
(1978) 09 MAD CK 0017

In the Madras High Court

Case No : M.C. No. 5 of 1977 and C.M.P. No. 9401 of 1978

Christinamary Stella

APPELLANT

Vs

Vijay Siddharaj and Another

RESPONDENT

Date of Decision : 07-09-1978

Acts Referred:

Divorce Act, 1869 — Section 10, 12, 17, 3, 47

Citation : AIR 1979 Mad 100 : (1979) 92 LW 110

Hon'ble Judges : Ramaprasada Rao, C.J.;Sathar Sayeed, J;Ramanujam, J

Bench : Full Bench

Judgement

Ramaprasada Rao, C.J.—This case comes up before us for confirmation of the order passed by the District Judge, Pudukottai, who allowed the petition filed by the first wife and dissolved the marriage as between the petitioner and the first respondent on the ground that the first respondent contracted a second marriage with the second respondent after the solemnisation of the first marriage and that the first respondent deserted the petitioner and is permanently living with the second respondent and had a child through her also. The facts, as disclosed in the petition, are that the first respondent married the petitioner on 19-2-1973 in the Sacred Heart Church, Pudukottai. and the marriage solemnisation certificate though not filed in the trial court, has been filed in this court which we marked as Ex. C. 1. having thus married the petitioner on 19-2-1973, it appears that the first respondent married again, 20 days thereafter on 11-3-1973, the second respondent and was not frequenting the petitioner. The case of the petitioner is that after the first respondent took the second respondent as his wife without her knowledge and consent, the first respondent suppressed such an act of adultery and neglected the petitioner also for a considerable length of time. The petitioner's further case is that by mistake she did not add in the original pleadings about the fact of both the petitioner and the first respondent having lived together lastly for about five days up to 14-5-1974 in Pudukottai. In order to fill up the void in the pleadings, C. M. P. No. 9401 of 1978 was taken out in this court for permission to file an additional affidavit disclosing such factual

residence together of the two spouses at Pudukottai on or about 14-5-1974. Having regard to the facts in this case and as there is no opposition we permitted the petition and admitted the additional affidavit in support of the pleadings already on record. On the ground of adultery and taking another woman in marriage during the subsistence of the first spouse, the application for dissolution of marriage was filed in the District court, Pudukottai u/s 10 of the Indian Divorce Act. Though the respondents were served, they were absent in the trial court. In fact, the learned District Judge noticed that Sri Rangaswami Iyenger, Advocate, filed vakalat for both the respondents. But thereafter no counter was filed and no representation was made. The petitioner examined herself as P. W. 1 and spoke to the facts already referred to. When the matter came up before us in the first instance we perused the record and found that there was no specific allegation about the last residence of the spouses at Pudukottai, and Mrs. Hamsala Rajendran appearing for the first respondent, having taken up a preliminary objection about the maintainability of the petition itself on the technical ground that the District Court, Pudukottai, has no jurisdiction to entertain the petition in the absence of a specific plea that the spouses were last residing together within the jurisdiction of the Pudukottai District Court, we permitted the petitioner to file an additional affidavit, which has since been filed and the permission to entertain the said affidavit has been granted by us in C. M. P. No. 9401 of 1978. Another objection taken by Mrs. Rajendran acting as amicus curiae for the first respondent was that there was no specific allegation about the collusion in the pleading and as such an allegation is a condition precedent for the maintainability of the application itself, this is a fatality which cannot be cured and hence this petition has to be dismissed.

2. The petitioner's counsel filed another document in proof of the second marriage. Which again was not filed in the court below. It is marked as Ex. C. 2 under which it is fairly clear that the first respondent took the second respondent as his wife and that the marriage was celebrated at Sri. Sidhdhewaraswami temple. Kalyanamantapam, Kanchamalai, Salem Dt. On the basis of the testimony of P. W. 1, which was not challenged in any manner, but in the light of the inchoate pleading, the learned District Judge issues an order of dissolution subject to confirmation by this court.

3. We may refer to the fact that this case came up earlier before us and in the perspective of events we gave an opportunity to the petitioner to complete the pleading at least at this stage and let in proof about the place of the last residence as between herself and the first respondent. It is in that context, that the affidavit filed with C. M. P. 9401 of 1978, has been accepted by us. This shows that the petitioner and the first respondent were last residing together at Pudukottai. No doubt, the learned counsel for the first respondent is right when she pointed out the lacuna in the pleadings and even the testimony of P. W. 1 about the absence of a specific allegation as to the place of last residence as between the two spouses. This, in our view, is purely a question of fact which could be supplemented even at the stage when the matter come up for

confirmation of the order of dissolution by this court. This is a case in which both the respondents are aware of the petition. They did not participate in it. They never wanted to involve themselves in it and the learned counsel for the second respondent, who is also appearing as amicus curiae before us says that she has no objection for the grant of an order of dissolution of marriage as prayed for. Taking all these circumstances into consideration, and as no counter was filed we after accepting the evidence of the petitioner through her affidavit in C. M. P. No. 9401 of 1978, are of the view that there is sufficient material on record to show that the spouses last resided within the local limits of the original jurisdiction of the District Court, Pudukottai. The decisions referred to by Mrs. Rajendran as amicus curiae for the first respondent namely *Premlatika Sircar Vs. Provash Ch. Sircar*, and *Clarence v. Raicheal*, AIR 1964 Mys 67 are distinguishable. In the *Calcutta* case, there was absolutely no evidence. The Special Bench noticed the records and in the absence of any supplementary pleading or on attempt on the part of the aggrieved spouse to supplement the pleading and the record, they had to necessarily hold that the District Court which passed the order of dissolution did not have the requisite jurisdiction to pass the order, as the place where the spouses resided or last resided was not established to the hilt. In the *Mysore* case, the Special Bench noticed, as a fact, that there was no material to show that the two parties were together at any time within the limits of the District Court, to which portals the case was brought excepting to allege that they were present on the date of marriage. The facts in our case are different. No doubt, as we said, the original pleadings were defective. But the respondents never challenged the pleadings or the course of the litigation. The petitioner has filled up the void in this court by filling the supplemental affidavit, and swore that she and her husband lived together as such spouses at Pudukottai, at her permanent residence for five days up to 14-5-1974. This allegation which is not controverted is sufficient to rest jurisdiction in the District Court of Pudukottai, to entertain the petition which was filed after two years after such date of desertion. The petition was filed on 24-6-1976. The allegation is that on and after 14-5-1974, the first respondent kept himself out of the company of the petitioner and, therefore the petitioner, by supplementing the pleadings which have not been challenged before us, has established that she and her husband last resided together at Pudukottai. Therefore, it follows that the District Court, Pudukottai as the court of original jurisdiction, within whose local limits the petitioner and the first respondent last resided together, did have the jurisdiction to entertain the application.

4. On the merits, we are satisfied that the first respondent took the second respondent as his wife as pleaded and it is proved by the production of Ex. C. 2, which is a record maintained in the regular course by Sri Sidhadheswaraswami Temple Kalyanamantapam authorities. Therefore, it follows that the first respondent contracted a marriage with another woman within the meaning of S. 3(8) of the Indian Divorce Act when the former spouse of his was alive and without her consent and knowledge. Therefore, he has committed an act which

entitled her to present a petition for dissolution of marriage under S. 10 of the Divorce Act.

5. The only other ground of attack by the learned counsel for the first respondent is that the allegation as to collusion has not been expressly mentioned and that such a reference as to collusion is the sine qua non for the grant of relief under the Indian Divorce Act. No doubt, the language of S. 47 of the Divorce Act says that every petition under the Act for a decree for dissolution of marriage, or of nullity of marriage, or of judicial separation shall state that there is not any collusion or connivance between the petitioner and the other party to the marriage. Rightly, therefore, an accent is given to the verb "shall" appearing in S. 47 and the contention of Mrs. Rajendran is that in the absence of compliance with the imperative guideline set in S. 47, the petition has to fail. We are of the view that the use of the word "shall" in Section 47 ought not to be understood in such a rigid manner. Collusion as between the two spouses in order to snatch an order for dissolution of a solemn marriage can easily be discovered even if the pleadings are delightfully silent about the prescribed norms in S. 47. In the instant case, the respondents having entered appearance through an advocate, deliberately kept themselves out of the court as well as the witness box. Even in this court, they have not given any instructions to the counsel who have been appointed as *amicus curiae* to contest the matter. The petitioner, examined as P. W. 1, would say that there was no collusion as between her and her husband. These factors cumulatively taken is a valid substitute for the absence of plea in the pleadings that there was no such collusion as between the spouses. As each case has to be decided on its own merits, the mere absence of a specific plea about the absence of collusion would not vitiate the entire matter so as to compel a court exercising jurisdiction under the Divorce Act to dismiss the petition in limine. If proof aliunde is available so as to satisfy the conscience of the court that there was no such collusion and such evidence is available either in the pleadings or in the course of the hearing of the petition or at any other specific subsequent state, this could be taken into consideration and a mere accent upon the verb "shall" in Section 47 shall not be the sole criteria for the dismissal of a petition by a wife who is faced with a circumstance where her husband has openly violated the matrimonial bondage and taken a second wife and has deserted her since 1974. We are satisfied that the petitioner is entitled to a decree for dissolution of marriage u/s 10, she having proved substantially all the relevant facts which are necessary to enable her to obtain an order of dissolution of marriage. In these circumstances, the order of the court below is confirmed.

6. We place on record our appreciation of the assistance rendered by Mrs. Hemsala Rajendran as *amicus curiae* for the first respondent, who brought to out notice certain lacuna appearing on record, which had to be rectified only in this court.

7. Order confirmed.