under Section 16 of the Act where the High Court entertains an application under Section 10A of the Act in an appeal pending against the decree passed by the District Court.

8. For the purpose of answering this question, we think it apposite to extract Section 10A as inserted by the Amendment Act and Sections 17 and 20 as available before and after the amendment.

9. Section 10A of the Act reads as follows:

"10A. Dissolution of marriage by mutual consent.-- (1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree."

10. Section 17, before the amendment was as under:

"S.17 Confirmation of decree for dissolution by district judge.-- Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

Case for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is two) by a Court composed of such two Judges and in case of difference the opinion of the senior Judge shall prevail.

The High Court, if it thinks further enquiry or additional evidence to be necessary may direct such enquiry to be made or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by the District Judge and the High Court shall thereupon make an order confirming the decree for dissolution of marriage or such other order as to the Court seems fit:

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof as the High Court by general or special order from time to time direct.

During the progress of the suit in the Court of the District Judge, any person, suspecting that any of the parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time direct, to apply to the High Court to remove the suit under Section 8, and the Court, shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of Original Jurisdiction and the provisions contained in Section 16 shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a divorce in accordance with the justice of the case."

11. After the amendment, Section 17 reads as follows:

"17. Power of High Court to remove certain suits.-- During the progress of the suit in the Court of the District Judge, any person suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under Section 8, and the Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in Section 16 shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary, to enable him to make a decree in accordance with the justice of the case."

12. Section 20 of the Act, before the amendment, was as follows:

"20. Confirmation of District Judge's decree.-

Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of Section 17, clauses 1, 2, 3 and 4, shall, mutatis mutandis apply to such decree."

By the Amendment Act 51 of 2001, Section 20 was omitted. Before the amendment by Act 51 of 2001, a decree for dissolution of marriage passed by the District Judge was required to be confirmed by the High Court under Section 17 as was then in existence. Likewise, every decree of nullity of marriage made by a District Judge was to be confirmed by the High Court under Section 20 of the Act then in existence. When a decree was passed by the District Court, it was not necessary for the District Court to pass a decree nisi. The reason for the same appears to be that the decree had to be confirmed by the High Court under Section 17 or Section 20, as the case may be. Such confirmation could be only after six months of the date of passing of the decree by the District Court. Section 17, before its amendment, provided for an opportunity to any person to make an application to the High Court to remove the suit under Section 8, if he suspected that any of the parties to the suit were acting in collusion for the purpose of obtaining a divorce. That part of Section 17 before amendment, now constitutes Section 17 after the amendment. If trial of a suit by the High Court as provided under Section 17 is held, then the provisions contained in Section 16 shall apply to such a suit. That means, the High Court can only pass a decree nisi which requires to be made absolute after six months. Section 16, before the amendment, provided that every decree for dissolution of marriage made by a High Court, not being confirmation of a decree of a District Court, shall, in the first instance, be a decree nisi. The words, "not being confirmation of a decree of a District Court" were omitted by Act 51 of 2001. Such omission was in tune with the amendment of the other provisions in the Act, whereby the provision for confirmation by the High Court was deleted. Therefore, Section 16, as it now stands, provides for passing a decree nisi, in the first instance. Such a situation will arise when the District Court dismisses the petition for dissolution of marriage and the High Court reverses the

decree and passes a decree for dissolution of marriage.

13. Even after the provision for confirmation by the High Court (of the decree passed by the District Court) is deleted by the Amendment Act 51 of 2001, there is no provision in the amended Act whereby the District Court has to pass a decree nisi. On the other hand, Section 16 provides for passing a decree nisi by the High Court. When a decree nisi is passed under Section 16, during the period mentioned therein, any person is at liberty to show cause why the decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before Court. Section 16 also provides as to how the case should be dealt with in such a contingency.

14. The amendments by Act 51 of 2001 were made to obviate the procedural delay and consequential hardship to the estranged couples. Before the amendment, if a decree is passed by the District Court, it had to be confirmed by the High Court under Section 17 or Section 20, as the case may be, and such confirmation could not be made before the expiration of six months. Section 57 of the Act was substituted by the Amendment Act 51 of 2001. Before the amendment of Section 57, a party who had obtained a decree of divorce could not marry again before the expiry of six months after the order of the High Court confirming the decree for dissolution of marriage or where the decree was passed by the High Court dissolving a marriage, before the expiry of six months from the date of decree. But after the amendment, waiting for a period of six months is not required. As per Section 57 as amended, a party can marry again after the expiry of the time for filing the appeal or when an appeal has been filed, on attaining finality of the dismissal of the Appeal.

15. Section 10A is a new provision introduced by the Amendment Act 51 of 2001. Section 10A provides for passing a decree declaring the marriage to be dissolved with effect from the date of decree, on the motion of both the parties made not earlier than six months after the date of presentation of the petition under Section 10A, provided the other conditions of sub-section (2) thereof are satisfied. Sub-section (2) of Section 10A does not provide for passing a decree nisi as provided in Section 16, to be made absolute after the expiration of six months. A decree

under Section 10A can be passed after the expiry of six months from the date of its presentation. The legislature deliberately made provision for passing a decree for dissolution of marriage under Section 10A instead of passing a decree nisi. Even after the amendment of the various provisions of the Act, a decree nisi is required to be passed under Section 16, but such a decree nisi is not required to be passed under Section 10A. If it is to be construed that a decree to be passed after expiration of the period of six months from the presentation of the petition under Section 10A can only be a decree nisi as provided under Section 16 of the Act, the result would be delay of a minimum period of one year from the date of presentation of a petition under Section 10A for dissolution of marriage by mutual consent. Section 10A is substantially the same as Section 28 of the Special Marriage Act and Section 13B of the Hindu Marriage Act. The only difference is that the period of separate living by the spouses should be one year under the Special Marriage Act and the Hindu Marriage Act, while it should be two years in the case of an application under Section 10A of the Divorce Act. The intention of the legislature is clear from a reading of the various provisions of the Divorce Act and the amendments thereto. It is clear beyond doubt that the legislature never thought of putting a fetter on the right of the parties to a marriage to get a decree of divorce after the period of six months from the date of presentation of a petition under Section 10A. Moreover, Section 10A speaks of the petition to be presented to the District Court. No decree nisi need be passed by a District Court. Then a question would arise whether a High Court could entertain a petition under Section 10A of the Act in a pending appeal. A learned single Judge of this Court in *Sherly Thomas v. Johny* (2002 (1) KLT 467), relying on the decision in *Janardhanan v. Syamala Kumari* (1990 (1) KLJ 231), held that a joint petition under Section 10A can be entertained by the High Court in a pending case.

16. If an application under Section 10A is entertained in a pending appeal before the High Court, then the same procedure to be followed by a District Court under Section 10A should be followed notwithstanding that the petition is to be dealt with by the High Court and not the District Court. If it is to be held that when the High Court entertains an application under Section 10A, even after the waiting period of six months only a decree nisi could be passed thereby compelling the parties to wait for another period of six months, it would have the result of holding that the

High Court even lacks the powers which the District Court has. Such a result is not contemplated by the Act. Section 45 of the Act provides 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, 1908. If so, in view of Section 107 of the Code of Civil Procedure, the Appellate Court will have the same powers as that of the trial court. The Appellate Court also can entertain a petition under Section 10A of the Divorce Act in a pending appeal, since the District Court also can entertain an application under Section 10A in a pending Original Petition for dissolution of marriage.

17. After all, the purpose of providing for a waiting period of six months is to see whether the parties change their mind and decide to unite. Another object of providing this waiting period is to ensure that the application is not filed as a result of collusion between the parties. The Act provides for the right of a third party to intervene and to say that the parties have filed the application for divorce collusively. Apart from the period of six months as provided under Section 10A, the legislature did not intend to impose a further waiting period of six months, after passing a decree nisi, only on the ground that the application under Section 10A is dealt with by the High Court and not by the District Court. Such an interpretation would defeat the very purpose of the amendment and put the parties to great prejudice, which the legislature wanted to avoid.

18. The Divorce Act makes sufficient provisions to ensure that a decree for dissolution of marriage is not obtained as a result of collusion between the parties. A consent decree for divorce was unknown before the insertion of Section 10A of the Act. A consent decree cannot be said to be a collusive decree. Absence of collusion is to be ensured even in a case where an application under Section 10A is filed. Collusion and consent are not the same. Though it can be said that there may be consent in every collusion, it cannot be said that there is collusion in every consent. "Collusion" is a concerted effort by the parties to achieve a goal which is not apparent. Sometimes, the parties may collude together and get a decree for divorce to gain an advantage. That is quite distinct and different from the genuine consent between the parties in the matter of a joint petition under Section 10A. In Black's Law Dictionary, "collusion" is defined as follows:

"An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose."

Since a divorce by consent is made legal and valid after the amendment of the Act by Act 51 of 2001, it would be unjust and unrealistic to put fetters on the right of the parties to get divorce by mutual consent. Passing a decree nisi after a period of six months from the date of filing of the petition and thereafter directing the parties to wait for another period of six months to make the decree absolute, would certainly defeat the purpose of the amendment brought out by Act 51 of 2001.

19. In *Sherly Thomas v. Johny* (2002 (1) KLT 467), a learned single Judge of this Court held thus:

"10. By the amendment of the Indian Divorce Act, Ss.17 and 20 of the Act have been deleted. As per the old Act, the orders passed by the District Court under Ss.10 and 18 were liable for confirmation by this Court. By deleting Ss.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 S.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 S.10A on mutual consent by the parties as absolute in view of S.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 S.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."

20. In Sherly Thomas's case, the wife filed a petition for dissolution of marriage before the High Court before the commencement of the Amendment Act 51 of 2001. During the pendency of the Original Petition, the amendment came into force and the parties filed a petition under Section 10A of the Divorce Act. Considering the fact that the parties were living separately for more than two years, it was held that it was not necessary for them to wait for a period of six months after filing the petition under Section 10A. But the Court held that it was necessary to pass a decree nisi. Going by the later decisions of the Supreme Court, it is not possible to waive the period of six months provided under Section 13B of the Hindu Marriage Act. (See Poonam v. Sumit Tanwar (AIR 2010 SC 1384), Manish Goel v. Rohini (2010 AIR SCW 1277) and Anil Kumar Jain v. Maya Jain (AIR 2010 SC 229). It is seen from the decision in Sherly Thomas's case that the Court took the view that only a total waiting period of six months was required to get a decree for divorce. The Court took the view that the waiting period of six months under Section 10A could be waived, but only a decree nisi could be passed in the said application.

21. With respect, we do not agree with the dictum laid down in Sherly Thomas's case, that a decree passed by the High Court under Section 10A shall be a decree nisi in the first instance, which could be made absolute only after the expiration of six months. We are of the view that it is not necessary at all to pass a decree nisi in an application under Section 10A of the Divorce Act, filed before the High Court in a pending appeal.

22. In Monika Sanctis v. Henry Joseph (2003 KHC 688 =2003 (2) KLT SN 152), the Karnataka High Court held thus:

"24. We have given our thoughtful consideration to the submissions made. We have also considered the object and effect of the amendments brought about by the Amending Act 51 of 2001. Parliament had brought about these changes in the Divorce Act being conscious of the deficiencies in the Act. There were certain anomalies in the principal Act particularly in the matter of granting relief to the dissatisfied couple and such anomalies being quite clear in comparison to similar

provisions governing persons belonging to the other communities. The whole object of the Act is that the parties may get relief quickly and easily and to relieve them of the procedural hurdles which had been found in the principal Act with its colonial background.

25. One very salient change brought about is doing away with the requirement of confirmation of a decree for dissolution of marriage passed by the District Court by a Bench of 3 Judges of the High Court. This indicates that a decree for dissolution of a marriage passed under the Divorce Act after the amending Act, becomes effective on its own and does not require any further confirmation. If that is the situation we do not see any reason to impose the restriction of waiting in period of 6 months before a decree for dissolution of the marriage can be made absolute, when the High Court is passing such a decree. In fact on a proper understanding of the provisions of the Act, the provisions of S.16 are applicable only in a situation where the petition for divorce is examined by the High Court in the exercise of its original jurisdiction. We commend that this is a proper understanding of the provisions of S.16 of the Act. Accordingly, we hold that the provisions of S.16 does not apply in a situation where the High Court while exercising its appellate jurisdiction passes an order of dissolution of marriage on any of the stipulated grounds. The amended provisions of S.17 also lend support to this view as when once a decree is passed for dissolution of marriage the parties are at liberty to marry again immediately after the period of limitation for filing an appeal expires."

We are in agreement with the view taken by the Karnataka High Court in Monika Sanctis's case.

23. For the aforesaid reasons, we are of the view that it is not necessary to pass a decree nisi in a petition under Section 10A of the Divorce Act. From the facts and circumstances of the case, it is clear that there is no collusion between the parties. All the other conditions under Section 10A are satisfied in these cases.

24. Accordingly, we allow I.A.No.2972 of 2011 and pass a decree declaring that the marriage between Linish P.Mathew and Mruthula Mathew is dissolved with effect from today. M.A.No.453 of 2011 and Cross Objection No.49 of 2011 are disposed of accordingly.

Mat. Appeal No.454 of 2011 is disposed of in terms of the compromise and full satisfaction of the decree in O.P.No.1065 of 2008 on the file of the Family Court, Alappuzha is recorded in terms of the compromise.

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