

(1989) 12 KL CK 0004

In the High Court Of Kerala

Case No : C.M.P. No. 17247 of 1988 in O.P. No. 5805 of 1988

Mary Soniz Zachariah

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-12-1989

Acts Referred:

Constitution of India, 1950 — Article 14
Divorce Act, 1869 — Section 10

Citation : (1990) 2 DMC 119

Hon'ble Judges : Thomas, J

Bench : Single Bench

Advocate : S. Lekha Suresh, for the Appellant; P.U. Madhavan Nambiar, Government Pleader, for the Respondent

Judgement

Thomas, J.—A primitive statute which still lingers in the law book is being attacked by a woman who is one of the victims struggling to squirm out of the legal tentacles of broken marriage alliance. The statute under attack is the Indian Divorce Act, 1869 passed by the British Parliament more than a century and two decades ago as the law to govern the marriages of Christians in India. The British Parliament in enacting the provisions of the Indian Divorce Act practically adopted the provisions of the English Matrimonial law, as they stood in 1869. The British Parliament did not make any improvement in the Indian Divorce Act until the British left India, even though they made substantial improvements in the mother statute, namely, the English Matrimonial Causes Act. After independence, the Indian Parliament brought about radical changes in the marriage law applicable to Hindus, Parsis and even to foreigners living in India by incorporating progressive and realistic grounds for divorce in such enactments. But either for no reason or for reasons which are not easy to comprehend, the law of marriage applicable to Christians remains unrealistic and antiquated.

2. One of the reasons advanced for not changing this primitive statute is that there is no demand from the Community concerned for changes. According to

the petitioner, the said stand is factually incorrect. The National Committee of YWCAs (South-West Region) expressed "deep concern" and strongly recommended for reforms in the "antiquated and discriminatory" provisions of the Indian Divorce Act (vide Ext. P 5). The Bombay YWCA which got impleaded in this Original Petition has also expressed in the same manner, Kerala Mahila Sangam and the Bishop of Church of East (Trichur) (who is also the Chairperson of the World Student Christian Federation) filed applications to get impleaded in this Original Petition for supporting the plea of the petitioner. All of them have unanimously expressed that the Indian Divorce Act is thoroughly illsuited and antiquated as far as the grounds for divorce are concerned.

3. Different High Courts have, on different occasions, strongly expressed in favour of legislative reforms in the Indian Divorce Act. Ananthanarayanna, C.J. speaking for the Full Bench of the Madras High Court in T.M. Bashiam Vs. M. Victor, stated thus :

"Before parting with the case, we may observe that the provisions of Act 4 of 1869 appear to be highly antiquated, and that they have not kept pace with the provisions of similar enactments relating to marriage in other communities, which are of a far more progressive character It is only under this Act 4 of 1869 that the law remains where it was, when this enactment was born, so that parties governed by this law are under the grave disadvantage that, even if a husband deserts his wife for a considerable period, that will be no ground for divorce; in our view, it is a genuine hardship, and there is urgent need for re-examination of the provisions of Act 4 of 1869, as the Act governs a large body of persons in this country to see that its provisions are rendered humane and up-to-date".

A Full Bench of the Madhya Pradesh High Court has, in emphatic terms, recommended for updating the statute. (Vide Mrs. Neena Vs. John Pormer, . A Full Bench of the Calcutta High Court has said in Swapna Ghosh v. Sadananda Ghosh, AIR 1989 Calcutta 1 thus :

"We are inclined to think that our Parliament or the State Legislatures (Marriage and Divorce being matters in the Concurrent List) should very seriously consider the question of introducing similar amendments in the Divorce Act of 1869 to bring it in harmonious conformity with other analogous enactments on the subject governing the other communities in India".

Unfortunate it is that despite repeated exhortations from several High Courts in India, the antiquated statute remains what it was originally.

4. Without establishing adultery of the other spouse a decree for divorce is unthinkable under the Indian Divorce Act. Those spouses who found their matrimonial lives irretrievably broken down remain helpless in view of the unrealistic and unhelpful provisions of the Indian Divorce Act. (A decree declaring the marriage null and void can be passed if it is established that opposite party was insane at the time of marriage). Thus, unless one of the spouses was insane,

or one of them is guilty of adultery, Indian Divorce Act will not help a spouse to get out of the marriage alliance. As the legislature did not help them till now, some of them invented devices to wriggle out the imbroglio. One device is to undergo a marriage again under the Special Marriage Act and then apply for a decree for divorce under that law. Some other spouses, in order to surmount the difficulty, collide between each other, so that one of them would make false allegations of adultery against the other and the latter would remain ex parte. Some others would make false pretence of being insane in order to obtain a decree declaring the marriage null and void. Through these devices, they try to escape from shattered matrimonial bondage. Those others who are not willing to adopt dishonest devices continue to suffer without escape under the primitive marriage law.

5. Law Commission in its 15th Report made a strong recommendation for reformation of the Indian Divorce Act. The Ministry of Law reciprocated to this proposal and drafted a Bill and referred it to the Law Commission again. After collecting public opinion, the Law Commission in its 22nd Report (1961) reiterated its stand in favour of a thorough revision in the marriage law of Christians. A Bill was introduced in Parliament in 1962 for that purpose. But ill-luck would have it, the said Bill got lapsed as the Parliament was dissolved before taking up the Bill. In 1983, some indications of revival of legislative function in this line were shown by introduction of Marriage Laws (Amendment) Bill. Then again due to some technical snag, the Bill did not proceed further. Though the legislative concern remained in limbo, the poor spouses of irretrievably broken down matrimonial ties in the Christian community remain without any relief, while members of other communities are privileged to be benefitted by realistic reliefs provided by the laws applicable to them.

6. The State of Kerala in the counter affidavit has offered to consider the question of introduction of Bill for amendment the Section 10 of the Indian Divorce Act (as the subject is in the Concurrent List). The said offer is made in the light of the "opinions expressed in certain judgments of this Hon"ble Court and other Hon"ble High Courts". The Union of India in its counter affidavit has stated that "Law Commission has made recommendations in its 90th Report for making changes in Section 10 of the Indian Divorce Act and the Government has not yet taken any decision about the said recommendation of the Law Commission".

7. If the Government of India would take a decision soon regarding the recommendations of the Law Commission of India, as referred to above, it will be unnecessary to consider whether Section 10 of the Indian Divorce Act, as it stands now, is violative of the Constitution. Some more time may be necessary to take a decision, although any further delay in taking such decision would be to the detriment of the members of the community concerned. I, therefore, directed the first respondent- Union of India to take a decision within six months from the date of receipt of a copy of this order, on the recommendation of the Law

Commission in its 90th Report for making amendments to Section 10 of the Indian Divorce Act.