

(2001) 01 BOM CK 0017

In the Bombay High Court

Case No : M.J. Suit No's. 316 of 1998 and 7132 of 1999

Henry Fernandes and etc.

APPELLANT

Vs

Succorinha Fernandes and etc.

RESPONDENT

Date of Decision : 18-01-2001

Acts Referred:

Divorce Act, 1869 — Section 10

Citation : AIR 2001 Bom 208 : (2001) 2 ALLMR 93 : (2001) 3 BomCR 360 :
(2001) 2 DMC 536 : (2001) 2 MhLj 806 : (2002) 2 RCR(Civil) 253

Hon'ble Judges : S.A. Bobde, J;B.N. Srikrishna, J

Bench : Division Bench

Advocate : Pankaj Bhatt, in No. 7132/99, for the Appellant; Flavia Agnes in
Respondent in No. 7132/99, for the Respondent

Judgement

B.N. Srikrishna, J.—Both these suits have been referred to this Division Bench by the Hon"ble the Chief Justice. The issue we have to answer is;

"Whether in view of the judgment of the Full Bench of this Court in Mrs. Pragati Varghese and etc. Vs. Cyril George Varghese and etc., , a Christian husband would be entitled to a decree of divorce on the ground of cruelty."

2. Though the issue of law referred to this Court is the same in both the cases, the facts are marginally different. It would be necessary to indicate the facts very briefly. In M. J. Petition No. 318 of 1988 the parties are Christians and a marriage was solemnized on 4th May, 1983 at St. Anne's Church, Bombay in accordance with Christian Rites and Ceremonies. On 13-8-1986 a male child named Jude Fernandes was born to the couple. On 30-3-1991 a female child was born to the couple. Differences arose between the husband and wife and a number of incidents have been pleaded which, according to the petitioner-husband, amounts to cruelty. The petitioner brought M.J. Suit No. 318 of 1998 before this Court u/s 10 of the Indian Divorce Act, 1869 praying for a decree of divorce between himself and respondent on the ground that the respondent is guilty of cruelty as contemplated u/s 10 of the Indian Divorce Act, 1869

(hereinafter referred to as "Act").

3. In M.J. Suit No. 7132 of 1999 the husband and wife are both Christians and were married in accordance with Christian Rites and Ceremonies at Bombay on 3-2-1991. A female child is born of the marriage on 9-10-1992 named Samantha. A number of incidents took place between the husband and wife which are alleged to amount to cruelty. Based on the said instances, the petitioner-husband has brought M.J. Suit No. 7132 of 1991 u/s 10 of the Act seeking a decree of divorce dissolving the marriage between him and the respondent on the ground of cruelty u/s 10 of the Act.

4. In Mrs. Pragati Varghese and etc. Vs. Cyril George Varghese and etc., (vide paragraph 43), the Full Bench of this Court pointed out that Section 10 is the only provision allowing dissolution of marriage among the Christians governed by the Act, that striking down of the provisions as a whole should be avoided as far as possible and that only offending portions of the impugned provisions, which were sever-able, had to be struck down and other provisions of Section 10, which were not discriminative or violative, had to be upheld. Observed the Full Bench.

"So, modified Section 10 would permit Christian wives to seek dissolution of their marriage on the grounds of adultery, desertion and cruelty also without the necessity of proving adultery. In that event, the remaining provisions will be more or less similar to the provisions contained in all other enactments in force regulating dissolution of marriages among people belonging to other religions and also the Special Marriage Act. If such a course is adopted, the provisions can be made constitutionally valid and retainable in the modified form to serve the purpose for which it was enacted in a better way avoiding the striking down of the entire provisions which have created a hiatus as feared by the Law Commission of India in its 90th report."

In paragraph 39 of the judgment in Mrs. Pragati Varghese and etc. Vs. Cyril George Varghese and etc., , the Full Bench indicated that, after striking down the portions of Section 10 that offend Articles 14, 15 and 21 of the Constitution, the Section would read as under :

"10. When husband may petition for dissolution -- Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution --Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage without another woman;

or has been guilty of adultery, or of bigamy;

or of marriage with another woman or of rape or sodomy or bestiality;
or of cruelty;
or of desertion, without reasonable excuse, for two years or upwards."

4A. Mr. Bhatt, learned Counsel for the petitioner-husband, contends that, even in the form in which Section 10 has now remained after the exercise of striking down was carried out by the Full Bench, the Section continues to violate Article 14 of the Constitution. He contends that while for a Christian husband only solitary ground of divorce is that of adultery, a Christian wife is enabled to bring a petition on the ground of cruelty, inter alia. He submits that the portion of section which deals with cruelty as a ground on which a Christian woman can bring suit for dissolution should be declared to be ultra vires the Constitution and struck down by us and that we should, (hat the grounds for divorce available to a Christian woman should be made freely available also to the husband. There may be several reasons why the law permits dissolution of the marriage at the instance of the Christian husband only on the solitary ground of adultery. Perhaps, Christian women are never cruel to their husbands, for they are "Christian". Assuming there is any discrimination, the discrimination, if at all, would be in favour of a woman, which is perfectly valid and permissible in view of Article 15(3). Ms. Flavia Agnes for respondent urges that it is not permissible for this Court to rewrite the legislation so as to enable a husband to bring petition for divorce on any ground other than the ground of adultery, particularly on the ground of cruelty as alleged.

5. In our judgment, the contention of Mr. Bhatt must fail. Even if we assume that there is some substance in the grievance that Section 10 of the Act as it stands makes a discrimination in the matter of grounds of divorce between a Christian husband and wife, we have no power to introduce into Section 10 a ground which the legislation did not contemplate. Section 10 is conveniently divided into two portions. The first, titled, "When husband may petition for dissolution", deals with the ground on which a Christian husband may petition for dissolution of marriage. From 1869 till today, the only ground for divorce available for the husband under the Act is the ground of adultery. The second portion of Section 10 deals with "When wife may petition for dissolution", and contains several grounds, some of which were struck down. We have reproduced hereinabove the presently available grounds for dissolution of marriage at the instance of a Christian woman. Even assuming that the remainder of Section 10 after the exercise carried out by the Full Bench is considered to be discriminative against the Christian husband, it is not open to us to read into Section 10 any ground other than the ground provided by the Legislature. In this view of the matter, it is unnecessary to consider the other contention of Mr. Bhatt that the section is discriminative of rights between a Christian husband and wife, in the matter of dissolution of marriage. The suit must fail on the first ground alone. Therefore, we decline to go into the constitutional issue raised by Mr. Bhatt.

6. In the result, we answer the reference made to us in the following manner :

"Notwithstanding the judgment of the Full Bench in Mrs. Pragati Varghese and etc. Vs. Cyril George Varghese and etc., , a Christian husband is not entitled to a decree of divorce on the ground of cruelty or on any other ground except the ground of adultery."

7. Consistent with the above view, we find both the suits bearing M.J. Suit No. 318 of 1998 and M.J. Suit No. 7132 of 1999 are untenable for they seek relief which is not permissible u/s 10. Hence, they would have to be dismissed. Since the suits themselves have been referred to us in exercise of the powers of the learned Chief Justice, we make the following order :

"M.J, Suit No. 7132 of 1999 and M.J. Suit No. 318 of 1998 are hereby dismissed with no order as to costs."

Parties to act on an ordinary copy of this order duly authenticated by the Associate of this Court.

Issuance of certified copy expedited.