
(2003) 10 PAT CK 0037

In the Patna High Court

Case No : Matrimonial Reference No. 1 of 1998

Mrs. Larley

APPELLANT

Vs

Mr. John @ Jony C.A.

RESPONDENT

Date of Decision : 13-10-2003

Acts Referred:

Citation : (2003) 10 PAT CK 0037

Judgement

S.N. Jha, J.—This is a reference u/s 20 read with Section 17 of the Indian Divorce Act, 1869, ("the Act" for short). Section 20 as it stood prior to the Indian Divorce (Amendment) Act, 2001 (Act 50 of 2001) provided that every decree of nullity of marriage made by 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 decrees. I shall refer to Section 17 of the Act a little later in this judgment. The petitioner instituted suit being Matrimonial Case No. 38 of 1996 in the Court of District Judge, Bhagalpur for decree of nullity of marriage with respondent on the ground that the respondent was an idiot at the time of marriage. The Second Additional District Judge, Bhagalpur to whom the case was transferred, accepting the petitioner's case granted her decree of nullity of marriage subject to confirmation by the High Court u/s 20 of the Act. That is how the matter has come to this Court.

2. Notice of the reference was issued to the parties pursuant to which the petitioner entered appearance. The respondent however, chose not to appear as in the Court below. The case was accordingly listed for ex parte hearing. In the meantime the petitioner had filed an application (I.A. No. 1070/2003) stating that during the pendency of the reference, Section 20 of the Act was omitted by the Indian Divorce (Amendment) Act, referred to above, and therefore, there is no requirement of confirmation of the decree passed by the Court below, and in the circumstances, the reference has become redundant and infructuous. The matter was heard on 14.7.2003.

3. I shall first consider the question as to whether by reason of the amendment

omitting Section 20 from the Act, the reference has become infructuous. In other words, whether the decree passed by the Court below has attained finality without requiring confirmation by this Court. The question as to the effect of the Amendment deleting Section 20 of the Act involves the question as to whether the amendment is prospective or retrospective. It is to be mentioned here that deletion of Section 20 is without any saving clause.

4. It is well settled rule of interpretation that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect. It is also well settled that while amendment in procedural law has a retrospective operation, any amendment affecting vested rights takes effect prospectively unless there are words in the statute sufficient to show that the intention of the legislature was to affect the existing rights. The point which arises for consideration is whether the amendment in question brings about change in the procedural law or affects the vested right of the parties.

5. At this stage Section 17 of the Act so far as relevant, may be quoted as under :

"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.

.....

The High Court, if it think 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....."

It is relevant to mention here that a new Section 17 has been substituted in place of the earlier one quoted above, by the above-said amendment.

6. From reading of the above provisions (as they stood) it is evident that confirmation of decree is not an empty formality or a routine affair. The High Court in the facts and circumstances of the particular case may get further enquiry made or evidence taken and thereafter either confirm the decree, or pass such other order as it deems fit. The section thus creates right in favour of the unsuccessful party to object to confirmation of the decree. It may be clarified here that though Section 17 deals with decree for dissolution of marriage-whereas the instant case is one of nullity of marriage covered by Section 20 of the Act - Section 20 makes the aforequoted parts of Section 17 applicable mutatis mutandis. If a decree of nullity of marriage made by the District Judge is subject to confirmation by the High Court; in other words, it does not take effect unless and until confirmed by the High Court, it is plain that the confirmation

provision cannot be said to be a mere matter of procedure. The provision confers substantive rights on the parties to the proceeding and therefore, amendment has to be given prospective effect. There is nothing in the amendment to suggest that the legislature intended it to be retrospective. For the sake of analogy reference may be made to Section 366 of the Criminal Procedure Code which provides for confirmation of death sentence by the High Court. Under that section a sentence of death cannot be executed unless it is confirmed by the High Court and thus when the Court of Session passes such a sentence the proceedings are to be submitted to the High Court for confirmation. Theoretically, thus, where the accused does not prefer appeal from the conviction, or even where he prefers appeal, he may alternatively argue that the death sentence was not warranted in the facts and circumstances of the case.

7. We could not lay our hands on any direct decision relating to retrospective or prospective effect of amendment relating to "confirmation" provision. However, there are decisions galore relating to amendment of appeal provisions under different statutes. Though, it is true, confirmation is not the same thing as appeal, nevertheless having regard to the fact that the High Court can make "such other order" as it deems fit u/s 17 of the Act, there cannot be any doubt that the Court may decline to confirm the decree on one or the other ground. It is true that in the present case the defendant did not choose to contest the proceeding either in the Court below or in this Court. But this would hardly have any bearing on the question - the true test being as to whether in the event of contest by the respondent, the reference could have become infructuous by reason of the amendment. The answer has to be in the negative.

8. Reference may be made to cases on the point of prospective effect of the appeal provision. The leading case on the point is Garikapatti Veeraya Vs. N. Subbiah Choudhury, where on review of various authorities the Constitution Bench of the Apex Court, by majority, held that the right to appeal is not mere matter of procedure but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit, The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the its commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment, and not otherwise. In State of Bombay Vs. Supreme General Films Exchange Ltd., the Supreme Court observed, that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment. In Jose Da Costa and Another Vs. Bascora

Sadasiva Sinai Narcornim and Others, the Supreme Court observed that the right of appeal being a substantive right, the institution of suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout. The court pointed out that this rule was subject to two exceptions -- (a) when by a competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and (b) when the Court to which appeal lay at the commencement of the suit stands abolished.

9. In view of the clear pronouncement of law by the Apex Court, any amendment in the appeal provision has to be held to be prospective unless otherwise provided--expressly or by necessary implication. A fortiori any amendment in the confirmation provision must also be held to be prospective unless otherwise provided in the amendment. There is no such clause in the amendment by which Section 20 has simply been omitted, that is, deleted from the act. It would thus follow that the deletion of Section 20 by the Indian Divorce (Amendment) Act, 2001 has no bearing on the present proceeding. The contention of the petitioner in the interlocutory application that there is no requirement of confirmation of the decree of the Court below and the reference has become redundant or infructuous, must therefore be rejected.

10. As a matter of fact, u/s 1(2) of the Amendment Act, the amendment is supposed to come into force on such date as the Central Government may by notification in the official gazette appoint. It is not known whether the amendment has been brought into force by such notification. The above discussion is on the premise that necessary notification has been issued making the amendment effective from the appointed date.

11. Now coming to the facts of the present case, the petitioner's case is that on 8.6.1993 she married the respondent at a Catholic Church at Mundur in District Trichur (Kerala) in accordance with custom and law provided for catholic marriage and certificate was granted by the Church to the parties. After the marriage she returned to Bhagalpur to resume her avocation as a teacher in Mount Asisi School, Bhagalpur. The respondent joined company in December, 1993. They started living as husband and wife. However, she was shocked to notice the abnormal behaviour of the respondent. She found that the respondent had no power of understanding, his behaviour was not rational and he had symptoms of insanity. Finding the respondent incorrigible she instituted the suit on the ground of his idiocy at the time of marriage. The petitioner alleged that the fact of idiocy was suppressed from her at the time of marriage and playing fraud upon her she was induced to contract the marriage with the respondent. The petitioner and respondent lived together till last part of 1995 at Bhagalpur whereafter the respondent- left the place and has since been living at Trichur.

12. Notice was issued by the Court to the respondent several times but he did not appear. In the circumstances, the suit was taken up ex parte. The petitioner examined three witnesses including herself and also brought documents on

record. On the basis of materials and evidence adduced by the petitioner the Court below came to the conclusion that it was a fit case for declaring the marriage null and void and accordingly on 30.11.1998 granted decree of nullity of marriage.

13. Section 18 of the Act provides that any husband or wife may present a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void. The grounds for declaration of null and void marriage are set out in Section 19, one of which is that either party was lunatic or idiot at the time of marriage.

14. Having gone through records as well as the evidence-oral as well as documentary-led by the petitioner I do not find any error of procedure nor any error in the finding recorded by the Court below to warrant any modification u/s 17 of the Act. The Court below made attempts to secure the presence of the defendant but that was not to be perhaps, the defendant has no objection to the decree being passed by the Court below or the same being confirmed by this Court since he has chosen not to appear in this Court either.

15. In the result, the decree of nullity of marriage granted by the Court below dated 30.11.1998 is confirmed and the reference is accordingly disposed of.

Radha Mohan Prasad, J.

16. I agree.

Shiva Kirti Singh, J.

17. I agree.